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The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage

Katherine Shaw Spaht*

I. INTRODUCTION

Over the last one hundred years the law has retreated¹ from a confidently moral view of marriage.² This retreat of the law includes areas such as entry into marriage, the content of marriage, and the grounds for its termination. As a consequence, the retreat has permitted the parties themselves to choose to enter the relationship of marriage without the information that used to be required, to define

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* Jules F. and Frances L. Landry Professor of Law, LSU Law Center. This article is dedicated to my colleague W. Lee Hargrave who died on November 15, 2002. (See Appendix.)

1. At least one other author has referred to this retreat as the “disestablishment” of the institution of marriage. See Ann Laquer Estin, *Marriage and Belonging*, 100 Mich. L. Rev. 1690 (2002), reviewing Nancy F. Cott’s *Public Vows: A History of Marriage and the Nation* (2000). “By the twentieth century, with the character of the national polity well established, marriage was effectively disestablished, as laws enforcing gender roles and creating barriers to divorce and nonmarital childbearing were abandoned.” Estin, 100 Mich. L. Rev. at 1691.

2. See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803 (1985).

An excellent book that traces the conception of marriage in the West as reflected in various religious traditions, its influence on law, and ultimately the influence of the Enlightenment and its secular view of marriage and family is John Witte, Jr.’s *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (1997):

This book, *From Sacrament to Contract*, shows how religion greatly influenced family law in Europe and America. Although this influence is all but forgotten, not only by contemporary churches but also by the present-day legal profession, it is essential in understanding the contemporary debate over the family. Few of us understand how medieval Catholic canon law shaped the marriage policies of the Protestant Reformation, how Luther and the Wittenberg reformers not only built on but also amended canon law to shape the legal marriage policies of Protestant Europe, how Calvin helped create the marriage laws of Geneva and Calvinist areas in Scotland, England, and America, and how these traditions have competed since the Enlightenment with an increasingly contractual and secular view of marriage and family.

See also a condensed version of the book in John Witte, Jr., *The Meanings of Marriage*, First Things 30-41 (2002), as well as a short essay with the same topic by Professor Witte, *An Apt and Cheerful Conversation on Marriage*, The Sixth Distinguished Faculty Lecture at Emory University (Feb. 7, 2001).

See also Albert W. Alschuler, *Law Without Values: The Life, Work, and Legacy of Justice Holmes* (2002).

the content of their marriage and to determine its day-to-day regulation. Even more remarkably, the determination of if and when a marriage should end now rests in the decision-making process of only one of the two parties;³ in other words, even without the legal protection given to simple contracts.⁴ Thus, it is both precise and accurate to refer to current no-fault divorce law as “unilateral repudiation.”

Although this article traces only the relevant history of the retreat of Louisiana law in its regulation of marriage, the Louisiana experience illustrates what has happened throughout the United States.⁵ Not surprisingly, people in Western countries have concluded that marriage is a private relationship which the law has no right to regulate and whose consequences affect only the parties to the marriage, not the general public, not even their own children. The singular and most crucial purpose of marriage as the incubator of future civilization has been replaced in Americans’ cultural imagination by a very different purpose. No longer does the general public intuit that the married couple is the instrumentality charged with civilization’s most burdensome, time-consuming but indispensable task, the acculturation of children.⁶ The new purpose

3. Under no-fault divorce laws throughout the country, one spouse may seek and obtain a divorce by alleging that irreconcilable differences exist or that there has been an irreparable breakdown of the marriage. No state adopting no-fault divorce has required actual proof that the differences are irreconcilable or that the marriage has broken down. In Louisiana, one spouse may simply file an action for divorce and then wait for one hundred eighty days after service of the petition and seek a divorce by rule to show cause. The only defense to the action for divorce is reconciliation. See La. Civ. Code arts. 102, 105.

4. La. Civ. Code art. 1983: “Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law”

5. In his dedicatory address at Ave Maria School of Law, Francis Cardinal George, O.M.I., essentially makes the same point: “Yet, in the name of individual ‘privacy,’ ‘autonomy,’ and ‘freedom,’ important protections of family life have been erased from the law.” Francis Cardinal George, *Law and Culture* 13, Address at Ave Maria School of Law (Mar. 21, 2002). Of course, in Western Europe the retreat has been hastier and more complete.

6. “Whatever the changes in lifestyles, the real purpose of giving special legal status to marriage and family remains what it has always been: The provision of our first-choice setting for the procreation and raising of children.” Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same-Sex, or Not at All?*, 34 Fam. L.Q. 271, 299 (Summer 2000). But see Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 La. L. Rev. 773 (2002) taking issue with other conclusions in Professor Krause’s article. Further, John Witte, Jr. in *From Sacrament to Contract*, *supra* note 2, describes the benefit children obtain from marriage in the following terms: “Marriage enhances the life of the child by providing it with a chrysalis of nurture and love, with a highly individualized form of socialization and education. It might take a whole village to raise a child

of marriage is best described as the public recognition of a private, sexually intimate, and privileged relationship created for the satisfaction, support, nurturance and fulfillment of the two parties.⁷ The state of current law supports and reinforces such a perception.

The effect of law on culture and culture on law continues to be a matter of extensive scholarly debate.⁸

Law and culture stand in a complex dialectical relationship. Neither comes first; neither comes last. Law contributes massively to the formation of culture; culture influences and shapes the law. Inescapably, inevitably, law and culture stand in a mutually informing, formative, and reinforcing relationship. For this reason and many others, the liberal ideal of governmental "neutrality" on contested cultural-moral issues, allegedly leaving everyone "free" to pursue their own private visions of the good and thus attain personal fulfillment, is an illusion. It amounts either to non-sense, or it masks an ideology of social engineering.⁹

In this article, the precise issue concerns not whether the enactment of law can change a nation's culture, such as the 1960s civil rights legislation has done,¹⁰ but whether the repeal of laws can

properly, but it takes a marriage to make one . . ." Witte, *supra* note 2, at 219.

Virtually all social science data supports the proposition that children raised in an intact married family benefit economically, socially, academically, physically, and emotionally, especially when compared to children of divorce or children reared by single mothers. See Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 La. L. Rev. 63 (1998) and Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 Notre Dame L. Rev. 1547 (1998), articles in which this data appears.

7. That marriage does benefit the two spouses is the subject of Linda S. Waite & Maggie Gallagher's book, *The Case for Marriage: Why Married People are Happier, Healthier and Better Off* (2000). The authors collect and synthesize the social science data that supports the proposition that marriage is good for men and for women. John Witte, Jr. in his book, *From Sacrament to Contract*, describes the effect of marriage on the spouses in the following manner: "Marriage enhances the life of a man and a woman by providing them with a community of caring and sharing, of stability and support, of nurture and welfare . . ." Witte, *supra* note 2, at 219.

8. In Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 Notre Dame L. Rev. 1547, 1559-63 (1998), the author discusses marriage and the law and the latter's relationship to the former, citing the philosophy of St. Thomas Aquinas (73 Notre Dame L. Rev. at 1559 n. 54) and the opinions of such diverse individuals as Mary Ann Glendon (73 Notre Dame L. Rev. at 1559-61) and James Boyd White, who considered law a branch of rhetoric (73 Notre Dame L. Rev. at 1561 n.64).

9. Francis Cardinal George, *supra* note 5, at 10.

10. *Id.* at 7:

The *Brown* court knew that law—whether just or unjust—functions as a

have such an effect. Does the repeal of laws which regulated sexual morality by channeling the sexual expression of a man and a woman to and within marriage¹¹ and which protected that relationship once formed¹² change the inherent nature of the institution? Law does represent the formal expression of society's collective interest. As Francis Cardinal George expresses it: "... law is the primary carrier of culture in this pluralistic society; law is the forger of our national identity and of *our collective sense of right and wrong*."¹³ When it withdraws by repealing legislation which previously expressed its fundamental concern for marriage, does that withdrawal communicate the abdication of the public's interest in marriage? Does that withdrawal convey to citizens that marriage is indeed a purely private matter¹⁴ and no longer an institution of significant public concern deserving of privilege and protection? This article examines those questions and reaches the conclusion, not surprisingly, that the

teacher. It is capable of instigating great cultural change; and it is capable of profoundly reinforcing a *status quo*. The Justices knew that segregation, as a cultural practice, would not end so long as law testified, and thus taught, in season and out, that black and white are unequal. They fell into neither of the two errors I mentioned, that of believing that legal reform is sufficient to overcome social evils or that of supposing that such reform has no significant role to play in the matter People—black and white—tended to internalize the norms of laws protecting patterns of racial segregation. The law called forth the ideology by which it was defended, thus rationalizing and deepening the racism that brought it into being in the first place.

11. One of the five purposes of family law is the "channelling" function: the law creates or (more often) supports social institutions, which are thought to serve desirable ends. Carl E. Schneider, *The Channelling Function in Family Law*, 20 Hofstra L. Rev. 495 (1992).

12. *Id.* The purpose, of course, was for the protection of potential offspring. The "protective" function of family law protects citizens against harms done them by other citizens.

13. Francis Cardinal George, *supra* note 5, at 19.

14. Witte, *supra* note 2, at 209:

Since the early 1960s, American reformers have been pressing the Enlightenment contractarian model of marriage to the more radical conclusions that [John Stuart] Mill and others had suggested. The same Enlightenment ideals of individualism, freedom, equality and privacy, which had earlier driven reforms of traditional marriage law, are now being increasingly used to reject traditional marriage laws altogether. The early Enlightenment ideals of marriage as a permanent contractual union designed for the sake of mutual love, procreation, and protection is slowly giving way to a new reality of marriage as a 'terminal sexual contract' designed for the gratification of the individual parties.

The author then cites the Uniform Marriage and Divorce Act as reflecting these changes. *See also* James Q. Wilson, *The Marriage Problem: How Our Culture Has Weakened Families* (2002), in which the author argues that the seeds of the destruction of the family were planted during the Enlightenment.

abandonment by law of the regulation of marriage played a significant role in changing society's understanding of marriage and its public character.

II.

A. *Legal Regulation of Entry into Marriage, Historically*

1. *The Promise of Marriage*¹⁵

Louisiana has always recognized that the promise of marriage, the engagement, is a contract and subject to the ordinary remedies provided for breach of contract.¹⁶ The promise of marriage assumes an exchange of promises by the prospective bride and the prospective groom.¹⁷ Article 1934 (1870) recognized that breach of a contract of marriage would result in damages rather than specific performance¹⁸

15. See generally Harriet S. Daggett, *Legal Essays on Family Law, The Action for Breach of the Marriage Promise*, 39-100 (1935) and Harry Cohen, *Note, Obligations - Breach of Promise to Marry*, 24 Tul. L. Rev. 501 (1950).

This promise of marriage is not what historically was referred to as the marriage contract. The marriage contract

is a contract entered into by the intended spouses primarily to adopt a matrimonial regime, that is to say, a plan of order respecting their patrimonial rights and obligations during marriage including a rule on the amount each spouse shall contribute to the expenses of the marriage. The marriage contract may include donations made by either spouse to the other in contemplation of marriage, and even third persons may join in the marriage contract in order to make donations in favor of one spouse or both and his or their descendants.

Katherine Shaw Spaht, *Louisiana Practice Series: Family Law in Louisiana* 73-74 (2000). See also discussion in *Morgan v. Yarborough*, 5 La. Ann. 316 (1850) (court distinguishes between two contracts).

16. See, e.g., *Rhodes v. Miller*, 189 La. 288, 179 So. 430 (1938); *Hurry v. Hurry*, 144 La. 877, 81 So. 378 (1918); *Zwikel v. Zwikel*, 154 La. 532, 97 So. 850 (1923); *Stallings v. Stallings*, 177 La. 488, 148 So. 687 (1933); *Cormier v. Cormier*, 185 La. 968, 171 So. 93 (1936); *Smith v. Braun*, 37 La. Ann. 225 (1885); *Morgan v. Yarborough*, 5 La. Ann. 316 (1850). See also Katherine Shaw Spaht, *Symposium—Family Law*, 44 La. L. Rev. 1545 (1984); Mary Bamforth Hubert, *The Annulment of Marriages in Louisiana*, 24 Tul. L. Rev. 217 (1949).

17. "To all contracts there must be at least two parties; one who does, or engages to do or not to do, another to whom the engagement is made . . . It is called a *bilateral* contract . . . when the parties expressly enter into mutual engagements." La. Civ. Code art. 1765 (1870). See La. Civ. Code art. 1906 (1984).

18. La. Civ. Code art. 1927 (1870):

In ordinary cases, the breach of such a contract [an obligation to do, or not to do] entitles the party aggrieved only to damages, but where this would be an inadequate compensation, and the party has the power of performing the contract, he may be constrained to a specific performance by means prescribed in the laws which regulate the practice of the courts.

and that the greatest damage suffered would not ordinarily be pecuniary loss. Therefore, as a specific example of the breach of a special type of contract¹⁹ that would permit the recovery of non-pecuniary damages, the Civil Code enumerated "a promise of marriage . . ." among its other examples.²⁰ The action, however, was considered to be *legally* personal and not heritable by virtue of its very intimate nature.²¹ Consistent with Civil Code principles, the jurisprudence permitted the recovery of damages "which result from injury to feelings and reputation as well as material damages . . ."²² However, the promisee of a promise of marriage could not retain the engagement ring as a form of liquidated damages since the Civil Code expressly recognized the scenario as an example of a failure of cause: "Every donation made in favor of marriage falls, if the marriage does not take place."²³ Notice that the gift contemplated is one made "in favor of marriage," the relationship or institution, the cause²⁴ being the marriage rather than the donee.

The same jurisprudence, however, recognized the application of other not so obvious contract principles whenever considering a claim for breach of a promise to marry. For example, if the plaintiff could prove "seduction" by the defendant, the amount of damages awarded

Interestingly enough, under Spanish law when ecclesiastical tribunals governed matters of marriage, the tribunal "would take cognizance of a breach of promise, and punish the party until he consented to fulfil the promise . . ."

Morgan v. Yarborough, 5 La. Ann. 316, 321 (1850).

19. "Where the contract has for its object the gratification of some intellectual enjoyment, whether in religion, morality or taste, or some convenience or other legal gratification, although these are not appreciated in money by the parties, yet damages are due for their breach . . ." La. Civ. Code art. 1934(3) (1870).

20. Other examples in La. Civ. Code art. 1934(3) (1870) included "a contract for a religious or charitable foundation, . . . or an engagement for a work of some of the fine arts . . ."

21. La. Civ. Code art. 1997 (1870):

An obligation is strictly personal, when none but the obligee can enforce the performance, or when it can be enforced only against the obligor.

It is heritable when the heirs and assigns of the one party may enforce the performance against the heirs of the other.

La. Civ. Code art. 1999 (1870): "Every obligation shall be deemed heritable as to both parties, unless the contrary be specially expressed, or necessarily implied from the nature of the contract."

For a case interpreting and applying these articles to a promise of marriage, see Johnson v. Levy, 118 La. 447, 43 So. 46 (1907).

See also La. Civ. Code arts. 1765, 1766 (1984).

22. *Supra* note 15, at 504. See Moulin v. Monteleone, 165 La. 169, 115 So. 447 (1927); Johnson v. Levy, 118 La. 446, 43 So. 46 (1907).

23. La. Civ. Code art. 1740 (1870). This article still remains in the Civil Code. See also La. Civ. Code arts. 1896-1898 (1870).

24. See text of La. Civ. Code 1825 (1870) at *infra* note 28.

to the plaintiff exceeded the usual award because the damages suffered by the plaintiff were considered "aggravated."²⁵ Presumably, such a result occurred because the judge exercised wide discretion in granting damages for non-pecuniary loss just as he did in delictual cases.²⁶ Furthermore, "unchastity of the plaintiff" always constituted a defense to the action, but even a showing of her general bad reputation "could constitute sufficient cause to deny recovery."²⁷

The underlying assumption made by this jurisprudence which justified aggravating the measure of damages if the plaintiff was seduced and denying her recovery if she was unchaste reflected the historical "double standard"—a man desired to marry only a chaste woman. There was no suggestion in the jurisprudence that the unchastity of the groom was at all relevant. Thus, a woman who was seduced by her fiancé was no longer a desirable commodity in the "marriage market," and by virtue of that lost value, she suffered long-term damage beyond what was usual for breach of the promise of marriage. Using the same assumption, the man who broke his engagement because he discovered that his fiancé was unchaste had been in error at the time of the contract and that error bore upon the "principal" cause of the contract without which he would not have promised to marry her.²⁸ Even if the bride did not know her chastity was the principal cause of his promise to marry, the law nonetheless presumed she knew.²⁹

25. *Supra* note 15, at 504: "Proof of seduction will aggravate the damages . . ." The author of the note cites *Johnson v. Levy*, 118 La. 446, 43 So. 46 (1907).

26. La. Civ. Code art. 1934(3) (1870):

In the assessment of damages under this rule [damages for non-pecuniary loss in a breach of contract action], as well as in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury, while in other cases they have none, but are bound to give such damages under the above rules as will fully indemnify the creditor, whenever the contract has been broken by the fault, negligence, fraud or bad faith of the debtor.

La. Civ. Code art. 2315 ("Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."). Two other tort actions historically recognized will be discussed later in the context of protecting the marriage once formed. See text accompanying *infra* note 64.

27. *Supra* note 15, at 503. The author cites *Morgan v. Yarborough*, 5 La. Ann. 316 (1850).

28. "The error in the cause of a contract to have the effect of invalidating it, must be on the principal cause, when there are several; this principal cause is called the *motive*, and means that consideration without which the contract would not have been made." La. Civ. Code art. 1825 (1870).

29. "No error in the motive can invalidate a contract, unless the other party was apprised that it was the principal cause of the agreement, or unless from the nature of the transaction it must be presumed that he knew it." La. Civ. Code art. 1826 (1870) (emphasis added).

The jurisprudence confidently applied contractual principles to breach of the promise to marry and did so consistently with traditional moral understanding. Marriage served the purpose of channeling sexual expression between a man and a woman into a desirable institution that could provide a stable environment for any resulting children. The female was the guardian of societal moral standards, no doubt for the very practical reason that she would bear the consequence of any failure of self-control. The "double standard" which distinguished between the acceptability of sexual experience for a man and such experience for a woman was simply recognition of her unique position as the bearer of offspring and her risk of graver consequences should she fail to exercise sexual self-control. Such jurisprudence seems at this juncture of history quite antiquated, downright naive and Victorian. After all women have been liberated from the consequences of lack of sexual self-control; dependable and effective birth control and the availability of abortion have meant that women are free to express themselves sexually in the same ways as men. The cases recognizing the aggravating factor of "seduction" and the legal defense of a female plaintiff's lack of chastity seem decidedly unsophisticated. As John Witte, Jr. observes in *From Sacrament to Contract*, "[s]exual pathos was prominent at the opening of the second millennium with widespread concubinage [cohabitation], prostitution, voyeurism, polygamy, adultery, fornication, sodomy, wife and child abuse, teenage pregnancy, abortion, and much else. Sexual pathos has returned with equal pungency at the close of this second millennium."³⁰ Although there continue to be actions instituted for breach of a promise of marriage,³¹ no one would expect reliance today upon this jurisprudence which imposed sexual moral standards that do not treat men and women equally.

2. Prerequisites to a Valid Marriage: Who Can Marry and How

Although the Louisiana Civil Code at the turn of the century described marriage in the law as "a civil contract,"³² marriage was never subject to the rules governing ordinary contracts.³³ Marriage

30. Witte, *supra* note 2, at 217.

31. See *Sanders v. Gore*, 95-660 (La. App. 3d Cir. 7/10/96), 676 So. 2d 866 and *Glass v. Wiltz*, 551 So. 2d 32 (La. App. 4th Cir. 1989), discussed in text at *infra* notes 138-177.

32. "The law considers marriage in no other view than as a civil contract." La. Civ. Code art. 86 (1870).

33. See *Hurry v. Hurry*, 144 La. 877, 81 So. 378 (1919); *Stallings v. Stallings*, 177 La. 488, 148 So. 687 (1933); *Mason v. Mason*, 399 So. 2d 1272 (La. App. 4th

historically was “more than a mere contract . . .”³⁴ it was a relation, an institution “in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society.”³⁵ Referring to marriage as a “civil contract” can be explained by the fact that “the prevailing philosophies of the eighteenth and early nineteenth centuries considered all human institutions, even law itself, to have their roots in contract . . .”³⁶ Furthermore, the use of the adjective “civil” to modify contract was intended to announce that “Louisiana law . . . controls all aspects of marriage,”³⁷ not ecclesiastical law.³⁸

Because of the importance of marriage to potential posterity which necessarily concerns the good of society, the law has regulated entry into marriage by proscribing who can not marry, by providing under what circumstances persons can marry, and by prescribing who must witness the marriage and what documentary evidence of the marriage must exist. To understand the significance of any prerequisite to a valid marriage, it is necessary to also consider the result of “contracting” a marriage without the prerequisite. Some prerequisites were and still are considered by the law and the jurisprudence as less serious than others, and in those cases, the resulting marriage “contracted” by the spouses is either valid despite failure of the couple to comply with the law or merely relatively null and subject to their confirmation. Obviously, the prerequisites which, though not followed by the couple, nonetheless do not affect the validity of the resulting marriage are considered the least serious. A failure to comply with a legal prerequisite to marriage that creates a relatively null marriage subject to confirmation involves a rule

Cir. 1981). See also *Rhodes v. Miller*, 189 La. 288, 179 So. 2d 430 (1938); *Zwikel v. Zwikel*, 154 La. 532, 97 So. 850 (1923); *Cormier v. Cormier*, 185 La. 968, 171 So. 93 (1936).

34. *Hurry v. Hurry*, 144 La. 877, 885, 81 So. 378, 381 (1919), quoting from *Maynard v. Hill*, 125 U.S. 190, 211, 8 S. Ct. 723, 729 (1888).

35. *Maynard v. Hill*, 125 U.S. 190, 211, 8 S. Ct. 723, 729 (1888), quoted in *Hurry v. Hurry*, 144 La. 877, 855, 81 So. 378, 381 (1919).

Even today in the comment to La. Civ. Code art. 86 (1987) the notion that marriage is more than a contract is expressed: “The marriage contract differs from other contracts in that it creates a social status that affects not only the contracting parties, but also their posterity and the good order of society . . .” Comment (c).

36. “The Philosophies of Locke and Ronsseau are examples.” Spaht, *supra* note 15, at 6.

37. *Id.*

38. La. Civ. Code art. 86 (1987): “Marriage is a legal relationship between a man and a woman that is created by civil contract . . .” (emphasis added).

Comment (a) to this article reads: “. . . In particular, the import of Article 86 of the Civil Code of 1870 remains unchanged: the law views marriage as purely a civil matter, and not as one subject to the operation of religious or ecclesiastical law. The term ‘civil’ in former Article 86 has been retained in order to emphasize that continuity of policy.”

"intended for the protection of private parties . . ." ³⁹ For the most serious proscriptions, the resulting marriage is absolutely null not subject to confirmation because such a marriage "violates a rule of public order," ⁴⁰ not simply a rule for the protection of private persons. Nonetheless, in the interest of any children born of the union who would otherwise be illegitimate, ⁴¹ often "adulterous or incestuous bastards," ⁴² and in the interest of an innocent spouse who had no knowledge of the impediment, even an absolutely null marriage could produce civil effects, ⁴³ an otherwise extraordinary result for an absolute nullity. ⁴⁴

39. La. Civ. Code art. 2031 (1984). This provision of the law is found in Book III, Title IV and refers to relatively null contracts; however, La. Civ. Code art. 1917 (1984) permits the application of the principles of Title IV (conventional obligations) to "obligations that arise from sources other than contract to the extent that those rules are compatible with the nature of those obligations." The explanation for the category of relatively null marriages does assist in distinguishing the prerequisites to a valid marriage and the consequences for any resulting marriage "contracted" without the prerequisite.

40. La. Civ. Code art. 2030 (1984). "A contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral. A contract that is absolutely null may not be confirmed . . ."

41. Illegitimate children at the turn of the century until the late 1970s were treated as outside the family. La. Civ. Code art. 238: "Illegitimate children generally speaking, belong to no family, and have no relations; accordingly they are not submitted to the paternal authority, even when they have been legally acknowledged." This article remains unrepealed today.

As a consequence their rights to support and to inherit from their parents, especially the father, were extremely limited. *See* La. Civ. Code arts. 240-245; 918 (intestate succession of the mother); *and* 919 (intestate succession of the father).

42. Children born of an adulterous or incestuous union were given the appellation bastards. La. Civ. Code art. 202 (1870). They were treated especially harshly as a way of punishing the conduct of the father and mother. *See, e.g.,* La. Civ. Code art. 920 (1870): "Bastards, adulterous or incestuous children shall not enjoy the right of inheriting the estates of their natural father or mother, in any of the cases above mentioned [intestate succession], the law allowing them nothing more than a mere alimony." *See also* La. Civ. Code arts. 198 (prior to its amendment in 1948); 245 (1870).

They could not be acknowledged by their parents. La. Civ. Code art. 204 (1870): "Such acknowledgment shall not be made in favor of children whose parents were incapable of contracting marriage at the time of conception." One exception existed by virtue of legislation in 1870 (1870 La. Acts, No. 68): children born of a miscegenous union could be legitimated by a declaration signed by the parents before a notary and two witnesses if the only impediment to the marriage was color. Later in the middle 1940s, another exception was made for adulterous children whose parents later married (assuming Article 161 did not apply for some reason). The following language was added to La. Civ. Code art. 204 by 1948 La. Acts, No. 483: ". . . however, such acknowledgment may be made if the parents should contract a legal marriage with each other."

43. La. Civ. Code art. 117 (1870): "The marriage, which has been declared null, produces nevertheless its civil effects as it relates to the parties and their children, if it has been contracted in good faith."

At the turn of the century, the three prerequisites to a valid marriage were parties who were willing to contract, able to contract, and did contract "pursuant to the forms and solemnities prescribed by law."⁴⁵

3. Parties Not Able to Contract: Absolute Nullity

Considered the most serious prerequisite to marriage, that the parties be able to contract marriage, it is not surprising to discover that the law at the turn of the century prohibited marrying a person who is already legally married to another;⁴⁶ who is related in the "direct ascending or descending line"⁴⁷ or in the collateral line including first cousins;⁴⁸ and who is a male under the age of eighteen years or a female under the age of sixteen years.⁴⁹ What did not

La. Civ. Code art. 118 (1870): "If only one of the parties acted in good faith, the marriage produces its civil effects only in his or her favor, and in favor of the children born of the marriage."

See such representative decisions interpreting these two provisions as *Evans v. Eureka Grand Lodge*, 149 So. 305 (La. App. 2d Cir. 1933); *Howard v. Ingle*, 180 So. 248 (La. App. 2d Cir. 1938). For what constituted "good faith" see *Succession of Chavis*, 211 La. 313, 29 So.2d 860 (La. 1947); *Jones v. Squire*, 137 La. 883, 69 So. 733 (La. 1915); *Succession of Bussiere*, 41 La. Ann. 217, 5 So. 668 (La. 1889). See also Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 Tul. L. Rev. 1 (1985).

44. In the ordinary case of an absolute nullity, for example an absolutely null contract, the agreement produces no civil effects. See La. Civ. Code art. 2033 (1984): "An absolutely null contract...that has been declared null by the court, is deemed never to have existed . . ."

45. La. Civ. Code art. 90 (1870).

46. La. Civ. Code art. 93 (1870): "Persons legally married are, until a dissolution of marriage, incapable of contracting another, under the penalties established by the laws of this State."

47. La. Civ. Code art. 94 (1870): "Marriage between persons related to each other in the direct ascending or descending line is prohibited. This prohibition is not confined to legitimate children, it extends also to children born out of marriage . . ."

48. La. Civ. Code art. 95 (1870): "Among collateral relations, marriage is prohibited between brother and sister, whether of the whole or the half blood, whether legitimate or illegitimate, between uncle and niece, between aunt and nephew, and also between first cousins . . ." First cousins were permitted to marry in Louisiana until 1902.

49. La. Civ. Code art. 92 (1870):

Ministers of the gospel and magistrates, intrusted with the power of celebrating marriages, are prohibited to marry any male under the age of eighteen years, and any female under the age of sixteen, and if any of them are convicted of having married such persons, he shall be removed from his office, if a magistrate, or deprived forever of the right of celebrating marriage, if a minister of the gospel . . .

The omitted second paragraph of this article permitted the judge to order such a

appear at the turn of the century as an incapacity to contract marriage was a person who is of the same sex. It never would have occurred to the lawmaker to prohibit the marriage of persons of the same sex since marriage, a natural institution by definition and by natural law, could only be contracted by persons of the opposite sex.⁵⁰ That marriage could be contracted between persons of the same sex would constitute an oxymoron; therefore, there was simply no need to include any prohibition of such "marriage." No other civilization which had recognized the institution of marriage had ever permitted the marriage of persons of the same sex.⁵¹

As to the proscription of marriage between minors, the jurisprudence distinguished its seriousness from that of the other two incapacities by emphasizing that the article's language was addressed to the minister or magistrate and not to the minors themselves.⁵² Furthermore, another Civil Code article gave parents whose minor children married without their consent the right to disinherit them only, not the right to annul the marriage.⁵³ Therefore, the court concluded that a marriage contracted between minors was not null, either absolutely or relatively, but in fact valid.⁵⁴

marriage to take place in the case of "extraordinary circumstances" and parental consent.

Distinguishing between the ages of males and females for the purpose of consenting to marriage was consistent with recognition of different ages of puberty for each. See La. Civ. Code art. 36 (1870) (age of puberty for males 14 and for females, 12).

50. Essentially, the United States Supreme Court has taken the same position in cases involving challenges to state marriage laws under the Fourteenth Amendment. Although recognizing that "marriage" is a fundamental right surrounded by a zone of privacy under the Fourteenth Amendment to the U.S. Constitution (liberty), marriage is defined traditionally as a union between a man and a woman. See *Bowers v. Hardwick*, 478 U.S. 186, 106 S. Ct. 2841 (1986). See also *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6, 109 S. Ct. 2333, 2344 n.6 (1989).

51. See La. Civ. Code arts. 89, 96 and 3520(B) and text accompanying *infra* notes 188-191.

52. *Id.*

53. La. Civ. Code art. 112 (1870):

The marriage of minors, contracted without the consent of the father and mother, can not for that cause be annulled, if it is otherwise contracted with the formalities prescribed by law; but such want of consent shall be a good cause for the father and mother to disinherit their children thus married, if they think proper.

Article 112 was in fact addressed to an entirely different prerequisite to marriage: parental consent for a minor with capacity to marry. La. Civ. Code art. 97 (1870): "The minor of either sex, who has attained the competent age to marry, must have received the consent of his father and mother or of the survivor of them; and if they are both dead, the consent of his tutor . . ."

54. *State v. Golden*, 210 La. 347, 26 So. 2d 837 (1946).

Not only were bigamous and incestuous marriages declared absolutely null and incapable of confirmation in the public interest,⁵⁵ but also, what may prove surprising to a child of post-modern America, so were marriages between white persons and “persons of color,”⁵⁶ between a man and a woman within ten months of the dissolution of her marriage to another,⁵⁷ and between an adulterer and his accomplice in adultery.⁵⁸ Until the 1967 United States Supreme Court opinion in *Loving v. Virginia*,⁵⁹ statutes prohibiting the intermarriage of whites and people of color were common, particularly in the South. Interestingly, however, the children born of miscegenistic unions could be legitimated by their parents,⁶⁰ which

55. La. Civ. Code art. 113 (1870): “Every marriage contracted under the other incapacities [not lack of free consent or lack of parental consent] or nullities enumerated in the second chapter of this title, may be impeached either by the married persons themselves, or by any person interested, or by the Attorney General” Extending the right to challenge the marriage beyond the person or persons to the marriage, especially to the Attorney General who represents the state, meant that the marriage was absolutely null. See La. Civ. Code art. 2030 (1984): “. . . Absolute nullity may be invoked by any person or may be declared by the court on its own initiative.”

56. La. Civ. Code art. 94 (1870; 1894): “. . . Marriage between white persons and persons of color is prohibited, and the celebration of all such marriages is forbidden and such celebration carries with it no effect and is null and void.” The prohibition of intermarriage between white persons and persons of color was contained in the Civil Code or Digest of 1808, repealed in 1868 (1868 La. Acts, No. 210), and reenacted in 1894 (1894 La. Acts, No. 54). For representative cases interpreting this article, see *Ryan v. Barthelmy*, 32 So.2d 467 (La. App. Orl. Cir. 1947); *Lee v. N.O. & Great Northern Railroad Co.*, 125 La. 236, 51 So. 182 (La. 1910) (meaning of “persons of color” included as little as one sixteenth traceable Negro blood); *Sunseri v. Cassagne*, 191 La. 209, 185 So. 1 (La. 1938) (certificate incorrect in describing person as colored); *Villa v. Lacoste*, 213 La. 654, 35 So. 2d 419 (1948) (persons of Filipino descent not “colored persons”).

In *Succession of Minvielle*, 15 La. Ann. 342 (La. 1860): “The prohibition contained in this article is one eminently affecting the public order . . . The law is of that rigorous nature that it will not permit a marriage to exist between persons of two different races for a moment” See also *Carter v. Veith*, 139 La. 534, 71 So. 2d 792 (La. 1917).

White persons were also prohibited from marrying Indians. La. R.S. § 9:201 (repealed 1975).

57. La. Civ. Code art. 137 (1870): “The wife shall not be at liberty to contract another marriage, until ten months after the dissolution of her preceding marriage.”

58. La. Civ. Code art. 161 (1870): “In case of divorce, on account of adultery, the guilty party can never hereafter contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy, and under the penalty of nullity of the new marriage”

59. 388 U.S. 1, 87 S. Ct. 1817 (1967).

60. Despite the prohibition contained in La. Civ. Code art. 204 which denies parents’ the right to acknowledge their children if the parents were incapable of contracting marriage at the time of conception (which includes adulterous and incestuous children as well as those of miscegenistic unions), a special statute

adulterous and incestuous children could not. The *Loving* case declared Virginia's anti-miscegenation statute unconstitutional under the Fourteenth Amendment to the U.S. Constitution, and Louisiana finally repealed its statutes in the early 1970s.⁶¹ The other two prohibitions—remarriage of a wife within ten months of dissolution of her marriage and marriage of an adulterer to his accomplice—deserve more careful consideration of the underlying rationale and of their ultimate repeal.

The prohibition of a wife's remarriage, requiring that she not remarry for ten months after dissolution of her marriage, concerned the application of the presumption of paternity of a child conceived during the marriage. Under Civil Code article 184, the husband of the mother was presumed to be the father of all children conceived during the marriage, which included a child born within three hundred days (roughly equivalent to ten months) of the dissolution of the marriage.⁶² Requiring a wife to wait ten months to remarry assured that paternity of any child born to the wife could be easily established using the presumptions of paternity contained in the Civil Code. Were the wife to marry within the ten-month period, the issue of "overlapping" presumptions of paternity would arise.⁶³ Under the Civil Code, such a child would have been presumed to be the child of both the first and the second husbands. Another secondary effect of the prohibition was that a wife whose marriage ended could not rush into remarriage. Current social science evidence reveals that second marriages end at a much higher rate than first marriages, and first marriages end at a rate of almost forty-five percent which is the highest in the Western industrialized world. Thus, a law that had the

enacted in 1870 (1870 La. Acts No. 68) afforded to parents the right to legitimate their children by a declaration signed by the parents before a notary and two witnesses if the only impediment to the marriage of the parents at conception was color. See *Succession of Davis*, 126 La. 178, 52 So. 266 (1910).

61. La. Civ. Code art. 94 (1870) was amended to repeal the prohibition of marriage between white persons and persons of color by 1972 La. Acts No. 256, § 1. La. R.S. § 9:201 was repealed in 1975.

62. "The same rule [child not presumed to be that of the husband of the mother] applies with respect to the child born three hundred days after the dissolution of the marriage . . ." La. Civ. Code art. 187 (1870).

63. The child born during the second marriage would be presumed to be the child of the second husband as long as it was born more than one hundred and eighty days after their marriage. "The child capable of living, which is born before the one hundred and eightieth day after the marriage, is not presumed to be the child of the husband . . ." La. Civ. Code art. 186 (1870).

Nonetheless, even if the child were born within one hundred eighty days of the marriage the husband had to institute a disavowal action to assert the lack of a presumption and to prove the child was not his, otherwise the child was presumed to be his child. La. Civ. Code art. 186 (as amended by 1976 La. Acts No. 430, § 1).

effect of imposing a waiting period upon remarriage proved beneficial for both certainty as to the child's paternity and the stability of a new marriage contracted by the wife.

Prohibiting an adulterer from ever marrying his accomplice in adultery contained in former Civil Code article 161 had a very interesting and colorful history, one that demonstrates the significance of withdrawal of the law from the regulation of sexual morality within marriage.⁶⁴ Obviously intended to discourage adultery by forever denying to the adulterer and his lover the possibility of a valid marriage after divorce,⁶⁵ the law also denied the adulterer spouse who was at fault, who could not get a divorce himself,⁶⁶ the possibility of ultimately benefitting by his own fault.⁶⁷ Furthermore, prohibiting the adulterer from marrying his accomplice meant that the innocent spouse had a real rather than illusory choice, either not to seek a separation or a divorce or to seek an immediate divorce on the grounds of adultery.⁶⁸ She possessed a real choice because, even if she sought and obtained a divorce, her adulterous husband could not thereafter marry his accomplice.⁶⁹ The innocent spouse was thus afforded the full range of remedies available and given them

64. Two other actions, both in tort (delict) recognized by the law of other jurisdictions were intended to serve a similar function: criminal conversation and alienation of affections. See William R. Corbett, *A Somewhat Modest Proposal to Prevent Adultery and Save Families: Two Old Torts Looking for a New Career*, 33 *Ariz. L.J.* 987 (2001).

65. See Hubert, *supra* note 16.

66. Until 1916 and the enactment of "no-fault" divorce in the form of living separate and apart for seven years (1916 La. Acts No. 269), the spouse at fault could not file for an immediate divorce or for a separation from bed and board. The only remedy available to the spouse at fault at the turn of the century was a divorce two years after a judgment of separation from bed and board and the separation action could only be instituted by the spouse not at fault. The guilty spouse had no such remedy before 1898 (1898 La. Acts No. 25); only the innocent spouse could seek a separation from bed and board and a divorce.

67. The only exception to the adulterer's benefitting by his own fault was the possibility that if he married the accomplice he could thereafter assert that this marriage was an absolute nullity. See *Rhodes v. Miller*, 189 La. 288, 179 So. 430 (1938). Such a possibility is totally consistent with theory and legislation concerning the character of an absolute nullity. See La. Civ. Code art. 2033 (1984): "... Absolute nullity may be raised as a defense even by a party who, at the time the contract was made, knew or should have known of the defect that makes the contract null."

68. The jurisprudence required that to assert the application of La. Civ. Code art. 161 (1870) the divorce be instituted on the grounds of adultery. See *e.g.*, *Succession of Gabisso*, 119 La. 704, 44 So. 438 (1907).

69. For the application of Article 161, the jurisprudence also required that the accomplice be named in the proceedings. See *Succession of Gabisso*, 119 La. 704, 44 So. 438 (1907); *Succession of Hernandez*, 46 La. Ann. 962, 15 So. 461 (1894); *Succession of Knupfer*, 174 La. 1048, 142 So. 609 (1932).

exclusively; she could remain married to the adulterous spouse or divorce him, in either case denying to the adulterous spouse the right to marry his accomplice. If she chose to seek a divorce on the grounds of adultery and obtained the judgment, the law provided that she was the parent entitled to custody of the children.⁷⁰

Adultery has always been considered the most grievous of fault grounds for divorce⁷¹—a personal betrayal of trust that strikes at the core of the most intimate of relationships. It represents conduct that by its nature violates one of the principal purposes of marriage from society's point of view—that is, the channeling of sexual expression between a man and a woman into an exclusive, monogamous relationship. As previously mentioned, at the turn of the century, children resulting from an adulterous or incestuous relationship were treated under the law especially harshly; they were denied rights afforded to other illegitimate children⁷² and denoted in the Civil Code as “bastards.”⁷³ Their parents could not marry after one or both were divorced, and even if they could have married because Article 161 did not apply,⁷⁴ their marriage did not legitimate the child until after the Civil Code article concerning legitimation by subsequent marriage was amended in 1948.⁷⁵

70. La. Civ. Code art. 157 (1870):

In all cases of separation, the children shall be placed under the care of the party who shall have obtained the separation, unless the judge shall, for the greater advantage of the children, and with the advice of the family meeting, order that some or all of them shall be intrusted to the care of the other party.

In all cases of divorce the minor children shall be placed under the tutelage of that party who shall have obtained the divorce.

71. Adultery constituted both grounds for obtaining a judgment of separation from bed and board (La. Civ. Code art. 138(1) (1870)) and for obtaining a judgment of divorce (La. Civ. Code art. 139(1) (1870)). It remains only one of two fault grounds for obtaining an immediate divorce. La. Civ. Code art. 103(2) (1990). It is even grounds for an immediate divorce (and a judicial separation) in a covenant marriage. La. R.S. § 9:307(A), (B) (1997).

72. See text accompanying *supra* note 60.

73. La. Civ. Code art. 202 (1870):

Illegitimate children who have been acknowledged by their father, are called natural children; those who have not been acknowledged by their father, or those whose father and mother were incapable of contracting marriage at the time of conception, or whose father is unknown, are contradistinguished by the appellation of bastards.

74. For example, Louisiana Civil Code article 161 might not apply to prohibit the marriage of an adulterer and his accomplice because the accomplice was not named in the proceedings.

75. La. Civ. Code art. 198 (1870):

Children born out of marriage, except those who are born from an incestuous or adulterous connection, may be legitimated by the subsequent marriage of their father and mother, whenever the latter have legally

Civil Code article 161 went even further than prohibiting the marriage of an adulterer and his accomplice; it imposed upon the adulterer the penalty "of being considered and prosecuted as guilty of the crime of bigamy"⁷⁶ The article's imposition of criminal liability for bigamy explains the use of "*accomplice* in adultery" in the Civil Code article. Compared to the other prohibitions related to the capacity of a person to marry, this article imposed the harshest consequences. Of course, in the case of a person who married before his prior marriage was dissolved and of persons related within prohibited degrees of relationship, the criminal law also punished the behavior—the former as bigamy⁷⁷ and the latter as incest.⁷⁸ The legislature intended to treat the marriage of an adulterer and his *accomplice* as harshly as a bigamous or incestuous marriage—absolutely null and criminal. Apparently, the legislature considered the circumstances of a marriage conceived in adultery as the equivalent in seriousness and in potential threat to the public order and good morals as a bigamous or incestuous marriage. Bigamy, polygamy,⁷⁹ and incest were abhorrent, hence their punishment historically in both the civil and criminal laws of this country.

However, in 1958 the Louisiana Legislature began to ratify and declare valid the marriages of an adulterer and his accomplice, utilizing the following statutory language: ". . . provided, however, that marriages heretofore contracted in contravention of this article but which are not invalid under any other laws of this state shall be deemed valid."⁸⁰ In actuality, amendments to the articles of the Civil Code concerning illegitimate children in the middle 1940s recognized that adulterous bastards could be legitimated by subsequent marriage, which implicitly recognized that an adulterer and his accomplice might be able to contract a legal marriage.⁸¹ After 1958, a pattern of

acknowledged them for their children, either before their marriage by an act passed before a notary and two witnesses, or by their contract of marriage itself.

In the 1940s the article was amended to remove references to adulterous connection and to add the additional possibility of informally acknowledging the child. See 1944 La. Acts No. 50 and 1948 La. Acts No. 482.

76. "In case of divorce, on account of adultery, the guilty party can never hereafter contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy" La. Civ. Code art. 161 (1870). See also La. R.S. § 14:76 (1898 La. Acts No. 93, § 1).

77. 1898 La. Acts No. 93, at 116.

78. 1884 La. Acts No. 78, at 101.

79. See, for example, Reynolds v. United States, 98 U.S. (8 Otto) 145 (1878).

80. 1958 La. Acts No. 340, § 1.

81. La. Civ. Code art. 198 (1870, as amended by 1944 La. Acts No. 50; 1948 La. Acts No. 482) (legitimation by subsequent marriage of the parents of an

periodic ratification of such marriages developed.⁸² Thus, "heretofore contracted" meant that such marriages contracted within the two-year period preceding the particular legislative session were declared valid. Finally, the legislature repealed the article in 1972.⁸³ Almost simultaneously the legislature adopted the same pattern of ratification every two years to cure "incestuous" marriages contracted between collaterals,⁸⁴ a general practice that only ended in 1987.⁸⁵

A common phenomenon which was to be repeated numerous times after the middle 1940s served as the motivation for the legislature and the courts to change public policy: sympathy for the innocent child born of an adulterous union.⁸⁶ Policymakers and courts had sympathy for the child who was often punished, too, and who had no control over the conduct of his parents.⁸⁷ Ten years after

illegitimate child and his formal or informal acknowledgment). La. Civ. Code art. 204 (1870 as amended by 1948 La. Acts No. 483): "Such acknowledgment [of an illegitimate child] shall not be made in favor of children whose parents were incapable of contracting marriage at the time of conception; however, such acknowledgment may be made if the parents should contract a legal marriage with each other." (emphasis added).

82. 1962 La. Acts No. 271, § 1; 1966 La. Acts No. 182, § 1; 1968 La. Acts No. 591, § 1; 1970 La. Acts No. 739, § 1.

83. 1972 La. Acts No. 625, § 1.

84. La. Civ. Code art. 95 (prior to its amendment in 1987). "... Marriages contracted by these collaterals [within the fourth degree] before September 11, 1981, were legal under former Civil Code Article 95, as retroactively amended by La. Acts 1981 No. 647. Though not continued as part of the Civil Code, that validating provision has been carried forward in Section 5 of the act embodying the revision (La. Acts 1987 No. 886)." La. Civ. Code art. 90, comment (b).

In addition La. Civ. Code art. 113 (1870; 1950) validated "marriages heretofore contracted between persons related within the prohibited degrees, either or both of whom were then and afterwards domiciled in this State, and were prohibited from intermarrying therein . . . where such marriages were celebrated in other States or countries under the laws of which they are not prohibited . . ."

85. One small exception remains. La. R.S. § 9:211 (1993): "Notwithstanding the provisions of Civil Code article 90, marriages between collaterals within the fourth degree, fifty-five years of age or older, which were entered into on or before December 31, 1992, shall be considered legal and the enactment hereof shall in no way impair vested property rights." This legislation is an illustrative example of special legislation designed for two constituents.

86. This sympathy was expressed in United States Supreme Court opinions such as *Trimble v. Gordon*, 430 U.S. 762, 97 S. Ct. 1459 (1977); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164, 92 S. Ct. 1400 (1972); *Gomez v. Perez*, 409 U.S. 535, 93 S. Ct. 872 (1973); *Levy v. Louisiana*, 391 U.S. 68, 88 S. Ct. 1509 (1968). See also La. Const. art. 1 § 3 (1974) (no discrimination on account of birth); *Succession of Brown*, 388 So. 2d 1151 (La. 1980). Also, the phenomenon of judicial recognition of "dual paternity" is justified by notions of protecting the child. See *Griffin v. Succession of Branch*, 479 So. 2d 324 (La. 1985) and *Smith v. Cole*, 553 So. 2d 847 (La. 1989).

87. See Katherine Shaw Spahnt, *The Two "ICS" of the 2001 Louisiana Child*

the 1948 amendment which permitted the legitimation of adulterous "bastards," the first bill ratifying marriages between an adulterer and his accomplice passed, a circumstance which was repeated almost every two years thereafter. Inevitably the pattern of ratification led to the repeal of the prohibition.⁸⁸ The withdrawal of public condemnation of the children conceived in adultery and ultimately of the adulterer himself left only the obligation of each spouse to be faithful to the other⁸⁹ for which the law permitted the offended spouse the right to seek a divorce.⁹⁰ However, by contrast to the law historically, the right to seek a divorce did not belong exclusively to the offended spouse.⁹¹ Even though the public continues to impose a legal obligation of fidelity upon the spouses in their personal relationship and permits an immediate divorce for the betrayed spouse, it has in every other respect withdrawn any punishment on behalf of society at large for conduct once considered violative of the public interest, punishment intended to protect the marital relationship from destructive outside forces.⁹²

4. A Marriage Ceremony: Absolute Nullity

For the reason that marriage bestows upon the spouses special legal privileges, rights and obligations, the law has always required a certain formality⁹³ to mark the change in relationship between a man and a woman, converting an informal relationship to that of a formal legal relationship. The ceremony performed by a legally qualified third person⁹⁴ who witnessed the exchange of vows, composed of

Support Guidelines: Economics and Politics, 62 La. L. Rev. 709, 732-35 (2002).

88. Interestingly enough, repeal of the prohibition against marrying a collateral relation did not occur despite a similar pattern. See discussion in text at *supra* notes 84-85.

89. La. Civ. Code art. 119 (1870): "The husband and wife owe to each other mutually, fidelity, support and assistance." (emphasis added). See La. Civ. Code art. 98 (1987).

90. La. Civ. Code arts. 138(1) (separation from bed and board), 139(1) (divorce) (1870). See La. Civ. Code art. 103(2) (1990).

91. See *supra* notes 64-70.

92. See also William R. Corbett, *supra* note 64 (discussing two torts historically recognized which had the same purpose: criminal conversation and alienation of affection).

93. La. Civ. Code art. 90 (1870):

As the law considers marriage in no other view than that of a civil contract, it sanctions all those marriages where the parties, at the time of making them . . .

* * *

(3) Did contract pursuant to the forms and solemnities prescribed by law.

94. Ministers of the gospel, a priest of any religious sect, parish judges and justices of the peace were at the turn of the century recognized as authorized to

consent by both husband and wife, served the purpose of that formality. The law also required the presence of three witnesses and the execution of the act of celebration of the marriage,⁹⁵ but these "formalities" were considered merely directory under the jurisprudence, which meant that they did not affect the validity of the marriage.⁹⁶ Only the ceremony presided over by a celebrant was considered essential.⁹⁷

Although the legislation suggested that the absence of a ceremony did not result in an absolutely null marriage as was the case for incapacities,⁹⁸ the jurisprudence characterized a marriage without a ceremony as an absolute nullity.⁹⁹ Obviously, as with incapacities, the public has an interest in assuring that those persons claiming special benefits and privileges afforded by law by virtue of their status as married are indeed entitled to them. These legal benefits often adversely affect third parties or the rest of society—for example, community or marital property was subject to seizure only by creditors of the husband¹⁰⁰ and tax privileges and social welfare benefits were supported by public tax dollars. A ceremony with an

perform marriage ceremonies as long as the clergymen registered. La. Civ. Code arts. 102, 103 (1870, 1958).

95. La. Civ. Code art. 105 (1870): "The marriage must be celebrated in the presence of three witnesses of full age, and an act must be made of the celebration, signed by the person who celebrates the marriage, by the parties and the witnesses."

96. See, e.g., *Succession of Jene*, 173 So. 2d 857 (La. App. 4th Cir. 1965); *Landry v. Bellanger*, 120 La. 962, 45 So. 956 (1908); *Sabalot v. Populus*, 31 La. Ann. 854 (1879).

97. *Sesostris Youchican v. Texas & Pacific Ry.*, 147 La. 1080, 86 So. 551 (1920).

98. La. Civ. Code art. 113 (1870) declared that all marriages contracted under incapacities or nullities "enumerated in the second chapter of this title" may be impeached by persons other than the parties themselves, and the second chapter did not include any of the articles prescribing the formalities for marriage (they were all in the third chapter). Nonetheless, the courts concluded that the ceremony constituted the "contracting" and was a necessary prerequisite to the marriage itself even if "contracted" by persons who were incapable. See discussion in such cases as *Succession of Marinoni*, 183 La. 776, 164 So. 797 (1935) (considered a marriage without a ceremony an absolutely null marriage and as such a potentially putative marriage) and *Succession of Rossi*, 214 So. 2d 223 (La. App. 4th Cir.), *writ refused*, 216 So. 2d 309 (La. 1968).

99. La. Civ. Code art. 113 (1870).

100. The community of acquets and gains was and is the legal regime for married spouses in Louisiana (La. Civ. Code art. 2327) and absent a matrimonial agreement adopting a different regime, as presently permitted under La. Civ. Code art. 2328, the spouses are to be governed by the law regulating the community regime. At the turn of the century the husband was the head and master of the community of acquets and gains (La. Civ. Code art. 2404 (1870)). By contrast, today the creditors of either spouse may seize community property in its entirety, not simply the one-half interest of the debtor spouse (La. Civ. Code arts. 2336 and 2345).

authorized third party present as a witness afforded proof of the marriage and assured that indeed the parties were entitled to the rights and privileges of married persons without relying solely upon the simple, potentially self-serving, testimony of the parties.

5. *Free Consent of the Parties: Relative Nullity*

As is true for an ordinary contract,¹⁰¹ Louisiana law has always required that the parties consent to marriage freely.¹⁰² If either spouse to a marriage failed to consent freely, then the resulting marriage was a relative nullity,¹⁰³ subject to confirmation by cohabitation between the party who did not freely consent and the other spouse.¹⁰⁴ A marriage in which one party did not freely consent produced a relative, rather than an absolute, nullity because the law requiring consent is designed for the protection of private parties rather than protection of the public order.¹⁰⁵ The defect of lack of free consent was and is considered to be less serious than those defects that created incapacity to contract marriage.

General contract law provided essentially the same result, classifying the contract to which at least one person did not fully consent as "voidable."¹⁰⁶ Of course, there was a difference between

101. La. Civ. Code art. 1797 (1870): "When the parties have the legal capacity to form a contract, the next requisite to its validity is their consent . . ."

La. Civ. Code art. 1798 (1870): "As there must be two parties at least to every contract, so there must be something proposed by one and accepted and agreed to by another to form the matter of such contract; the will of both parties must unite on the same point."

See also La. Civ. Code art. 1927 (1984).

102. La. Civ. Code art. 90 (1870): "As the law considers marriage in no other view than that of a civil contract, it sanctions all those marriages where the parties, at the time of making them, were: (1) Willing to contract . . ." *See also* La. Civ. Code art. 87 (1987).

103. La. Civ. Code art. 110 (1870):

Marriages celebrated without the free consent of the married persons, or one of them, can only be annulled upon application of both the parties, or that one of them whose consent was not free.

When there has been a mistake in the person, the party laboring under the mistake can alone impeach the marriage.

104. La. Civ. Code art. 111 (1870): "In the cases embraced by the preceding article, the application to obtain a sentence annulling the marriage, is inadmissible, if the married persons have, freely and without constraint, cohabited together after recovering their liberty or discovering the mistake."

"Louisiana jurisprudence has generally defined the term 'cohabitation' as necessarily including sexual intercourse." *Ford v. Ford*, 292 So. 2d 275 (La. App. 2d Cir. 1974); *State v. Brown*, 236 La. 562, 108 So. 2d 233 (1959); *State v. Freddy*, 117 La. 121, 41 So. 436 (1906) . . ." La. Civ. Code art. 95, comment (c).

105. La. Civ. Code art. 2031 (1984).

106. La. Civ. Code art. 1881 (1870): "Engagements made through error,

a contract that was "relatively null" and one that was "voidable." A relatively null contract was and is null until confirmation, and a voidable contract is valid until declared null. The jurisprudence at the turn of the century considered a marriage contracted without the free consent of one or both parties as valid until declared null,¹⁰⁷ a result no doubt motivated by a desire to protect the innocent off-spring of such a marriage from illegitimacy which was not a concern of general contract law. Present law codifies this jurisprudence¹⁰⁸ which is a clear legislative departure from the result in the case of an ordinary contract to which one or both of the parties did not freely consent. An ordinary contract lacking the free consent of one of the parties is null until confirmed by the party whose consent was not freely given.¹⁰⁹

Law at the turn of the century was not prosaic in its description of those instances where consent to a marriage was not freely given; for example, consider "[w]hen given to a ravisher, unless it has been given by the party ravished, after she has been restored to the enjoyment of liberty...."¹¹⁰ The other two examples mentioned in the article were consent given because of violence, which would include that given to a ravisher presumably, or because of a mistake respecting the person.¹¹¹ Early jurisprudence interpreted "mistake respecting the person" to mean only a mistake in physical identity,¹¹² not to mistakes concerning some quality or qualities of personality that one party believed the other to possess—like chastity¹¹³ or sanity.¹¹⁴ Not surprisingly, there was no Louisiana case declaring a marriage null for lack of consent due to a mistake respecting the

violence, fraud or menace, are not absolutely null, but are voidable by the parties, who have contracted under the influence of such error, fraud, violence or menace, or by the representatives of such parties."

107. See, for example, *State v. Loyacano*, 66 So. 307 (La. 1914); *Lacoste v. Guidry*, 47 La. Ann. 295, 16 So. 836 (1895). See also *Succession of Barth*, 178 La. 847, 152 So. 543 (1934) and *Delpit v. Young*, 51 La. Ann. 923, 25 So. 547 (1899).

108. La. Civ. Code art. 97 (1987).

109. La. Civ. Code art. 2033 (1984). A relatively null contract is null until confirmed by the party or parties. La. Civ. Code arts. 2031, 1842 (1984).

110. La. Civ. Code art. 91(1) (1870).

111. La. Civ. Code art. 91:

Consent is not free:

* * *

(2) When it is extorted by violence

(3) When there is a mistake respecting the person, whom one of the parties intended to marry.

112. *Delpit v. Young*, 51 La. Ann. 923, 25 So. 547 (1899).

113. *Id.*

114. *Stier v. Price*, 214 La. 394, 37 So. 2d 847 (1948); *Ducasse v. Ducasse's Heirs*, 120 La. 731, 45 So. 565 (1908); *Sabalot v. Populous*, 31 La. Ann. 854 (1879).

person.¹¹⁵ The Louisiana Supreme Court eloquently expressed the justification for so narrowly interpreting the phrase in *Delpit v. Young*:¹¹⁶

... if the general assembly had intended that marriages should be annulled when the one party mistakes the character, the social standing, the pedigree, the acquirements, the pecuniary means, the habits, the temperament, or the religion of the other, or when the one party, after the marriage, discovers "redhibitory" vices in the other, some language beyond the words "mistake respecting the person," would have been found to express that intention. If the marriage of a woman is to be annulled because she was unchaste before marriage, what is to be done in the case of a man?¹¹⁷ If the courts are to determine whether the mistake is sufficiently serious, how are they to deal with people who, having united themselves together "for better, for worse, in sickness and in health," etc., present a case where the one develops hereditary disease, such as consumption, or insanity, of the possibility of which the other was ignorant, or becomes confirmed in a pre-existing alcohol or opium habit, of which the other had no knowledge?

Consent extorted by violence or by a ravisher essentially concerned violence or threats of violence, which today is expressed simply by use of the word *duress*.¹¹⁸ Judges applied to "contracting" marriage the same principles that made violence or threats of violence a lack of free consent in ordinary contracts; principles highly developed in the legislation and jurisprudence.¹¹⁹

By virtue of the structure of Article 91, which listed three instances in which consent was not free, the jurisprudence was ultimately required to determine if the list was illustrative or

115. For a full discussion of this subject, see Katherine Shaw Spaht, *Revision of the Law of Marriage: One Baby Step Forward*, 48 La. L. Rev. 1131 (1988).

116. 51 La. Ann. 923, 931, 25 So. 547, 550 (1899).

117. Interestingly, this is an issue about which the court had no difficulty if a female plaintiff was seeking damages for breach of a promise to marry and the defendant proved the lack of chastity of the plaintiff. Lack of chastity of a female plaintiff was a recognized defense. See discussion of this topic in text at *supra* notes 27-30.

118. See La. Civ. Code arts. 93, 1959-1963 (1984).

119. La. Civ. Code arts. 1850-1859 (1870). Representative cases include *Grundmeyer v. Sander*, 143 So. 45 (La. 1932); *Thompson v. Thompson*, 87 So. 250 (La. 1921); *Simmons v. Simmons*, 61 So. 734 (La. 1913); *Pray v. Pray*, 55 So. 666 (La. 1911); *Quealy v. Waldron*, 52 So. 479 (La. 1910); *Collins v. Ryan*, 22 So. 920 (La. 1897); *Lacoste v. Guidroz*, 47 La. Ann. 295, 16 So. 836 (La. 1895); *Seals v. Jacob*, 292 So. 2d 885 (La. App. 1st Cir. 1974); *Taylor v. Castille*, 318 So. 2d 106 (La. App. 3d Cir. 1975); *Stakelum v. Teral*, 126 So. 2d 689 (La. App. 4th Cir. 1961).

exclusive. Was a marriage contracted by an insane person valid? If not, was it an example of an instance where the insane person's consent was not freely given? Such a marriage was not one in which the law of marriage considered that the insane person lacked *ability* to contract. A mid-twentieth century case in dicta considered the marriage of an insane person subject to annulment but only by the insane person or his legal representative,¹²⁰ thus implicitly deciding that the insane person's consent was not freely given since a limited right to annul applies only to a relative nullity. Therefore, one could argue that the jurisprudence interpreted the list of instances when a party's consent to marriage is not free as illustrative, rather than exclusive. Nonetheless, no Louisiana case ever explicitly held the article illustrative, leaving open to question such marriages as those contracted by a party under the influence of drugs or alcohol.

Examining the jurisprudence interpreting the instances of lack of free consent to a marriage, one can reach the conclusion that annulment of a marriage for failing to freely consent was not easy to obtain, despite the dicta in one case suggesting that the restrictive list in Article 91 was illustrative. The attitude of judges toward annulment for lack of free consent at the turn of the century can best be described as extremely cautious. Such a cautious approach was justified since cases involving lack of free consent to marriage concern laws for the protection of private parties¹²¹ not matters of public order,¹²² and there are serious consequences for the parties and their offspring. In addition, the judiciary recognized the potential for abuse of actions to annul marriage at a time when divorce was difficult to obtain and the interest of society in maintaining the stability of marriages, the foundation of the family unit, was widely accepted. Judges, such as the author of the oft-quoted language in *Delpit v. Young*,¹²³ expressed the notion that each spouse should take his marriage vows seriously, for the court surely would.

6. Other Statutory Requirements: Valid Marriage

Other legal prerequisites to marriage - such as the requirement of a marriage license¹²⁴ issued only after obtaining copies of the parties'

120. *Stier v. Price*, 214 La. 394, 37 So. 2d 847 (1948).

121. La. Civ. Code art. 2031 (1984).

122. See language in text accompanying *supra* note 105.

123. See *supra* note 116.

124. La. Civ. Code art. 104 (1870):

No minister of the gospel, or other person, shall celebrate any marriage in this State, unless he shall have obtained previously a special license to him directed, issued by the person appointed by law to grant licenses in the parish wherein the marriage is to be celebrated, authorizing him to celebrate such marriage.

birth certificates;¹²⁵ the results of blood tests to screen for venereal disease¹²⁶ and later AIDS;¹²⁷ the affidavit that the parties were not related within the prohibited degrees;¹²⁸ the consent of parents,¹²⁹ if necessary; the lapse of seventy-two hours between issuance of the license and performance of the ceremony;¹³⁰ a duly qualified and registered celebrant;¹³¹ three witnesses to the ceremony;¹³² and an act of marriage executed at the ceremony and signed by the parties, the celebrant and the witnesses¹³³ were considered by the jurisprudence as merely directory.¹³⁴ Therefore, the failure to comply with any such "formalities" did not affect the validity of the parties' marriage. Almost all of the provisions containing these formalities were addressed to the officiant rather than to the parties or to the marriage, and no other Civil Code article declared null a marriage without such prerequisites. Although the proscription of the marriage of minors of a certain age was located in a different chapter from other "formalities" and there was a specific article in the Civil Code that provided for its invalidity,¹³⁵ the courts concluded that marriages of minors were valid, rather than null, because the language of the article was addressed to the celebrant rather than the parties.¹³⁶

All of these prerequisites in the nature of formalities were designed to provide evidence of a marriage and to elicit information from the prospective spouses that would be useful to the two parties as well as to the officiant or other state officer. Because marriage conferred, and still does confer, extensive legal rights and obligations, requiring a marriage license and an act of marriage with witnesses and a celebrant assured that there would be evidence of the marriage, either in the form of a document or the testimony of witnesses.¹³⁷

See also La. Civ. Code arts. 99 (1870; as amended 1882 La. Acts No. 25; 1948 La. Acts No. 312).

125. La. R.S. § 9:241 (repealed 1987).

126. La. R.S. §§ 9:229-233 (repealed 1988).

127. *Id.*

128. La. Civ. Code art. 95 (1870; as amended by 1902 La. Acts No. 9).

129. La. Civ. Code arts. 97, 98 (1870).

130. La. Civ. Code art. 99 (1870; as amended by 1882 La. Acts No. 25; 1948 La. Acts No. 312).

131. La. Civ. Code arts. 102 (1870; as amended by 1952 La. Acts No. 229; 1958 La. Acts No. 331).

132. La. Civ. Code art. 105 (1870).

133. *Id.*

134. See, e.g., *Succession of Jene*, 173 So. 2d 857 (La. App. 4th Cir. 1965); *Landry v. Bellanger*, 120 La. 962, 45 So. 956 (1908); and *Sabalot v. Populus*, 31 La. Ann. 854 (1879).

135. La. Civ. Code art. 113 (1870; as amended by 1938 La. Acts No. 426; 1950 La. Acts No. 242).

136. See discussion in text accompanying *supra* notes 52-54.

137. In the absence of the best evidence, which includes the documentary

Some of the other requirements were intended to elicit information from the two parties, which in the case of the blood tests to screen for sexually transmitted diseases, were intended as much for the two parties as for the state officer. Other information to be submitted to the clerk, such as that contained in the affidavit that the parties were not related within the prohibited degrees and in the expression of parental consent, concerned protection of the public's interest. The seventy-two hour waiting period was designed to protect the parties from the hastiness of a decision to marry. However justified and well intended the purposes of the formalities, when weighed against the public's interest in the stability of marriages, especially for the protection of the offspring of the parties, the jurisprudence concluded that none of these formalities rose to a level of seriousness that should affect the validity of a marriage. In fact, there was never a suggestion that there was widespread noncompliance with the legally required formalities.

B. Present Law on Entry Into Marriage

1. Promise of Marriage

Despite the fact that other states have long since abandoned an action for breach of the promise to marry,¹³⁸ Louisiana has not. Even though the Civil Code no longer specifically refers to the promise to marry as an example of a contract for the breach of which the law permits the recovery of non-pecuniary damages,¹³⁹ the comments

evidence of the marriage act, a marriage license, or the testimony of the celebrant or witnesses, the law creates a presumption that a couple is married if they hold themselves out as a married couple within the community. Under the jurisprudence, the only exception to the presumption is if the relationship of the couple began in concubinage (cohabitation). Succession of Dotson, 202 La. 77, 11 So. 2d 488 (1942); Succession of Tyson, 186 La. 516, 172 So. 772 (1937); *Oliphant v. La. Long Leaf Lbr. Co.*, 163 La. 601, 112 So. 500 (1927); *Doiron v. Vacuum Oil Co.*, 164 La. 15, 113 So. 748 (1927); Succession of Fuselier, 325 So. 2d 296 (La. App. 3rd Cir. 1975) (court confused presumption of marriage with the putative marriage doctrine).

138. Margaret F. Brinig, *Rings and Promises*, 6 J.L. Ec. Org. 203 (1990).

Rings and Promises discusses the death of a legal rule, the suit for breach of promise to marry, not only in terms of the changing social forces involving courtship that hastened its demise but in terms of the custom that arose to replace the legal action [diamond engagement ring as contract guarantee].

Margaret F. Brinig, Carl E. Schneider & Lee E. Teitelbaum, *Going Courting, in Family Law in Action: A Reader* 69 (1999).

139. La. Civ. Code art. 1998 (1984):

Damages for nonpecuniary loss may be recovered when the contract, because of its nature is intended to gratify a nonpecuniary interest and,

reveal there was no intent to change the law. Furthermore, Article 1740 which directs that donations in contemplation of marriage fall if the marriage does not take place remains.¹⁴⁰

Two relatively recent appellate court cases have had the occasion to consider an action for breach of the promise to marry: one in which the breach is raised as a reconventional demand to an action to recover an engagement ring worth in excess of \$25,000,¹⁴¹ and the second in which the defendant raised the defense that the promise to marry was null because of an illicit cause, an existing marriage.¹⁴² In *Glass v. Wiltz*,¹⁴³ the groom who broke the engagement sought to recover the engagement ring from the defendant who had refused to return it. Under Civil Code article 1740, the plaintiff was entitled to recover the ring, but the defendant filed a reconventional demand against the groom alleging his breach of the promise to marry and her consequential damages. Relying upon an earlier 1960s case,¹⁴⁴ the court enunciated the rule of law as follows: "The trend therefore seems to be that courts resist awarding damages in such causes of action unless the injured party can clearly demonstrate that he or she is free from fault and that he or she has suffered damage."¹⁴⁵ Ultimately, the court concluded that the defendant, plaintiff in reconvention, failed to prove that she suffered damage or that any physical damage she suffered was caused by his breach of the promise to marry, both of which are required to recover any type of damages for breach of contract.¹⁴⁶

More intriguing than the holding of the court in the *Glass* case was the articulation of the "trend" in the law, which apparently continues to recognize that the plaintiff claiming breach of promise to marry may be denied recovery unless he or she is free of fault. The word fault did have a statutory definition at the time of the *Glass* case; but the differentiation of its various degrees, i.e., gross, slight or very slight, applied almost exclusively within the context of quasi-

because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform would cause that kind of loss . . .

Comment (c) gives as an example a "contract involving matters of sentimental value."

140. See discussion in text at *supra* notes 23-24 about the nature of this action as one based upon failure of cause.

141. *Glass v. Wiltz*, 551 So. 2d 32 (La. App. 4th Cir. 1989).

142. *Sanders v. Gore*, 95-660 (La. App. 3rd Cir. 1996), 676 So. 2d 866.

143. 551 So. 2d 32 (La. App. 4th Cir. 1989).

144. *Daigle v. Fournet*, 141 So. 2d 406 (La. App. 4th Cir. 1962).

145. *Glass*, 551 So. 2d at 33 (emphasis added).

146. La. Civ. Code art. 1994 (1984): "An obligor is liable for the damages caused by his failure to perform a conventional obligation . . ."

offenses.¹⁴⁷ The definition was repealed in 1999.¹⁴⁸ The term free of fault appears to be more analogous to free from fault found in Civil Code article 111, which conditions final periodic support [permanent alimony], upon a party proving she is "free from fault prior to the filing of a proceeding to terminate the marriage"¹⁴⁹ Fault in Article 111, however, has a jurisprudential definition: grounds for separation from bed and board that existed prior to 1990,¹⁵⁰ such as adultery, attempt on the life of a spouse, cruel treatment or habitual intemperance.¹⁵¹ Because this conduct constituting fault for purposes of spousal support after divorce involves breach of the explicit and implicit obligations imposed upon spouses,¹⁵² it is difficult to envision the court applying this definition of *fault* in the context of a breach of the promise to marry. Therefore, a judge is apparently free to define the term in the context of a defense to an action for breach of the promise to marry as he sees fit. It is hard to imagine that **fault** at this moment in the twenty-first century could mean lack of chastity of the claimant,¹⁵³ be the claimant male or female, much less a generally bad reputation.¹⁵⁴ However, by considering **fault** of the claimant relevant to the action for breach of promise to marry, the court in *Glass* suggests that some defendants who break their engagement are justified, although it is not clear what behavior of the plaintiff constitutes such justification.

147. La. Civ. Code art. 3506(13):

. . . The *gross* fault is that which proceeds from inexcusable negligence or ignorance; it is considered as nearly equal to fraud.

The slight fault is that want of care which a prudent man usually takes of his business.

The very slight fault is that which is excusable, and for which no responsibility is incurred.

148. 1999 La. Acts No. 503, § 1, amending La. Civ. Code art. 3506 to remove the definition of fault.

149. La. Civ. Code art. 111 (1997).

150. La. Civ. Code art. 101, comment(c) (1990): "The source Article's reference to the effect of separation from bed and board has been omitted because this revision does not provide for legal separation."

Separation from bed and board does exist for couples in a covenant marriage. See La. R.S. § 9:307(B) (1997).

151. *Adams v. Adams*, 389 So. 2d 381 (La. 1980); *Goodnight v. Goodnight*, 735 So. 2d 809 (La. App. 3rd Cir. 1999); *Currier v. Currier*, 599 So.2d 456 (La. App. 2d Cir. 1992).

Additional fault grounds for separation from bed and board contained in La. Civ. Code art. 138 (1870) include: conviction of a felony and sentence of imprisonment at hard labor or death, public defamation, being charged with a felony and fleeing from justice, abandonment, and intentional non-support of a spouse who is in destitute or necessitous circumstances.

152. La. Civ. Code art. 98 (1987).

153. See text accompanying *supra* note 27 for a discussion of this defense which was available at the turn of the century.

154. *Id.*

*Sanders v. Gore*¹⁵⁵ may be even more important for purposes of measuring the effect of the withdrawal of the law from the regulation of marriage. The prospective bride filed suit against the prospective groom alleging breach of a promise to marry and claiming both pecuniary and non-pecuniary damages, as well as the return of gifts to him made by her. The defendant by means of an exception raised the defense that the contract (the promise of marriage) was absolutely null because it was against public policy and as such no damages were due for its breach.¹⁵⁶ The essence of the defendant's promise according to the court was "not merely that he would marry Ms. Sanders, but that he would divorce his wife and marry Ms. Sanders."¹⁵⁷ At the time the defendant promised to marry the plaintiff, he was married to someone else; the plaintiff on the other hand was persuaded by the defendant to divorce her husband. Relying upon research and the opinion of scholars that the action for breach of the promise to marry was borrowed from the common law,¹⁵⁸ the court examined common law authorities which supported the proposition that "promises of marriage, when made by persons already married, are unenforceable."¹⁵⁹ Of course, the civil law likewise recognizes that contracts in derogation of marriage are against public policy, according to the court. The arguments raised by the plaintiff that public policy no longer supports protection of the marital relationship and the discussion by the court of those arguments in its majority and dissenting opinions prove to be the most interesting parts of the opinion.

The plaintiff argued that the refusal to enforce contracts that derogated from marriage was no longer the public policy of Louisiana as demonstrated by the state's lack of interest "in promoting the

155. 95-660 (La. App. 3rd Cir. 1996), 676 So. 2d 866.

156. La. Civ. Code arts. 1968, 2030, 2033 (1984).

The contract whose enforcement is against public policy is absolutely null and deemed never to have existed and the parties are to be placed back in the position they enjoyed before the contract. Even if performance has been rendered under the contract, it may not be recovered by the performing party who knew or should have known of the defect that makes the contract null.

La. Civ. Code art. 2033.

157. *Sanders*, 95-660, 676 So.2d at 870.

158. Harriet S. Daggett, *Legal Essays on Family Law, The Action for Breach of the Marriage Promise* 39-100 (1935); Planiol, *Traite Elementaire de Droit Civil* §§ 781 *et seq.*, at 454 (La. State Law Institute, trans. 1959). Interestingly, most of the common law states in the United States have abandoned the action. See text accompanying *supra* note 138.

159. *Sanders*, 95-660, 676 So.2d at 870, relying upon Corbin on Contracts § 1475, at 619.

continued existence of marriage"¹⁶⁰ Predictably, the plaintiff alleged that the state's lack of interest was reflected in the increasing laxity of divorce laws. The majority of the court responded that "[w]hile we recognize that divorce is now easier to obtain legally we also recognize that the institution of marriage is still guarded by public policy provisions."¹⁶¹ Relying upon Louisiana jurisprudence as recent as 1974,¹⁶² the court declared that "[i]n keeping with this policy of the law, every attempt should be made to reconcile estranged couples."¹⁶³ In reasserting the public interest in marriage, the author of the majority decision opined that "[t]he marriage contract affects not only the parties involved, but also their posterity and the good order of society."¹⁶⁴ Furthermore, she observed that the obligations imposed upon the two spouses during marriage are owed not only to each other but also to society.¹⁶⁵ Thus, any contract in which the defendant promised to end his marriage was "in direct opposition to Mr. Gore's [defendant's] obligations under La. Civ. Code art. 98."¹⁶⁶ Those obligations imposed by Article 98 include fidelity, support and assistance. Presumably, in the eyes of the court, the defendant violated his obligation of fidelity, ordinarily defined under the jurisprudence as the obligation not to share one's sexual potential with another, by promising to marry the third person with whom he was indeed sharing his sexual potential. In essence, the author of the majority opinion extended fidelity to incorporate violations of trust, which after all is the dictionary's definition of fidelity, between spouses caused by, or growing out of, a spouse's adultery.

One judge concurred in the result and another dissented. The concurring judge observed that the historical reason why one who was married could not promise to marry another was because marriage was indissoluble, the result of "the influence of the Catholic Church on the civil law of European and other countries, and on the

160. *Id.* at 871.

161. *Id.*

162. *Succession of Butler*, 294 So. 2d 512, 514 (La. 1974): "The law's attitude toward the marriage relation has been stated as follows: '[p]ublic policy, good morals, the highest interest of society require that the marriage relation should be surrounded with every safeguard and their severance allowed only for the causes specified by the law, and clearly proven.'"

163. *Sanders*, 95-660, 676 So.2d at 871. The court cited *Meyer v. Howard*, 136 So. 2d 805 (La. App. 4th Cir. 1962).

164. *Id.*

165. La. Civ. Code art. 98, comment (e) (1987). These obligations are matters of public order from which the parties may not derogate by their contract.

166. *Sanders*, 95-660, 676 So. 2d at 872.

English law until King Henry VIII.”¹⁶⁷ After eruditely tracing the history of divorce, a practice inimical to marriage as an institution, the concurring judge declared that “[t]he idea of the indissolubility of marriage has disappeared in the civil law of Louisiana.”¹⁶⁸

Divorce is almost as easy to get in Louisiana today as it was in ancient Roman times . . . [A] divorce is now obtainable based solely on living separate and apart for 180 days . . . [traces history of repeal of laws covered in text of this article¹⁶⁹] The State has no interest in forcing one married person to stay married to one to whom he or she does not want to be married and it is doubtful that forcing them to remain married would be conducive to the family concept. *Thomason v. Thomason*, 355 So. 2d 908 (La. 1978). Contracts with concubines are no longer against public policy . . . “[T]he state has made divorce so easy that it may be unrealistic to consider marriage to be more stable than concubinage; indeed, the state has virtually abandoned its policy of encouraging only long-term, stable marriages.”¹⁷⁰ The ideal remains the same, but in today’s divorce court a judge who tries to dissuade a person from obtaining a divorce is all too often considered as meddling in an affair that is none of his business. In assessing public policy, the recent changes in attitude toward marriage and divorce cannot be ignored.¹⁷¹

Nonetheless, the concurring judge ultimately concluded that the contract is against public policy. As his reasoning reflects, even though divorce inflicts the ultimate damage upon marriage, the involvement of a third person to whom an enforceable obligation is owed to get a divorce from one’s spouse is simply too threatening to the institution of marriage: “However free a person may be to terminate, unilaterally, his or her own marriage, it is something else when a third person steps in and after making the termination of another’s marriage the subject of a contract, wants damages for the breach of it.”¹⁷² Rather than discouraging a third person’s involvement in breaking up a marriage, such as the action of alienation of affections did,¹⁷³ recognizing a legal obligation to

167. *Id.* at 876.

168. *Id.* He points out that even the word is gone since Louisiana Civil Code article 101 (1987) uses the word “terminate,” rather than “dissolve.”

169. See text accompanying *supra* notes 46-92.

170. Quoting from Katherine Shaw Spaht & W. Lee Hargrave, 16 Louisiana Civil Law Treatise—Matrimonial Regimes § 8.3, at 369 (1989).

171. *Sanders v. Gore*, 95-660 (La. App. 3rd Cir. 1996), 676 So. 2d 866, 877.

172. *Id.* at 878.

173. See *supra* note 64 for an excellent article discussing the action for

divorce a spouse as promised in a contract would encourage a third person's involvement.

The dissenting judge, suffice it to say, relied upon the statement from the *Thomason* case highlighted in the excerpt quoted by the concurring judge. "Divorcing" the statement from the context of the facts in the *Thomason* case meant that the statement could be broadly construed to support the proposition that the state does not have an interest, literally, "in forcing one spouse to remain married to another."¹⁷⁴ Yet, the statement should not be divorced from its historical¹⁷⁵ and factual context: the *Thomason* case involved two spouses, each of whom were guilty of fault entitling the other to a divorce. The application of the judicially created doctrine of recrimination produced the result that neither spouse in the *Thomason* case could obtain a divorce. As the dissenting judge correctly observed, "[t]he recrimination doctrine resulted in the denial of a divorce in cases where both parties were equally guilty, thereby sentencing them to continue as a married couple even though they proved they were incompatible."¹⁷⁶ Two spouses who had each seriously breached their marital obligations and under applicable law were denied a divorce is an entirely different situation from one spouse seeking a divorce from the other who has in no way breached his marital obligations. Nonetheless, the dissenting judge combined the statement in *Thomason* with the simplification of the divorce process in 1990 to reach the conclusion that "[p]ermittting a married person to contract to marry another does not violate public policy because the State does not have an interest in forcing a spouse to remain married to his or her spouse."¹⁷⁷

Although the sexual and gender assumptions made in the early jurisprudence concerning breach of the promise to marry may no longer exist, the action remains viable and some general notion of fault on the part of the "jilted" fiancé replaces earlier defenses.

alienation of affections.

174. *Sanders*, 95-660, 676 So. 2d 866 at 881. It must be remembered that the *Thomason* decision was rendered in 1978 at the peak of the easing of divorce laws. The no-fault divorce revolution began in 1970 and by 1975, three years before the *Thomason* case was decided, no-fault divorce had been enacted in virtually every state in the United States. In addition the empirical data had not yet revealed the devastation the "divorce revolution" had wreaked on women and children, first reported by Lenore Weitzman, *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America* (1985) and since confirmed by so many others, including Judith S. Wallerstein, Julia M. Lewis, & Sandra Blakeslee, *The Unexpected Legacy of Divorce: A 25-Year Landmark Study* (2000).

175. *Sanders*, 95-660, 676 So. 2d at 881.

176. *Id.*

177. *Id.*

Furthermore, despite a steady erosion of the directly expressed interest of society in marriage as the exclusive domain for the sexual expression of a man and a woman, a Louisiana court has on at least one occasion involving the breach of a promise to marry reasserted rather confidently that indeed society has an interest in the marital relationship—its stability and its duration. And the author of that opinion is now a justice of the Louisiana Supreme Court.¹⁷⁸

2. Prerequisites to a Valid Marriage: Who Can and Can Not Marry

Before beginning to consider the present law on entry into and nullity of marriage, it is important to examine the current conceptual understanding of marriage as defined in the Civil Code. Article 86, in recognition of the history of its predecessor,¹⁷⁹ defines marriage as “a legal relationship between a man and a woman that is created by civil contract.” No longer is marriage defined as a contract; it is a legal relationship. It is not subject to the rules governing ordinary contracts.¹⁸⁰ “[t]he relationship and the contract are subject to special rules prescribed by law.”¹⁸¹ However, by utilizing the statutory language “created by civil contract,” Article 86 permits the selective application of contractual principles if there are no otherwise applicable “special” rules. To that extent, unanswered questions concerning the validity of certain marriages may be answered by general contractual principles.¹⁸²

The definition of marriage includes specification that the relationship is one between a man and a woman. At the turn of the century, there was no similar reference in Civil Code article 86 concerning who might be able to contract marriage, but the jurisprudence in distinguishing marriage from an ordinary contract observed that it could only be contracted between a man and a woman.¹⁸³ Not until 1975¹⁸⁴ did Article 88 include a reference to

178. Judge Jeannette Knoll of the Third Circuit Court of Appeal who authored the opinion in *Sanders v. Gore* is now a member of the Louisiana Supreme Court.

179. La. Civ. Code art. 86, comment (a) (1987): “This provision effects no change in the substance of the source provisions . . . In particular, the import of Article 86 of the Civil Code of 1870 remains unchanged: the law views marriage as purely a civil matter, and not as one subject to the operation of religious or ecclesiastical law”

180. La. Civ. Code art. 86, comment (c) (1987).

181. La. Civ. Code art. 86.

182. See discussion in Spaht, *supra* note 115.

183. *Hurry v. Hurry*, 144 La. 877, 885, 81 So. 378, 380 (1919): “The consent of the parties is required, but it can only be contracted between a male and a female”

184. 1975 La. Acts No. 361, § 1 amended La. Civ. Code art. 88.

marriage as a relationship between a man and a woman. The redactors believed that marriage was a natural institution;¹⁸⁵ thus no definition was necessary. Applying the principles of natural law, there was no question that marriage could only be contracted between male and female; they were created physically by design in a sexually complementary manner.¹⁸⁶ To include language that marriage is a relationship between a man and a woman was redundant, for to define marriage in any other way would be oxymoronic. However, over the last twenty to thirty years, the “gay rights” movement has insisted that marriage be an institution available to them as well as to heterosexuals.¹⁸⁷ Present Louisiana law not only excludes marriage between persons of the same sex by definition, but also reinforces that exclusion by an explicit prohibition in Article 89, an article in which a marriage between persons of the same sex is referred to as a “purported” marriage.¹⁸⁸ Furthermore, Louisiana law declares its strong public policy on the issue¹⁸⁹ and denies any civil effects afforded by the putative marriage doctrine to such absolutely null marriages.¹⁹⁰ A “purported” marriage between persons of the same

185. John Witte, Jr., *An Apt and Cheerful Conversation on Marriage*, Sixth Distinguished Faculty Lecture at Emory University at 3 (Feb. 2001): “And marriage is a *natural institution*, subject to the natural laws taught by reason and conscience, nature and custom.”

Even proponents of broadening the definition of marriage and family recognize marriage historically as a natural institution: “Heterosexuality was the unquestioned call of nature . . .” Harry Krause & David D. Meyer, *What Family for the 21st Century?*, 50 Am. J. Comp. L. 101 (2002).

186. David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 So. Tex. L. Rev. 1 (1997).

187. This whole movement supported by elite opinion, especially in prestigious national law reviews, will be addressed in the second article by the author that discusses the revolution and counter revolution concerning marriage law and the future of marriage as an institution, enshrined, protected and privileged in the law. See Katherine Shaw Spaht, *Revolution and Counter-Revolution: The Future of Marriage in the Law*, ___ Loy. L. Rev. ___ (2003) (publication forthcoming). Just one recent example of such writing is Harry D. Krause & David D. Meyer, *What Family for the 21st Century*, 50 Am. J. Comp. L. 101 (2002).

188. La. Civ. Code art. 89 (1987): “Persons of the same sex may not contract marriage with each other. A purported marriage between persons of the same sex contracted in another state shall be governed by the provisions of Title II of Book IV of the Civil Code.”

La. Civ. Code art. 3520(B) (1991, as amended by 1999 La. Acts No. 890, § 1): “A purported marriage between persons of the same sex violates a strong public policy of the state of Louisiana and such a marriage contracted in another state shall not be recognized in this state for any purpose, including the assertion of any right or claim as a result of the purported marriage.”

189. La. Civ. Code art. 3520(B) (1991 as amended by 1999 La. Acts No. 890 § 1). The text of this paragraph appears at *supra* note 188.

190. La. Civ. Code art. 96 (1987): “. . . A purported marriage between parties

sex, it is safe to say, is the most reprehensible of all absolutely null marriages under present law and even more reprehensible than a marriage between an adulterer and his accomplice under earlier provisions of Louisiana law.¹⁹¹

Even more importantly, when considering the present law on entry into marriage, whether the legal provision involves a prerequisite or a nullity, it is critically important to place those rules within the context of a new reality—easy divorce. The relaxation of rules governing divorce removes the pressure on grounds for nullity of a marriage. In many instances obtaining a divorce by summary proceedings 180 days after filing a petition simply alleging the desire for a divorce¹⁹² will be faster and will result in a more certain remedy than seeking annulment of a marriage which requires an ordinary proceeding for very specific grounds stated in the legislation. Thus, it is unremarkable that most cases in which the issue of nullity is raised are divorce actions in which one spouse alleges that the marriage is null. The only advantage to filing a suit for nullity or to raising nullity as a defense to an action for divorce is in the case of an absolutely null marriage¹⁹³ if the other spouse was not in good faith.¹⁹⁴ The spouse in bad faith is not entitled to the civil effects of the marriage,¹⁹⁵ which include an interest in community property,¹⁹⁶ spousal support after judgment of nullity,¹⁹⁷ and other claims available only to a spouse at termination of the marriage.¹⁹⁸

The legislation, unlike its turn-of-the-century predecessor, now incorporates the judicial interpretation of the effects of a relatively null marriage: “[a] relatively null marriage produces civil effects until it is declared null.”¹⁹⁹ By producing civil effects until the marriage is declared null, the legislation, just as previous jurisprudence, continues to distinguish a relatively null marriage from a relatively null contract;

of the same sex does not produce any civil effects.”

See also La. Civ. Code art. 89, comment (d) (1987 as amended by 1999 La. Acts No. 890 § 1).

191. See text accompanying *supra* notes 64-70 for a discussion of La. Civ. Code art. 161 (1870).

192. La. Civ. Code art. 102, comment (b) (1990).

193. La. Civ. Code art. 94 (1987).

194. La. Civ. Code art. 96 (1987).

195. La. Civ. Code art. 152 (1993). Compare with La. Civ. Code art. 151 (1993).

196. See, e.g., La. Civ. Code art. 2338.

197. La. Civ. Code arts. 152, 111-117.

198. For example, a claim for contributions to the education or training of a spouse. La. Civ. Code arts. 121-124.

199. La. Civ. Code art. 97 (1987). Comment: “This Article is new, but it does not change the law”

the latter is deemed never to have existed.²⁰⁰ Furthermore, confirmation of a relatively null marriage after recovering one's liberty or discernment is no longer limited simply to cohabitation; confirmation of the marriage may occur by express declaration²⁰¹ as in the case of an ordinary contract which is relatively null.²⁰² The changes simply make confirmation of a relatively null marriage easier, and after all, relatively null marriages are those which involve laws for the protection of private persons. This legal change which makes a relatively null marriage easier to affirm and convert to a valid marriage is not inconsistent with a policy of promoting marriage as an institution.

Developed for the purpose of protecting the innocent spouse and the children of an absolutely null marriage, the putative marriage doctrine has changed in two important respects since the turn of the century, one which is obvious and the other less obvious. Even though the doctrine only applies if a spouse is in "good faith" at the time the marriage was contracted²⁰³ and, as a general rule, the civil effects last only as long as a spouse's good faith, the 1987 legislation extends civil effects beyond the moment that good faith ceases, in one special set of circumstances: "[w]hen the cause of the nullity is one party's prior undissolved marriage, the civil effects continue in favor of the other party, regardless of whether the latter remains in good faith, until the marriage is pronounced null or the latter party contracts a valid marriage."²⁰⁴ The general rule, which only extends civil effects as long as good faith lasts, was intended to motivate the spouses to act and either stop living together in the case of an incestuous union or cure the defect and marry again in the case of a bigamous union. For marriages reprehensible to society, the parties should be encouraged to end them, and terminating the civil effects at the moment the innocent party has knowledge or is put on notice of the impediment assures the

200. La. Civ. Code art. 2031 (1984).

201. La. Civ. Code art. 95 (1984). See comment (c) to Article 95:

This Article changes prior law by substituting the broader term 'confirm' for the phrase 'cohabit together' used by Article 111 of the Civil Code of 1870 in specifying the means of validating a relatively null marriage . . . Proof that the parties have lived together as man and wife will continue to be persuasive evidence that the one whose consent was initially defective subsequently intended that a valid marriage should subsist, but the use of the broader term in this Article also permits the application of certain general obligations principles regarding confirmation of contracts. For instance, under Civil Code article 1842 (rev. 1984) a party who had married under duress could confirm the marriage by express declaration.

202. La. Civ. Code art. 1842 (1984).

203. La. Civ. Code art. 96 (1987): "An absolutely null marriage nevertheless produces civil effects in favor of a party who contracted it in good faith for as long as that party remains in good faith . . ."

204. *Id.*

accomplishment of society's objectives.²⁰⁵ The special extension of civil effects in favor of a spouse who contracted a bigamous marriage in good faith and was not the spouse who was already married continues to protect the party who has no dispositive power "to rectify the nullity (by divorcing his former spouse and remarrying his present one)."²⁰⁶ The result of the special extension is to deny to the spouse who despite his own impediment marries, the power to terminate the civil effects that flow to the other spouse by simply confessing to his prior undissolved marriage.²⁰⁷

Less obvious than the statutory change protecting an "innocent" spouse from the cessation of civil effects is the increasingly forgiving nature of the judiciary in deciding what constitutes "good faith," the prerequisite to the flow of civil effects from an absolutely null marriage. "Good faith" has always been defined as "an honest and reasonable belief that there exists no legal impediment to a marriage."²⁰⁸ Early in the twentieth century, judges generally were demanding upon spouses who found themselves in absolutely null marriages and who claimed to have had a reasonable belief that no impediment existed to the marriage. In particular, the jurisprudence insisted that if one spouse knew that the other spouse had been married at one time, it was incumbent upon the spouse claiming a reasonable belief, thus "good faith," to have conducted some sort of investigation before accepting the assurances of the other spouse that his former marriage had terminated.²⁰⁹ After intervening decisions which made increasing exceptions for unintelligent and unsophisticated spouses²¹⁰ (and even their families²¹¹) who claimed

205. La. Civ. Code art. 96, comment (b).

206. *Id.*

207. Spaht, *supra* note 115:

The Committee [Persons Committee of the Louisiana State Law Institute] felt that the spouse whose impediment caused the nullity should remain motivated to cure the defective marriage, either by remarrying the putative spouse once the impediment is removed or by obtaining a judicial declaration of nullity. The other 'innocent' spouse can only rectify the defect by obtaining a judicial declaration of nullity. Furthermore, if civil effects cease upon receiving information concerning the impediment, the spouse whose impediment caused the absolutely null marriage may control the flow of civil effects to the other spouse . . .

Id. at 1152-53.

208. La. Civ. Code art. 96, comment (d) (1987): "This Article is not intended to disturb the prior jurisprudence construing the term 'good faith' in this context . . ."

209. See, e.g., Succession of Taylor, 39 La. Ann. 823, 2 So. 581 (La. 1887), discussed in Succession of Marinoni, 183 La. 776, 164 So. 797, 810-12 (La. 1935) (Odom, J, dissenting).

210. Eddy v. Eddy, 271 So. 2d 333 (La. App. 2d Cir. 1972). Later the same treatment was afforded to the wife in Mara v. Mara, 452 So. 2d 329 (La. App. 4th

they were in "good faith," the Louisiana Supreme Court in *Gathright v. Smith*²¹² affirmed the decision of the trial court that a husband who knew his wife had been married twice and simply relied upon her statements that those marriages were dissolved was in "good faith." Even more recently, in *Alfonso v. Alfonso*²¹³ the wife in a bigamous marriage relied on the statement by the husband that his marriage to his first wife was dissolved, but she also depended upon a document written in Spanish and delivered to her while in Honduras to mean that they were married. The court concluded that she was in "good faith," having possessed an honest and reasonable belief that there was no impediment to the marriage and that she indeed was married even though there was no ceremony.

Of course, having strict standards as to what constitutes a reasonable belief that no impediment to a marriage exists discourages persons from entering into absolutely null marriages without investigating the other spouse's statements. In the past, the judiciary apparently considered it part of their responsibility to society to discourage marriages which their elected representatives deemed reprehensible and injurious to the public good. By "softening up" the standards for "good faith" over the last one hundred years, the judiciary retreated from punishing parties to absolutely null marriages by means of withholding the civil effects of marriage. Maybe the reason was because in an increasingly mobile society it is hard to know and determine the background of a potential spouse. This reason, however, becomes less convincing as methods of communication and means of gathering information at the end of the twentieth century have proven to be superior to those methods available at the beginning of the century. A more plausible reason is that the judiciary became less convinced that an absolutely null marriage was reprehensible to society at large and the remedy of divorce was quick and easy to obtain.

3. *Parties with An Impediment to Marriage: Absolute Nullity*

Rather than formulate the prohibitions against marriages that are absolutely null as *inability* to contract marriage,²¹⁴ present law considers the prohibitions as impediments to marriage.²¹⁵ The

Cir. 1984).

211. Succession of Barbier, 296 So. 2d 390 (La. App. 4th Cir. 1974).

212. 368 So. 2d 679 (La. 1978).

213. 99-261 (La. App. 5th Cir. 1999), 739 So.2d 946.

214. La. Civ. Code art. 90 (1870). See text accompanying *supra* notes 46-57.

215. La. Civ. Code art. 87 (1987): "The requirements for the contract of marriage are:

change in language was purposeful; an incapacity to contract ordinarily produces a relatively null contract,²¹⁶ yet in the case of the marriage contract, an incapacity results in an absolutely null marriage.²¹⁷ Furthermore, incapacity of a contracting party suggests a law that is intended for the purpose of protecting the individual rather than protecting public order and good morals. Consistent with the notion that an incapable party is prevented from contracting because the law protects him from obligating himself, he also may confirm what he did upon the termination of his incapacity, effectively waiving the protection the law afforded him.²¹⁸ Thus, for purposes of marriage, persons who prior to 1987 were considered unable to contract marriage were not in the general theoretical sense incapable; their marriages were prohibited because such marriages violated strong public policy. Therefore, the redactors of Article 87 chose a different term to express the category of marriages which if contracted would result in an absolute nullity—marriages to which there was an impediment.²¹⁹

As mentioned earlier “purported” marriages between persons of the same sex are now explicitly prohibited.²²⁰ Such “purported” marriages are considered by Louisiana law as the most reprehensible of the absolutely null marriages: the parties are denied the application of the putative marriage doctrine, hence any civil effects of marriage,²²¹ and such a “purported” marriage contracted in another state is not entitled to recognition in Louisiana.²²² The first of only two other changes to a category of absolutely null marriages clarified the prohibition against marrying relatives: the prohibition applies even if the relationship is created by adoption.²²³ The second alteration to the same prohibition is more substantive: with judicial approval, collaterals related only by adoption may marry.²²⁴ The source provision for this change exists in the Quebec Civil Code.²²⁵ Although the article itself offers no substantive criteria to guide the

The absence of legal impediment”

216. La. Civ. Code art. 2031 (1984).

217. La. Civ. Code art. 94 (1987). *See also* La. Civ. Code art. 113 (1870).

218. La. Civ. Code art. 1842 (1984).

219. La. Civ. Code art. 87 (1987). *See text of article supra* note 215.

220. La. Civ. Code art. 89 (1987 as amended by 1999 La. Acts No. 890 § 1).

221. La. Civ. Code art. 96 (1987).

222. La. Civ. Code art. 3520(B) (1991 as amended by 1999 La. Acts No. 890 § 1).

223. La. Civ. Code art. 90 (1987): “. . . The impediment exists whether the persons are related by consanguinity or by adoption”

224. *Id.* “Nevertheless, persons related by adoption, though not by blood, in the collateral line within the fourth degree may marry each other if they obtain judicial authorization in writing to do so.”

225. Quebec Civ. Code art. 406.

judge in the exercise of his discretion in authorizing such a marriage, the official comment to the article does: "In deciding whether to do so, [authorize the marriage] the judge should consider whether the policy of preserving family harmony will be advanced or impeded by the proposed union . . ." ²²⁶ Thus, the law prohibiting incestuous marriages was liberalized only to the following limited extent: those within the collateral line related by adoption only who are prohibited from marrying may now obtain judicial authorization to marry.

To a far greater degree, the legislative repeal fifteen years earlier of the prohibition against an adulterer marrying his accomplice in adultery liberalized the law of absolutely null marriages. No other prohibition protected an existing marriage to the same extent, especially when coupled with extremely restrictive grounds for divorce. At the same time, the law prohibiting a "purported" same-sex marriage enacted in 1987 is the strongest prohibition ever enacted in Louisiana law. ²²⁷ It is as if after relenting on almost all prohibitions except bigamy and incest the legislature drew an emphatic line in the sand at same-sex "marriage," suggesting liberalization would go no further. Whether that line in the sand remains or shifts like the sand in which it is drawn is yet to be determined. ²²⁸

4. *Marriage Ceremony: Absolute Nullity*

Although earlier jurisprudence concluded that a "marriage" without a ceremony is an absolutely null marriage, ²²⁹ the Civil Code was not explicit. Present law is. Under Civil Code article 91, the parties, who must be physically present, ²³⁰ are obligated to participate in a marriage ceremony performed by a third person. If they do not, the marriage is absolutely null. ²³¹

226. La. Civ. Code art. 90 comment (e) (1987).

227. See text accompanying *supra* notes 220-222.

228. In her review of Nancy Cott's book *Public Vows* (*supra* note 1), Ann Estin writes: "Over time, if public opinion continues to shift, same-sex marriage will no longer be so unthinkable By comparison [to interracial marriage and liberalization of divorce laws], the debate over same-sex marriage has progressed remarkably quickly." Estin, 100 Mich. L. Rev. at 1704.

In note 48 on page 1704, Estin cites Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 783-84 (2002), to the following effect: ". . . that movement for gay rights has moved further and faster than any previous movement."

229. See text accompanying *supra* notes 98-99.

230. La. Civ. Code art. 91 (1987). See also La. Civ. Code art. 92 (1987): "A marriage may not be contracted by procuracy."

231. La. Civ. Code art. 94 (1987): "A marriage is absolutely null when

To an extent it can be argued that Article 91 is more restrictive than prior law because it specifies that the third person be qualified, which occurs by being a registered²³² member of the clergy²³³ or a judge,²³⁴ or “reasonably believed by the parties to be qualified” to perform the ceremony. Prior jurisprudence considered the qualification and registration of a celebrant as a formality that was merely directory thus not affecting the validity of the marriage.²³⁵ A person reasonably believed by the parties to be qualified does not require that the officiant be factually qualified, only that the parties are reasonable in believing that he is. “The change in statutory language to encompass such a celebrant was in response to the fact that a Louisiana officiant not authorized by law to perform marriage ceremonies did so and no one was certain that the marriages were valid.”²³⁶ As the comments explain, “A ‘person . . . reasonably believed by the spouses to be qualified’ to perform a marriage ceremony may include any member of the class of persons generally recognized as empowered to perform such ceremonies, whether or not properly registered to do so.”²³⁷ The expressed motivation for this extension of protection was to prevent the nullity of a marriage for purely “technical reasons” beyond the spouses’ control,²³⁸ such as the expiration of a bond to be posted by a justice of the peace.

5. Free Consent of the Parties: Relative Nullity

Civil Code article 93, which contains the instances in which consent to a marriage is not free, incorporates the more specific consent given to a ravisher under prior law²³⁹ into the word duress. Duress replaced violence or threats²⁴⁰ in the law of conventional

contracted without a marriage ceremony”

232. La. R.S. § 9:204 (1987).

233. La. R.S. §§ 9:201-02 (1987 as amended by 1997 La. Acts No. 73 § 1).

234. La. R.S. §§ 9:202-03 (1987 as amended by 2001 La. Acts No. 341 § 1; La. Acts. 2001 No. 1103 § 1; La. Acts. 2002 1st Ex. Sess. No. 60 § 1).

235. See text accompanying *supra* notes 94-96.

236. Spaht, *supra* note 115, at 1141.

237. La. Civ. Code art. 91, comment (c) (1987).

238. *Id.*: “. . . The expression may be broadly construed to prevent the annulment of marriages for technical reasons reasonably beyond the control of the intended spouses.”

239. La. Civ. Code art. 91 (1870).

240. La. Civ. Code art. 1959, comment (b) (1984): “. . . In sum, ‘duress’ is a word of art or technical word in the English language which expresses exactly what is meant by ‘violence or threats’ in Civ. Code arts. 1850-1852 (1870). Its adoption in this revision is not intended to incorporate notions incompatible with that meaning.”

obligations and has an established meaning under the Civil Code.²⁴¹ However, Article 93 omits reference to a "mistake respecting the person" which appeared in its predecessor, Article 91.²⁴² The term "mistake respecting the person" had been interpreted by prior jurisprudence so narrowly²⁴³ that it was considered an obsolete phrase. Furthermore, to include a term such as error would, as warned by the court in *Delpit v. Young*,²⁴⁴ create instability in all marriages because of the term's breadth.²⁴⁵ Nonetheless, Article 93 does not declare that the instances of lack of free consent are exclusive so it is possible to argue in an aggravated case "involving mistake in physical identity" that resort to general principles of conventional obligations is appropriate to permit annulment of the marriage.²⁴⁶

Article 93, enacted in 1987, added a new instance where consent is not freely given: consent given by a person who is incapable of discernment.²⁴⁷ Although being deprived of reason is for purposes of general contract law an incapacity²⁴⁸ producing a relatively null contract,²⁴⁹ Louisiana marriage law considers an incapacity to discern as a party's failure to freely consent.²⁵⁰ As a result, the marriage, like the ordinary contract, is relatively null.²⁵¹ Prior to 1987, the law of marriage contained in the Civil Code was not explicit about the result of a marriage contracted by one party who was insane or under the influence of drugs or alcohol. However, the jurisprudence in dicta declared that the marriage could only be annulled by the party who

241. La. Civ. Code arts. 1959-1963 (1984).

242. See text accompanying *supra* note 111.

243. See text accompanying *supra* note 112.

244. See text accompanying *supra* notes 112-116, and the quoted language in the text accompanying *supra* note 117.

245. For example, see *Verneuville v. Verneuville*, 438 So. 2d 615 (La. App. 4th Cir. 1983) (husband sought annulment of marriage because of his error as to the entire identity of his wife who was pregnant when he married her but only revealed the child was not his when the child was born).

246. Spaht, *supra* note 217, at 1145:

[A]n aggravated case involving a mistake in physical identity could be resolved by resort to the general articles on error. A justification for resorting to those articles is that article 86 defines marriage as a relationship created by civil contract. The words civil contract were used for two reasons: (1) To demonstrate the historical assertion of jurisdiction over marriage by secular authorities and (2) To permit analogy to the law of conventional obligations when appropriate.

247. The source of this new provision was Quebec Civ. Code art. 425 (rev. 1981).

248. La. Civ. Code art. 1918 (1984).

249. La. Civ. Code arts. 1919, 2031, 2033 (1984).

250. La. Civ. Code art. 93 (1987).

251. La. Civ. Code art. 95 (1987).

was insane or his legal representative.²⁵² Such a conclusion meant that the marriage was to be treated as a relative nullity, thus presumably as a matter of defective consent.

Arguably, present law is more permissive by explicitly permitting the annulment of a marriage because of incapacity to discern, a condition which constitutes more than a mere lack of judgment but arguably less than deprived of reason. However, it can also be argued that the inclusion of “incapable of discernment” merely codified prior jurisprudence²⁵³ and offered a solution to unanswered questions about the validity of marriages contracted by a person under the influence of alcohol or drugs.²⁵⁴ In response to the argument that the Article merely codified prior jurisprudence, it must also be noted that “incapable of discernment” was intended to permit a judge to examine the marriage of minors to determine whether in a particular case the minor understood his action in consenting to marriage.²⁵⁵ To this extent, present law delegates to the judge the possibility of setting a minimum age in a specific case below which a particular minor did not freely consent, which constitutes a change in prior law at least as judicially interpreted.²⁵⁶ It would be accurate in summary to state that at least, as concerns a party’s freedom of consent, present law, with

252. See text accompanying *supra* notes 120-123.

253. La. Civ. Code art. 93, comment (c) (1987): “. . . As under prior jurisprudence, under this Article insanity is viewed as creating a lack of free consent, rather than a lack of capacity to contract marriage; so only the insane spouse may seek annulment of such a marriage”

254. La. Civ. Code art. 93, comment (d) (1987): “A ‘person incapable of discernment’ may include, but is not limited to, a person under the influence of alcohol or drugs, a mentally retarded person”

255. See La. Civ. Code art. 93, comment (d) (1987): “A ‘person incapable of discernment’ may include, but is not limited to, . . . a person who is too young to understand the consequences of the marriage celebration.”

256. Spaht, *supra* note:

Just as under prior law, the officiant is directed not to perform a marriage in which a party is a minor unless ‘. . . the minor has the written consent to marry of both of his parents, or of the tutor of his person, or of a person who has been awarded custody of the minor.’ If the minor is under the age of sixteen, he or she must also obtain judicial authorization to marry. The choice to continue the present jurisprudential rule concerning the marriage of minors was conscious. The Committee [Persons Committee of the Louisiana State Law Institute] chose to preserve the validity of such marriages because, given the frequency of the marriage of minors, serious social problems could result from a law pronouncing the nullity of such a marriage.

Id. at 1136.

“. . . Since there is no minimum age below which a marriage of minors will be considered null, the Committee considered it advisable to permit the court to examine the consent to marriage by a minor to determine if he was too young to understand the consequences of the celebration” *Id.* at 1146.

a few minor exceptions, is neither more permissive nor more restrictive than the law at the turn of the century.

6. *Other Statutory Requirements: Valid Marriage*

Other ceremonial requirements, other than the provisions requiring a ceremony and a qualified officiant contained in the Civil Code, are merely directory consistent with past jurisprudence. Their placement in the Revised Statutes as opposed to the Civil Code was intended to convey the directory nature of those provisions and to signal that a failure to comply with them does not affect the validity of a marriage.²⁵⁷ The ceremonial provisions include "those relating to the issuance and presentation of marriage licenses,²⁵⁸ the registration of officiants,²⁵⁹ the requisite number of witnesses to the ceremony and their qualifications,²⁶⁰ and the written act of celebration of the marriage . . ."²⁶¹ In addition, the Revised Statutes contain the provision requiring that seventy-two hours elapse between issuance of the license and performance of the ceremony,²⁶² the provisions on filing of an opposition to a marriage,²⁶³ and the provisions regulating record-keeping.²⁶⁴

Even though the number of witnesses to the ceremony and the presentation of a medical certificate were formalities previously considered to be merely directory, substantive changes throughout the twentieth century, even as recently as the 1980s, suggest liberalization of the law of entry into marriage. No longer are three witnesses to a marriage ceremony required, only two. But of far greater significance, no longer is a medical certificate required that contains an attestation by a physician that a party does not suffer from venereal disease or AIDS. The latter formality required prior to issuance of a marriage license was repealed in 1988.²⁶⁵ Part of the explanation for

257. La. Civ. Code art. 91, comment (a) (1987):

This Article clarifies but does not change the law. It reflects the prior jurisprudential rule that the articles of the Civil Code of 1870 that set forth the formalities of marriage were only directory to officiants. An officiant's failure to comply with any other ceremonial provision than is imposed by Article 87 and this Article may subject him to civil sanction . . . but it will not invalidate the resulting marriage.

258. La. R.S. §§ 9:205, 221-225, 226-228, 234-236 (2003).

259. La. R.S. § 9:204 (2003).

260. La. R.S. § 9:244 (2003).

261. La. R.S. § 9:245 (2003). See La. Civ. Code art. 91, comment (b) (1987).

262. La. R.S. §§ 9:241-243 (2003).

263. La. R.S. §§ 9:261-262 (2003).

264. La. R.S. §§ 9:251-256 (2003).

265. 1988 La. Acts No. 345 § 1; 1988 La. Acts No. 808 § 2; 1988 La. Acts No. 973 § 1).

the repeal of the requirement of a medical certificate was the cost of testing for AIDS in 1988. The argument was also made that testing for AIDS served merely to discriminate against those with this devastating disease. If the AIDS testing was to be eliminated, the rationale proceeded, why should any testing for venereal disease be required. After all, of the sexually transmitted diseases, AIDS was and still is, by far the most serious.

The repeal coincided with an explosion of sexually transmitted diseases in the United States, such as herpes, and the lack of widespread knowledge and information about at-risk populations for the newly diagnosed disease of AIDS. Apparently, there was no consideration given to one of the purposes of the medical certificate, that is, to provide information to the parties about each other's sexual history and the risk of exposure to a spouse's sexually transmitted disease. By 1988, there may have been an assumption that all couples who may have needed such information had already been sexually intimate and that to require a medical certificate and public disclosure would violate a party's privacy. There may also have been concern that many of the newly diagnosed sexually transmitted diseases, such as herpes or AIDS, have no known cure; therefore, the obstacle of requiring a medical certificate could prevent the infected person from ever marrying.

The repeal of the requirement of a medical certificate represents one more example of retreating from legal regulation of the sexual conduct of parties who desire to enter marriage. The repeal also communicates that the sexual conduct of parties to an intended marriage is a private matter beyond the interest of the public. Can one legitimately argue that sexually transmitted diseases are not matters of public concern? If the public is concerned with marriage at all, such as in granting licenses to marry and in regulating who may marry, can a person argue that the public has no interest in assuring that those persons who do marry are free of disease? From a different perspective, what distinguishes sexually transmitted diseases and the risk they pose to the disease-free spouse and children of the marriage from other diseases, particularly genetically transmitted ones? Is there some inherent connection between sex and marriage that makes freedom from sexually transmitted diseases more relevant than other, even hereditary, diseases? Would knowing a prospective spouse has a sexually transmitted disease more seriously affect the decision to marry than knowing a spouse carries the breast cancer gene? Or, has science only now perfected genetic testing to the extent that such information can be obtained?

A. Historical Regulation of the Marital Relationship

At the turn of the century until the passage of the Married Women's Emancipation legislation during the period of 1916 to 1928,²⁶⁶ a wife fell under the authority of her husband and was required to obtain his authorization, concurrence or consent to certain civil acts.²⁶⁷ She was deemed to suffer a civil incapacity coextensive with her need for her husband's authorization. Historically, the incapacity of the married woman had little to do with age or maturity of judgment; it was based on the notion that "the husband was the head of the family"²⁶⁸ and therefore had an interest in supervising his wife's activities."²⁶⁹ Even after the passage of the emancipation legislation, wives who were under eighteen years of age or interdicted remained under their husband's authority until 1974.²⁷⁰ Even though the husband's marital power and the correlative incapacity of the wife existed for patrimonial reasons rather than personal reasons, both the power and the incapacity were treated as matters of public order rather than private order. The patrimonial reasons consisted of assuring that the husband was indeed the "head and master" of the community and of protecting third parties from confusion²⁷¹ as to his authority during the existence of the community regime.²⁷² Hence, the incapacity of the wife and resulting marital power of the husband were treated "as a part of the law of marriage proper rather than as

266. That legislation now appears in La. R.S. §§ 9:101-105 (2003). The legislation emancipates married women from the authority of their husbands. "... [I]n no case shall any act, contract, or obligation of a married woman require, for the validity or effectiveness thereof, the authority of her husband or of the judge." La. R.S. § 9:101 (2003).

267. La. Civ. Code art. 1786 (1870): "The incapacity of the wife [La. Civ. Code arts. 122-135 (1870)] is removed by the authorization of the husband, or, in cases provided by law, by that of the judge." The wife, however, was permitted to execute a will without the authorization of her husband. La. Civ. Code art. 135 (1870).

268. See La. Civ. Code art. 120 (1870) (wife bound to live with her husband and follow him wherever he chooses to reside) and La. Civ. Code art. 216 (parents exercise parental authority, but in case of a difference the will of the father prevails).

269. Spaht, *supra* note 15, at 144.

270. La. R.S. § 9:104 (1950) was repealed by 1974 La. Acts No. 89, § 1.

271. Since 1980, the definition of *matrimonial regime* in La. Civ. Code art. 2325 establishes that the legislation affects third parties as well as the two spouses.

272. La. Civ. Code art. 2404 (1870) designated the husband as "head and master" of the community regime. See *infra* note 279 for the text of Article 2404 (1870). Article 2404 was ultimately declared unconstitutional by the United States Supreme Court in *Kirchberg v. Feenstra*, 450 U.S. 455, 101 S. Ct. 1195 (1981), one year after the repeal of the Article by the legislature in 1979 La. Acts No. 709.

part of the law of matrimonial regimes,²⁷³ more as a personal effect rather than as a patrimonial effect of marriage.

The authority of the husband over his wife and her civil acts was extensive and applied even if the wife was separate in property²⁷⁴ from her husband.²⁷⁵ To appear in court,²⁷⁶ borrow money or contract debts “for her separate benefit and advantage,” thus binding only her separate and paraphernal property, the wife required the authorization of her husband and “the sanction of the judge.”²⁷⁷ It must be remembered that the wife had no authority whatsoever in her personal capacity²⁷⁸ to bind community property because the husband was head and master and the sole authority concerning the management of community property.²⁷⁹ The only exceptions to the requirement of the husband’s authorization of his wife’s obligations was (1) to her contracts if she was a “public merchant”²⁸⁰ although the exception did not permit her to appear in court without his authorization;²⁸¹ (2) “to her contracts for necessaries for herself and family, where he does not himself provide them; and (3) to all her other contracts, when he is himself a party to them.”²⁸² If the wife was a public merchant, she could “obligate herself in anything relating to her trade; and in such case, her husband [was] bound also, if there [existed] a community of

273. Spaht, *supra* note 15, at 144.

274. See present law in La. Civ. Code art. 2328 (permits spouses to adopt a separation of property regime) and La. Civ. Code arts. 2370-2373 (contain a few rules about the content of a separation of property regime).

275. La. Civ. Code art. 122 (1870): “The wife, even when she is separate in estate from her husband, can not alienate, grant, mortgage, acquire, either by gratuitous or incumbered title, unless her husband concurs in the act, or yields his consent in writing.”

276. La. Civ. Code art. 121 (1870): “The wife can not appear in court without the authority of her husband, although she may be a public merchant, or possess her property separate from her husband.”

277. La. Civ. Code art. 126 (1870).

278. In 1944 the wife was permitted to act as mandatary for her husband or for the community, when authorized by her husband, as well as for third parties even though she “be not authorized by her husband . . .” La. Civ. Code art. 1787 (1870 as amended by 1944 La. Acts No. 49, § 1).

279. La. Civ. Code art. 2404 (1870): “The husband is the head and master of the partnership or community of gains; he administers its effects, disposes of the revenues which they produce, and may alienate them by an onerous title, without the consent and permission of his wife . . .”

280. La. Civ. Code art. 131 (1870) contained the definition: “. . . She is considered as a public merchant, if she carries on a separate trade, but not if she retains only the merchandise belonging to the commerce carried on by her husband.”

281. La. Civ. Code art. 121 (1870). See also text accompanying *supra* note 276.

282. La. Civ. Code art. 1786 (1870). Later, in 1944, La. Civ. Code art. 1787 was amended to permit the wife to act as a mandatary for a third person, mandate being a contract, without her husband’s authorization.

property between them."²⁸³ She could bind her husband because his authorization of her commercial contracts was presumed by law, "if he [permitted] her to trade in her own name."²⁸⁴

If the husband refused to authorize his wife to appear in court,²⁸⁵ to obligate herself or to bind her separate property, the law permitted her to seek judicial authority to act without his authorization.²⁸⁶ If the wife were living separate and apart from her husband,²⁸⁷ provision was made for authorization by the judge so that he could determine if the proposed transaction was for her benefit or instead for the benefit of the husband or of the community.²⁸⁸ If the transaction was for the benefit of the husband or of the community, the judge was directed "not [to] give his sanction authorizing the wife to perform the acts or incur the liabilities set forth in article 126."²⁸⁹ Obviously, the law intended to protect a wife who, because she was living separate and apart from her husband, could be vulnerable to imposition by him, a law modern-day feminists would label "patronizing." She was otherwise protected from his imposition, even while living with her husband, by denying her the right to contract with her husband during the marriage, subject to only a few narrow exceptions,²⁹⁰ and by denying her, even with her husband's authorization, the right "to alienate her dotal property, or to become security for his debts."²⁹¹ Even as recently as 1979, legislators were still concerned about protecting wives from imposition by their husbands. In 1980, spouses were afforded the right to contract

283. La. Civ. Code art. 131 (1870).

284. La. Civ. Code art. 1786 (1870).

285. La. Civ. Code art. 124 (1870).

286. La. Civ. Code art. 125 (1870): "If the husband refuses to empower his wife to contract, the wife may cause him to be cited to appear before the judge, who may authorize her to make such contract, or refuse to empower her, after the husband has been heard, or has made default."

287. La. Civ. Code art. 123 (1870): "The woman separated from bed and board [judicial separation] has no need in any case of the authorization of her husband, as this separation carries with it not only a separation of property, but a dissolution of the community of acquets and gains."

288. La. Civ. Code art. 127 (1870).

289. La. Civ. Code art. 127 (1870).

290. La. Civ. Code art. 1790 (1870). Exceptions included (1) the three sales contained in La. Civ. Code art. 2446 (1870)—(a) a transfer by one spouse to the other after a judicial separation in payment of his or her rights, (b) a transfer by husband to wife which has a legitimate cause like replacing her dotal effects that had been alienated, (c) a transfer by a wife to her husband in payment of a sum promised as dowry—(2) donations which were not mutual and reciprocal in the same act (La. Civ. Code art. 1751 (1870)), and (3) mandate after 1944 (La. Civ. Code art. 1787 (1870 as amended by 1944 La. Acts No. 49, § 1)).

291. La. Civ. Code art. 1790 (1870).

generally during their marriage,²⁹² but not if the contract was a matrimonial agreement. If the agreement modified or altered their matrimonial regime,²⁹³ the legislature required the spouses to obtain court approval²⁹⁴ as a means of protecting the spouse whose contributions to the marriage were largely non-economic, a euphemism for the wife.

The underlying assumptions of the law which deemed the wife incapable of civil acts proved to be founded principally upon and coextensive with the husband's marital power. The wife's legal incapacity failed to survive twenty years into the twentieth century, yet other vestiges of the husband's power and authority survived until nearly the end of the century. For example, the legal position of the husband as "head and master" of the community property regime was repealed in 1979 and replaced with an "equal management" scheme.²⁹⁵ When replacing the law which made the husband "head and master" of the community, the legislature carefully examined the existing concomitant protections afforded to the wife against her husband's abusive management of the community. Then the legislature either extended those protections to the husband, too, such as the right to reserve the income from separate property as separate²⁹⁶ or to seek a separation of property,²⁹⁷ or repealed them, such as the right to renounce the community and be relieved of any community liabilities.²⁹⁸

In 1985, the provision that required the wife to follow her husband and reside where he so chose was repealed.²⁹⁹ Under that article, the wife was obligated to follow the husband and reside where he chose³⁰⁰ and in exchange for that obligation, the husband was

292. La. Civ. Code art. 1790 (1870 as amended by 1979 La. Acts No. 711).

293. La. Civ. Code art. 2328 (1979). See Spaht & Hargrave, *supra* note 170, at § 8.12 for a discussion of the distinction between a matrimonial agreement and other contracts between spouses.

294. La. Civ. Code art. 2329 (1979). See discussion of this requirement in Katherine Shaw Spaht & Cynthia A. Samuel, *Equal Management Revisited: 1979 Legislative Modifications of the 1978 Matrimonial Regimes Law*, 40 La. L. Rev. 83, 100-02 (1979) to the effect that this requirement was intended to protect the spouse whose contributions to the community were largely non-economic, i.e., the wife.

295. La. Civ. Code art. 2346 (1979). For a description of the changes wrought by the 1979 legislation, see Spaht & Samuel, *supra* note 294 and Spaht & Hargrave, *supra* note 170, chs. 5 and 6.

296. La. Civ. Code art. 2339 (1979). Compare with La. Civ. Code art. 2386 (1870).

297. La. Civ. Code art. 2374 (1979).

298. La. Civ. Code art. 2357 (1979). Compare with La. Civ. Code art. 2410 (1870).

299. 1985 La. Acts No. 271, § 1. See La. Civ. Code art. 98, comment (f).

300. As a consequence, the law provided that the wife had the domicile of her husband. La. Civ. Code art. 39 (1870). The article was amended to delete that

obligated to receive her and "to furnish her with whatever is required for the convenience of life, in proportion to his means and condition."³⁰¹ In other words, his power and authority came burdened with a special obligation, an obligation understood to be greater than the mutual obligation each spouse had to support the other,³⁰² and an obligation conditioned upon the wife's living with him. The obligation of support under Article 120 required the husband to provide his wife the "conveniences of life," not merely necessities incorporated within the meaning of "support," which at the turn of the century was significantly different. Furthermore, he was to provide them proportionate to his means, interpreted as all of his resources from which the wants of life can be supplied, and his condition in life, which "meant his position in society."³⁰³ "This special obligation of the husband had its foundation in the fact that, both by cultural pattern and the suppletive law (that which comes into play in the absence of contrary agreement of the parties), the husband usually enjoyed control over some of the income from the wife's industry or capital or both so that he might the better support the expenses of the marriage."³⁰⁴

By 1987, with the repeal of the "head and master" law and the repeal of the wife's legal obligation to follow her husband, Louisiana marriage law, representing the personal rights and obligations of spouses, and the law of matrimonial regimes, representing the patrimonial rights and obligations of spouses, had evolved from a patriarchal system concentrating marital power in the hands of the husband to what many scholars today refer to as a marriage of equal regard. Only one legal vestige of the husband's position as head of the family survives,³⁰⁵ and it is often ignored³⁰⁶ and is probably unconstitutional.³⁰⁷

reference by 1985 La. Acts No. 272, § 1. The article had been declared unconstitutional in *Crosby v. Crosby*, 434 So. 2d 162 (La. App. 5th Cir. 1983).

301. La. Civ. Code art. 120 (1870).

302. La. Civ. Code art. 119 (1870), now La. Civ. Code art. 98 (1987).

303. Spaht, *supra* note 15, at 143.

304. *Id.*

305. La. Civ. Code art. 216: "A child remains under the authority of his father and mother until his majority or emancipation. *In case of difference between the parents, the authority of the father prevails*" (emphasis added). The title of the Chapter of the Civil Code in which this article appears reflects the content of the second paragraph—"Of Paternal [not Parental] Authority." Compare with La. Civ. Code art. 99 (1986). See also comment to La. Civ. Code art. 99.

La. Civ. Code art. 221; La. Code Civ. P. arts. 683, 735, 4501 which implement the directive of the second paragraph of Article 216.

306. See, e.g., *Stelly v. Montgomery*, 347 So. 2d 1145 (La. 1977).

307. La. Const. art. 1, § 3 (1974) prohibits the arbitrary and capricious discrimination on the basis of sex and the U.S. Const. amend. 14 prohibits the

Although it was not a constituent part of the law regulating the rights and duties of married persons,³⁰⁸ the law of separation and divorce spoke directly to how spouses should conduct themselves toward each other during marriage. Certain conduct was so egregious and such a serious violation of one's marital obligations³⁰⁹ that the law permitted the aggrieved spouse to seek a separation from bed and board, which did not have the effect of terminating the marriage, or, if the conduct was especially egregious, a divorce. In interpreting the law of separation and divorce, the jurisprudence fleshed out the meanings of "fidelity, support, and assistance" and the attitude with which a spouse was to perform those obligations. Fidelity meant the obligation not to share one's sexual potential with another person, a breach of which entitled the aggrieved spouse to a judicial separation³¹⁰ or a divorce.³¹¹ Over time, fidelity also acquired the meaning of an affirmative obligation on the part of a spouse to share his or her sexual potential with the other spouse, an unjustified breach of which entitled the aggrieved spouse to a judicial separation for cruel treatment, as long as it rendered the life together insupportable.³¹² Support meant providing the spouse with the necessities of life, the breach of which entitled the aggrieved spouse to a judicial separation for intentional nonsupport when the spouse was in destitute or necessitous circumstances.³¹³ Assistance under the jurisprudence meant at least providing an ill spouse with medical assistance,³¹⁴ a breach of which entitled the aggrieved spouse to a judicial separation for cruel treatment.³¹⁵ Another ground for judicial separation taught spouses that in addition to the shame experienced by the family, the ends of marriage could not be served if a spouse was convicted of a felony and sentenced to imprisonment at hard labor or death.³¹⁶ As evidence of its seriousness, the law permitted

denial of equal protection or due process of law.

308. The Respective Rights and Duties of Married Persons was contained in Chapter 5 of Title IV of the Louisiana Civil Code (1870).

309. La. Civ. Code art. 119 (1870). Spouses owed to each other fidelity, support and assistance. *Compare with* La. Civ. Code art. 98 (1987).

310. La. Civ. Code art. 138 (1) (1870).

311. La. Civ. Code art. 139 (1870).

312. La. Civ. Code art. 138(3) (1870). For representative jurisprudence, *see* Von Bechman v. Von Bechman, 386 So. 2d 910 (La. 1980); Currier v. Currier, 599 So. 2d 456 (La. App. 2d Cir. 1992); Dean v. Dean, 579 So. 2d 1124 (La. App. 2d Cir. 1991), *writ denied*, 584 So.2d 683 (La. 1991); Shenk v. Shenk, 563 So.2d 1000 (La. App. 4th Cir. 1990). *See also* discussion in Spaht, *supra* note 15, at 132-33.

313. La. Civ. Code art. 138(8) (1870).

314. Dollar v. Dollar, 159 La. 219, 105 So. 2d 296 (1925).

315. The cruel treatment had to render the life together insupportable. La. Civ. Code art. 138(3) (1870).

316. La. Civ. Code art. 138(2) (1870). In the same spirit, but considered less serious, and thus only a ground for judicial separation, was a spouse's being

the aggrieved spouse to seek not only a separation but also a divorce, the only conduct other than adultery that constituted grounds for divorce.³¹⁷ A spouse could hardly assist the other in the common endeavor of marriage if he or she was habitually intemperate;³¹⁸ treated the other spouse cruelly, either physically or mentally;³¹⁹ attempted to kill the other spouse;³²⁰ publicly defamed the other spouse;³²¹ or abandoned the other spouse by leaving the marital domicile (or by the wife's refusing to follow the husband, which she was obligated to do³²²), without lawful cause, and constantly refusing to return.³²³

The assumption underlying the specific, articulated grounds for separation and divorce was that the conduct of the spouses within their marriage was a concern of the community in which they lived, of society, beyond the direct imposition of the mutual obligations of fidelity, support, and assistance. The spouses were to behave toward each other civilly and compassionately so that the marriage might serve the public interests of channeling the two adults' sexual passions into marriage and of assuring that the acculturation of any children born of the union be done in a cooperative and caring manner. Each spouse was to yield to the other in sexual matters as long as the request was reasonable and to conduct himself so as not to bring dishonor and shame to the family formed by the marriage, which could occur by adulterous affairs, outrageous or felonious behavior, and constant intemperance. These conclusions are derived from the grounds for separation and divorce as well as the jurisprudence interpreting such statutory language as "cruel treatment." The rest of society had expectations about a married person's conduct and if those expectations were not met, although deeply interested in preserving the stability of marriages,³²⁴ society was willing to yield to the individual desires of the aggrieved spouse.

charged with a felony and fleeing from justice, if the plaintiff could prove that the spouse was guilty of the felony and had fled. La. Civ. Code art. 138(7) (1870).

317. La. Civ. Code art. 139 (1870).

318. La. Civ. Code art. 138(3) (1870).

319. *Id.*

320. La. Civ. Code art. 138(6) (1870).

321. La. Civ. Code art. 138(4) (1870).

322. La. Civ. Code art. 120 (1870).

323. La. Civ. Code art. 138(5) (1870). *See also* La. Civ. Code arts. 143-145 (1870).

324. La. Civ. Code art. 139 (1870). At the turn of the century, the waiting period between a judicial separation and a divorce was one year for the spouse who obtained the judgment of separation from bed and board and two years for the other spouse. The lengthy period of time between separation and divorce was to encourage reconciliation by getting the attention of the defendant spouse and giving him an opportunity to rectify his behavior. *See Spaht, supra* note 15, at 154.

B. Present Law Regulating the Marital Relationship

Although there are three articles remaining in the chapter of the Civil Code entitled "Incidents and Effects of Marriage," only one contains the essence of legal obligations imposed upon spouses during marriage. Article 98 contains the reciprocal obligations owed by the spouses to each other—fidelity, support and assistance—just like its predecessor Article 119. Fidelity continues to mean "not only . . . to refrain from adultery, but also . . . to submit to each other's reasonable and normal sexual desires. . . ." ³²⁵ Yet, the law provides a remedy only if the breach of the obligation concerns adultery; it remains grounds for divorce. ³²⁶ If the breach consists of a failure to submit to the reasonable sexual desires of the other, no longer does the possibility of a judicial separation exist; ³²⁷ the sole relevance of that conduct is that it constitutes fault for purposes of final spousal support. ³²⁸ Support and assistance continue to mean what they meant before 1990, ³²⁹ but there is no remedy in marriage law for their breach. Furthermore, with the repeal of Civil Code article 120 there is no longer any explicit obligation imposed upon the spouses to live together, which the comment to Article 98 acknowledges: "the spouses are free to live together as necessary to fulfill their obligation mutually to support, assist, and be faithful to each other." ³³⁰

For the economically secure spouse, the breach of almost any marital obligation imposed by marriage law or the breach of the standard of marital conduct previously contained in grounds for separation ³³¹ no longer creates any consequence to be suffered for that spouse's misconduct, no matter how egregious that conduct may be. For example, physical cruelty by a spouse in the form of domestic abuse of the other spouse, has civil consequences only if the abuser needs final spousal support or has children whose custody is in

325. La. Civ. Code art. 98, comment (b) (1987).

326. La. Civ. Code art. 103 (2) (1990).

327. La. Civ. Code art. 101, comment (c) (1990): "The source Article's reference to the effect of separation from bed and board has been omitted because this revision does not provide for legal separation."

328. La. Civ. Code art. 111 (1997): "... the court may award . . . final periodic support to a party free from fault prior to the filing of a proceeding to terminate the marriage" See *Currier v. Currier*, 599 So.2d 456 (La. App. 2d Cir. 1992).

329. La. Civ. Code art. 98, comment (c) (1987): "The jurisprudence decided under the source provision has held that the spouses' duty to support each other is limited to furnishing the necessities of life . . . The duty to render assistance, insofar as it is separate from that of support, includes the personal care to be given an ill and infirm spouse."

330. La. Civ. Code art. 98, comment (f) (1987).

331. See text accompanying *supra* note 324.

dispute.³³² The only conduct of a spouse, other than adultery, for which the marriage law offers a remedy is the commission of a felony and a sentence of imprisonment at hard labor or death.³³³ The remedy is limited to divorce, however; a judicial separation is no longer available.³³⁴ Thus, a spouse who may have desired a judicial separation for religious reasons or for the sole purpose of getting the other spouse's attention is deprived of a choice of remedy. A judicial separation historically represented legal recognition of the possibility, indeed the hope, of reconciliation by virtue of its relatively lengthy waiting period between the judgment of separation and the divorce.³³⁵

The Official Revision Comment that describes the freedom of spouses to live together as necessary to fulfill their marital obligations³³⁶ capsulizes the essence of the 1987 revision: "the revision continues a trend of permitting the private ordering of the [marital] relationship by the spouses."³³⁷ The Persons Committee of the Law Institute when presented with the possibility of a series of articles regulating marriage like those in the Civil Code of Quebec rejected "greater regulation of the marital relationship."³³⁸ Instead, the Committee only added two other insignificant articles to the chapter on effects of marriage: one article introduced parental authority³³⁹ and the other provided for the effect of marriage upon a spouse's name.³⁴⁰

Three years later, in a Law Institute revision of the law of divorce, the same penchant for private ordering appears. According to the Persons Committee of the Law Institute, spouses divorce for very

332. La. R.S. §§ 9:361-368 (1992) (Post-Separation Family Violence Relief Act). The remedies are available if the abused spouse can prove a history of family violence. Otherwise, conduct other than physical violence that would constitute fault, and at the turn of the century deny the guilty spouse custody, has little effect upon the custody decision. See La. Civ. Code art. 134. See also La. Civ. Code arts. 131-132.

333. La. Civ. Code art. 103 (3) (1990).

334. La. Civ. Code art. 101, comment (c) (1990). A separation from bed and board is a possibility for a spouse in a covenant marriage. La. R.S. § 9:307(B) (1997).

335. A judicial separation can not be obtained, but the law permits a spouse who is living separate and apart from the other to obtain a judicial separation of property after the spouses have lived separate and apart for six months (La. Civ. Code art. 2374(D)) and to seek custody of any children of the spouses, child support, and spousal support. La. R.S. § 9:291 (2003).

336. See La. Civ. Code art. 98, comment (f).

337. Spaht, *supra* note 115, at 1156.

338. *Id.* at 1156, n.167.

339. La. Civ. Code art. 99 (1987).

340. La. Civ. Code art. 100 (1987): "Marriage does not change the name of either spouse. However, a married person may use the surname of either or both spouses as a surname."

personal reasons; thus, to provide a list of conduct that is grounds for divorce could not possibly reflect every spouse's personal reason.³⁴¹ The underlying assumption of such a statement is, of course, that the spouse who desires a divorce is the best judge of whether his or her marriage is no longer viable, and that the public has no interest in keeping spouses together when one spouse wants a divorce. In the same spirit, practicing lawyers on the Persons Committee argued that a separation from bed and board had become merely a step in the divorcing process and that the waiting period between judgment of separation and filing for divorce did not result in reconciliations. The result of those two arguments is that the law of separation and divorce which at one time spoke so eloquently to the spouses about society's expectations for their conduct in marriage has been silenced. What we have discovered is that spouses do not always exercise their freedom responsibly; in fact, nationally, approximately two-thirds of divorces are for those very personal "soft" reasons³⁴² — such as poor communication, failed expectations or unmet needs, growing apart, a change in priorities, or failing to emotionally connect³⁴³ — all of which supports ultimately a lack of commitment to the marriage.³⁴⁴ The law permits a spouse to decide for herself if she desires to end her marriage whether for "soft" or "hard" reasons even though the most recent empirical evidence demonstrates that "bad marriages go good," often with no other explanation than the mere passage of time.³⁴⁵

At the same time that the law of marriage was revised in 1987, the Law Institute also proposed a Civil Code article that would have extended to cohabitants, neither of whom were married to another, the limited right to contract in writing.³⁴⁶ Cohabitants were defined

341. For an example of the type of reasons spouses give for desiring a divorce, the top five appear in a pamphlet entitled *Making Marriage Last: A Guide to Preventing Divorce*, published by the American Academy of Matrimonial Lawyers: poor communication, financial problems, a lack of commitment to the marriage, a dramatic change in priorities, and infidelity. *Id.* at 3.

Other reasons include failed expectations or unmet needs; addictions and substance abuse; physical, sexual or emotional abuse; and lack of conflict resolution skills. *Id.*

342. Paul R. Amato and Alan Booth, *A Generation at Risk: Growing Up in an Era of Family Upheaval* (1997).

343. Bob Thompson, *The Good Divorce: One Couple's Attempt to Split Up Without Tearing the Kids Apart*, Wash. Post Sunday Magazine, Nov. 24, 2002, at W14.

344. See reasons contained in the pamphlet produced by the American Academy of Matrimonial Lawyers, *supra* note 341.

345. Linda J. Waite, Don Browning, William J. Doherty, Maggie Gallagher, Ye Luo, & Scott M. Stanley, *Does Divorce Make People Happy? Findings from a Study of Unhappy Marriages*, published by Institute for American Values (2002).

346. "An otherwise valid contract is not rendered unenforceable solely because

in comment (c) to the proposed article as "persons who live together in a companionate sexual relationship."³⁴⁷ In the pre-1987 jurisprudence, cohabitants could contract with each other concerning matters disassociated from their life in common, but they could not enter into "any kind of partnership or similar arrangement the object of which would be to supply the equivalent of a matrimonial regime."³⁴⁸ To do so would amount to a contract the enforcement of which would be against public policy.³⁴⁹ Louisiana law has never conferred upon those who live in concubinage or in a cohabiting relationship any of the rights or obligations resulting from marriage. In fact, Louisiana law has exacted a certain punishment of such relationships by refusing to enforce contracts made between cohabitants, with one fairly recent exception. The exception, created by the repeal of a prohibition against certain donations³⁵⁰ between those living in open concubinage,³⁵¹ was made in the same year that the legislature rejected the proposed article recommended by the Law Institute. The precipitating factor in the repeal of the prohibition against donations between concubines was *Succession of Bacot*,³⁵² a decision in which the court of appeal interpreted the relationship of concubinage to mean only a heterosexual relationship.³⁵³ The donation *mortis causa* in the *Bacot* case was made to a homosexual lover of the testator. As a consequence, the legislature repealed the prohibition believing that if *concubinage* did not extend to

the parties, neither of whom was married, were cohabitants at the time of contracting but such a contract must be in writing." Proposed La. Civ. Code art. 101 (H.B. 1139 [Reg. Sess. 1987]).

See the case of *In re estate of Roccamonte*, N.J. A-75-01 (10/23/02), *aff'd* 28 FLR 1053, 1059-60 (10/29/02) in which the deceased cohabitant, a married man, had promised lifetime support to his cohabitant and the New Jersey Supreme Court permitted her to recover against his estate. This case went much further than the proposed 1987 proposed legislation.

347. Spaht, *supra* note 115, at 1158 n.185.

348. Spaht, *supra* note 15, at 757.

349. La. Civ. Code art. 1968 (1984). See *Sparrow v. Sparrow*, 231 La. 966, 93 So.2d 232 (1957); *Schwegmann v. Schwegmann*, 441 So.2d 316 (La. App. 5th Cir. 1983).

350. A donation *inter vivos* is a contract by definition. It requires an offer and an acceptance. La. Civ. Code art. 1468.

351. La. Civ. Code art. 1481 (1870) (repealed by 1987 La. Acts, No. 468, § 1):

Those who have lived together in open concubinage are respectively incapable of making to each other, whether *inter vivos* or *mortis causa*, any donation of immovables; and if they make a donation of movables, it can not exceed one-tenth part of the whole value of their estate. Those who afterwards marry are excepted from this rule.

352. 502 So. 2d 1118 (La. App. 4th Cir. 1987).

353. At least partial support for such a proposition appeared in the article itself which lifted the prohibition if the concubines "afterwards marry" which homosexuals are prohibited from doing. For text of article, see note [350] *supra*.

homosexual relationships, then the prohibition did not reach what constitutes for society the most offensive of sexual relationships.³⁵⁴ Ultimately, some years later and for different purposes, a broader term was formulated that included homosexual and lesbian relationships: cohabitation with another person of either sex in the manner of married persons.³⁵⁵

Even though the legislature has to a very limited extent removed one of the civil punishments of the participants in an irregular relationship that mimics but is not marriage, this action does not signify legislative approval of a general category of stable sexual relationships. Nothing in the most recent legislative history, other than repeal of the laws punishing illegitimate children³⁵⁶ who are considered to be only innocent victims of the cohabitation of their parents,³⁵⁷ suggests a retreat from the desirability of channeling sexual relationships between a man and a woman into marriage. Marriage continues to afford to the parties many legal privileges as an incentive to regularize their sexual relationship. As cohabitation increases, and

354. For a discussion of the law that supports the conclusion that homosexual relationships are considered the most offensive under the marriage law of Louisiana, see text at notes 188-191, *supra*. Nonetheless, the repeal of Article 1481 (1870) but the refusal to adopt the proposed Article 101 may ultimately have some effect upon contracts entered into between cohabitants. See Spaht, *supra* note 115.

355. La. Civ. Code art. 115 (1997) (extinguishment of spousal support obligation if recipient has cohabited). Comment (e):

the phrase 'cohabited . . . in the manner of married persons' means to live together in a sexual relationship of some permanence regardless of whether the cohabitants are prohibited from marrying. See Article 89 [prohibiting purported marriages between persons of the same sex]. It does not mean just acts of sexual intercourse The phrase 'in the manner of married persons' does not require that the cohabitants be capable of contracting marriage under Chapter 1 of Title IV of this Code.

356. La. Civ. Code art. 27 (1870): "Children are legitimate or illegitimate. Legitimate children are those who are born of a marriage lawfully contracted; and illegitimate children are such as are born of an illicit union." Compare La. Civ. Code art. 179 (1870 as amended by 1979 La. Acts No. 607, § 1): "Legitimate children are those who are either born or conceived during marriage or who have been legitimated as provided hereafter." La. Civ. Code art. 180 (1870 as amended by 1979 La. Acts No. 607, § 1): "Illegitimate children are those who are conceived and born out of marriage."

This phenomenon has been described elsewhere by the author in other articles, including Spaht, *supra* note 87, at 733-34.

357. Victims these children are as virtually all social science studies now substantiate. See, e.g., William J. Doherty, William A. Galston, Norval D. Glenn, John Gottman, Barbara Markey, Howard J. Markman, Steven Nock, David Popenoe, Gloria G. Rodriguez, Isabel V. Sawhill, Scott M. Stanley, Linda J. Waite & Judith Wallerstein, *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences* (Institute for American Values 2002) (succinct summary of the consequences to the child born out of wedlock).

it has increased fourfold since the early 1960s,³⁵⁸ and the unrelenting "gay rights" movement insists upon the right to marry³⁵⁹ or at least to enjoy the same legal privileges extended to spouses, attention needs to be focused on the following issues: (1) why is marriage between a man and woman legally privileged,³⁶⁰ (2) will extension of those privileges to other relationships in the form of recognition of "civil unions"³⁶¹ or "domestic partnerships" undermine marriage,³⁶² and (3) should the law contain any provisions about marriage and its privileges, or is this a matter that should be returned to the exclusive authority of the church.³⁶³ These issues are fundamental and will be addressed in a subsequent article by the author.³⁶⁴

IV. LAW'S RETREAT COMMUNICATES A PRIVATIZATION OF MARRIAGE AND A REPUDIATION OF THE PUBLIC'S INTEREST

This article arbitrarily limited its examination of the law's retreat from the regulation of marriage to changes occurring over the last century in one state with a strong historical connection to other Western European countries. However, the historical trend lines

358. *Id.* at 7-8. "Cohabitation is not the functional equivalent of marriage." *Id.* at 7. See also noted government professor James Q. Wilson's *The Marriage Problem: How Our Culture Has Weakened Marriage* (2002).

"Cohabitation has captured the interest of U.S. family-policy experts because it is a steadily growing phenomenon: In 1960, the Census Bureau counted fewer than 500,000 unmarried couples living together. In 2000, it reported 4.7 million cohabiting households." Cheryl Wetzstein, *Cohabitation Levels Are on the Rise*, *The Washington Times* (National Edition), Nov. 18-24, 2002, at 13.

359. E.J. Graff, *The Other Marriage War*, in *The American Prospect* 30 (Spring 2002).

360. See Gallagher, *supra* note 6.

361. Vermont was the first state in the United States to enact "civil union" legislation (Vermont Public Act 91, eff. July 1, 2000) in response to a dictate from the Vermont Supreme Court in *Baker v. State of Vermont*, 744 A.2d 864 (Vt. 1999). In the opinion, the court discusses what other countries have enacted that is similar or the equivalent of "civil unions." See also discussion of other countries "marriage problem" in Wilson, *supra* note 14, at 198 (discussing the new French PACS).

362. Lynne Marie Kohm, *How Will the Proliferation and Recognition of Domestic Partnerships Affect Marriage?* 4 *J. & Fam. Studies* 105-15 (2002).

363. In the context of the push by gays and lesbians to obtain the right to marry in Ottawa, Canada, the Justice Department is considering whether to abandon the marriage and divorce business completely making marriage solely a religious institution. Janice Tibbetts, *Ottawa May Get out of Marriage, Divorce Business, Create Couples Registry*, *National Post* (Nov. 8, 2002).

For a discussion of why this solution will be returning jurisdiction over marriage to the church, see text accompanying *supra* note 2.

364. The article is entitled, *Revolution and Counter Revolution: The Future of Marriage in the Law*, to be published in the Spring issue of the *Loyola Law Review*.

indicate that the retreat began long before the turn of the century.³⁶⁵ By examining the evolution of the law regulating marriage over time, it is easier to see the withdrawal of the expression of public interest in marriage through changes in the laws of divorce, of the husband's marital power over his wife as head of the family, of defenses to the breach of a promise to marry, of marriages once prohibited by law, of "good faith" in an absolutely null marriage, and of the legal content of marriage. Over the last century, the law found significantly less to prohibit, less to protect, and less to regulate.³⁶⁶ Decisions the law once made on behalf of the public interest and good morals about the seriousness and the purpose of marriage—such as the destructiveness of adultery to a marital relationship, the desirability of long-term marriages not easily dissolved for inconsequential reasons, and the corrosive effect of not punishing other competing irregular relationships—were reversed or, for all practical purposes, delegated to the spouses. Law's power as rhetoric, even if the provisions are hortatory only, is absent from the law of marriage. By way of contrast consider for example the law of parental authority; children, regardless of age, are reminded that they owe their fathers and mothers honor and respect.³⁶⁷

To describe the evolution of marriage from a sacrament to a contract as John Witte does³⁶⁸ fails to accurately reflect the evolution of marriage in the law, although it does fairly describe the evolution of marriage in various religious denominations. The evolution of marriage in the law proceeds further and in a more radical fashion. Marriage in the law is no longer even a contract;³⁶⁹ one spouse alone may make the decision to dissolve the relationship. To evolve from an institution³⁷⁰ that could not be terminated by the spouses³⁷¹ to a "relationship" that can be ended by the decision of one spouse alone for no good or sufficient reason is a radical revolution. Furthermore, as the law has withdrawn from regulating marriage, it is not unreasonable for people to believe that marriage has been

365. Wilson, *supra* note 14.

366. For recognition of the same phenomenon, see George, *supra* note 5, at 13-19.

367. La. Civ. Code art. 215.

368. Witte, *supra* note 1.

369. La. Civ. Code art. 1983 (1984): "Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law . . ." (emphasis added).

370. "Marriage is a virtually universal human institution." Doherty, *supra* note 357, at 8-9.

371. Under Louisiana law there was no divorce under general laws until 1827. See Spaht, *supra* note 15, at 153.

privatized.³⁷² It is a relationship in which, with few exceptions, the parties determine its content and its contours without interference by law. Therefore, it is not unreasonable for the same people to believe that marriage is a private relationship intended for their individual fulfillment and satisfaction. The public's interest and, indeed, the public purpose of marriage have been forgotten.

There are currently "hints" of a counter-revolution at both the state and the federal level, probably in response to the steady stream of social science data which indicate the fragile nature of marriage as evidenced by divorce and cohabitation rates and the devastating effects of divorce or failure to marry upon the children of this country.³⁷³ States have enacted covenant marriage legislation which permits spouses to contract for a stronger form of marriage, imposing the legal obligation to submit to counseling prior to divorce and a more restricted "right" to divorce.³⁷⁴ Other states have enacted legislation requiring marriage education³⁷⁵ and reducing the marriage license fee if the bride and groom submit to pre-marital counseling.³⁷⁶ Federal legislation has been introduced to repeal the marriage tax penalty,³⁷⁷ and the President is recommending the dedication of \$300

372. "... [W]e have spent the last thirty years 'privatizing' sexual conduct and procreation. Can the 'privatization' of marriage itself be far behind? The answer, of course, is that the privatization of marriage is already upon us." Francis Cardinal George, *supra* note 5, at 17.

Jeffrey Evans Stake and Eric Rasmussen urge the complete privatization of marriage—i.e., permitting the parties to enter into a contract concerning their personal relationship including under what circumstances either may end it. Interestingly enough, part of the reason is that it will offer spouses the possibility of making their marriage stronger and more stable than the law provides for at present—the motivation of covenant marriage legislation. *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 Ind. L. J. 433 (1998). See also Elizabeth Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 Va. L. Rev. 9 (1990); Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 Va. L. Rev. 1225 (1998); and Brian Bix, *Choice of Law and Marriage: A Proposal*, 36 Fam. L.Q. 255 (2002).

373. The social science data capsulized in Lenore J. Weitzman's *The Divorce Revolution: The Unintended Social and Economic Consequences on Women and Children in America* (1987); Barbara Dafoe Whitehead, *Dan Quayle Was Right*, *The Atlantic Monthly* 47 (Apr. 1993); and Wallerstein, et al, *supra* note 174. Another recent publication that looks at the glass half-full rather than half-empty is E. Mavis Hetherington & John Kelly, *For Better or For Worse: Divorce Reconsidered* (2002).

374. Three states have enacted covenant marriage legislation: Louisiana, Arizona, and Arkansas. See La. R.S. §§ 9:272-309 (1997).

375. Fla. Stats. § 1003.43(3)(i) (eff. Jan. 7, 2000).

376. See, e.g., Fla. Stat. Ann. § 741.01 (2002); Minn. Stat. § 517.08 (2001).

377. "There has always been strong support for reducing marriage tax penalties for many two-earner families. This is a complicated task because the majority of married couples, in fact, receive tax bonuses rather than penalties." Theodora

million of TANF monies³⁷⁸ for state experimentation in programs to promote marriage.³⁷⁹ Oklahoma,³⁸⁰ West Virginia,³⁸¹ and Arizona³⁸² have already aggressively undertaken such experiments. In the wake of the enactment of covenant marriage legislation, a coalition of national Christian ministries announced a religious covenant marriage movement; and Marriage Savers, an organization that promotes and assists ministers in U.S. cities to sign Community Marriage Agreements,³⁸³ recently welcomed its 164th city. In an effort to provide intellectual underpinnings and arguments for these disparate grassroots initiatives, the Institute for American Values located in

Ooms, *Marriage Plus*, *The American Prospect* 7 (Spring 2002).

378. TANF means Temporary Assistance to Needy Families which is the program that replaced welfare legislation in 1994 and has resulted in enormous savings in welfare funds. See an entire issue of *The American Prospect* entitled *The Politics of Family* (Spring 2002). Pay special attention to Theodora Ooms, *Marriage Plus*, at 4-7.

379. In the 1994 Welfare Reform legislation, three of the four purposes for which the money saved in welfare at the state level could be used involved the promotion of two-parent families and marriage: "The law exhorts states to promote 'job preparation, work and marriage,' to 'prevent and reduce the incidence of out-of-wedlock pregnancies,' and to 'encourage the formation and maintenance of two-parent families.'" *Id.* at 4.

380. Oklahoma used ten million dollars of TANF funds to initiate a series of programs devoted to strengthening marriage for the purpose of reducing the divorce rate in Oklahoma by one-third by 2010. For a summary of what states are doing to promote marriage in a preliminary report, see *State Policies to Promote Marriage*, compiled by the Department of Health and Human Services, available at <http://aspc.hhs.gov/hsp/marriage02/marr-rpt.htm> (last visited Oct. 15, 2002). See also Mary Parke & Theodora Ooms, *More Than a Dating Service? State Activities Designed to Strengthen and Promote Marriage*, Center for Law and Social Policy (CLASP), Policy Brief No. 2 (Oct. 2002).

381. "In West Virginia the state has spent \$12.8 million to give 128,497 married couples an extra \$100 a month in their welfare checks." Cheryl Wetzstein, *Welfare Promotes Marriage*, *The Washington Times*, Sept. 16, 2002, at A01. See also report of DHHS, *supra* note 380 and CLASP Policy Brief, *supra* note 380.

382. Arizona dedicated more than one million dollars of TANF money to offer marriage-education classes that emphasize communication skills to Arizona residents. Wetzstein, *supra* note 381. See also report of DHHS, *supra* note 380 and CLASP Policy Brief, *supra* note 380.

383. A Community Marriage Agreement is an agreement signed by clergy in a particular community in which all agree to require certain minimum instructions for all couples marrying in their churches. Typically, the clergy agree to a minimum waiting period before the ceremony that varies anywhere from four to six months, a minimum number of sessions with the minister, a pre-marital inventory and assessment (like PREPARE or FOCCUS), and mentoring couples in each congregation. Community Marriage Agreements exist in Louisiana for Baton Rouge, Shreveport, the Greater Rapides Parish area, and Bogaloussa. Other Louisiana cities are in the process of organizing such agreements. Information on Community Marriage Agreements exists at www.marriagesavers.org (last visited Oct. 15, 2002).

New York City served as a catalyst for the formation of a National Marriage Movement, which has thus far issued three publications.³⁸⁴

There are signs of a reversal in our cultural patterns³⁸⁵—a higher birth rate, which had dropped precipitously during the 80s and 90s; significant improvement in the teenage pregnancy rate and in the number of teenagers who are sexually active, both through abstinence programs in part; a leveling off of the divorce rate, although admittedly at historically high levels; and an improvement in the number of African American children born to married parents. Not everyone is enthusiastic about the nascent counter revolution.³⁸⁶ While acknowledging that the nuclear family is extremely important,³⁸⁷ Carl F. Horowitz, a Washington area domestic policy consultant, argues that the doomsayers leading the marriage movement, especially those who lament the “skyrocketing” divorce rates like Maggie Gallagher, Pat Fagan, and Allan Carlson, are manufacturing “an aura of crisis.”³⁸⁸ Kim Gandy, the president of the National Organization for Women and adamantly opposed to President Bush’s welfare marriage initiative, argues: “To make ‘finding a man’ the administration-approved ticket out of poverty is not just an insulting throwback; it’s terrible public policy.”³⁸⁹ But those participants interviewed in Arizona and Oklahoma, who had availed themselves of the marriage education programs, claim in an article by Cheryl Wetzstein in *The Washington Times* to have benefitted from them.³⁹⁰ Ms. Gandy’s articulated formulation of the President’s goal is, of course, hyperbole and also inaccurate. At the same time that Ms. Gandy is expressing her disgust at a public strategy that includes encouraging marriage, other young American women are asking why their

384. The Marriage Movement: A Statement of Principles (2000), *Why Marriage Matters: Twenty-One Conclusions from the Social Sciences* (2002), *Does Divorce Make People Happy? Findings from a Study of Unhappy Marriages* (2002).

385. The cultural challenge is not to be underestimated. See Wilson, *supra* note 14, at 197 (Chapter 9: The Cultural Challenge).

386. For example, see Stephanie Coontz, *Nostalgia as Ideology* and Cara Feinberg, *Hitting Home*, in *The American Prospect* at 4 and 10, respectively (Spring 2002).

387. Carl F. Horowitz, *The Collapsing Nuclear Family: Inventing a Crisis*, *The Women’s Freedom Network Newsletter* 4, 6 (July/Aug. 2002): “Very few people would deny the importance of the nuclear family as a socializing institution. Despite all its flaws—human nature itself being flawed—it remains the best alternative of ensuring children receive financial support and emotional guidance.”

388. *Id.*: “The idea that family breakdown can serve as a meta-explanation for the ills of America and the rest of the modern world is questionable to begin with. But those who create hobgoblins of collapse through statistical sleight of hand ought to be seen as reprehensible, not simply misguided.”

389. Wetzstein, *supra* note 381.

390. *Id.*

mothers did not tell them about marriage and having children at a younger age³⁹¹ before it is too late.³⁹²

V. CONCLUSION

Even by its absence, law can shape culture in destructive ways.³⁹³

When law retreats from the regulation and protection of a key institution like marriage,³⁹⁴ it communicates that there no longer is a public interest³⁹⁵ in assuring the careful and deliberative entry into marriage. The law's regulation communicated that marriage was a relationship intended to last for life and to produce and nurture children. Law's retreat means that "individuals are 'free' to confront the non-legal structures of society; be it an unforgiving system of unregulated exchange that may . . . virtually invite the exploitation of labor, or the vacuum which previously was inhabited by a proper care for public morality."³⁹⁶ It "may very well leave upright persons, families, and institutions of civil society vulnerable to a massive, objective framework of settled understandings and expectations—a culture which, though it is destructive and debilitating, they lack the effective resources to resist."³⁹⁷ Even if they do resist, "there may well be informal . . . sanctions and penalties of ostracism, rejection, and stigma."³⁹⁸ Any sort of custom related to marriage, such as monogamy or permanence, necessarily requires "a culture" that supports it; "monogamy . . . cannot be practiced by an individual."³⁹⁹

Culture does not exist in a legal vacuum For law is necessary to civilization, and even the absence of law—the choice to omit or remove legal regulation in some area of cultural life—shapes culture, for better or for worse Alone, it cannot cure moral defects in a people. It can, however, change people's sense of their hierarchy of values

391. Danielle Crittendon, *What Our Mothers Didn't Tell Us: Why Happiness Eludes the Modern Woman* (1999).

392. Sylvia Ann Hewlett, *Creating A Life: Professional Women and the Quest for Children* (2002).

393. Francis Cardinal George, *supra* note 5, at 14.

394. Jeff Johnson, *Journalist Calls Marriage Society's "Key Institution," The Wanderer* 1 (Nov. 14, 2002). That journalist was Maggie Gallagher. *See also* Schneider, *supra* note 2.

395. "Law's expressive abilities may be used, first, to provide a voice in which citizens may speak and, second, to alter the behavior of people the law addresses." The expressive function deploys the law's power to impart ideas. Schneider, *supra* note 11.

396. Francis Cardinal George, *supra* note 5, at 14.

397. *Id.*

398. *Id.*

399. *Id.* at 15.

and of what finally falls out of the realm of acceptable behavior. Law teaches more than it prevents.⁴⁰⁰

What our law, both in Louisiana and elsewhere in the United States, teaches about marriage needs revision desperately—a revision that reinvigorates, strengthens, and protects the most fundamental of human institutions. The need for reinvigoration in law of the traditional understanding of marriage is pressing; it may be the only way Americans can resist other ideas inimical to and destructive of the institution of marriage. The time is now to get about this most difficult yet crucial task.

400. *Id.* at 18-19. See also Schneider, *supra* note 2 and Schneider, *supra* note 11.

APPENDIX A**EULOGY FOR LEE HARGRAVE***Katherine Shaw Spaht***St. Joseph's Cathedral, Baton Rouge, LA****November 18, 2002**

Lee was the consummate teacher and I was his student from my first day of class at the LSU Law School in the fall of 1968, literally until the moment of his death. Many of you here had the same experience.

In the fall of 1968, he taught me the principles of civil law property through a masterful combination of statutes and cases illuminated by well-planned and creative hypotheticals.

But he taught me so much more—appreciation for a teacher's being thoroughly prepared, being engaged in dialogue with his students, being intellectually concentrated for the entire class hour, and being genuinely excited about the subject matter and the students' responses to it.

In the fall of 1969, as a student research assistant for Frank Sullivan, I was taught by Lee the pleasure of taking his research queries sent from South Vietnam and finding answers to his novel questions about the creation of a system of courts where access made possible the pursuit of justice for ordinary Vietnamese citizens.

In 1974, he taught me about the incomparable satisfaction of serving the State of Louisiana and its people he so dearly loved, with devotion in a selfless task that will remain as his enduring legacy—the Louisiana Constitution of 1974.

From 1986 to 1989, he taught me about the self discipline required for research and writing, about the importance of a cleared desk (the symbol of a clear mind), about concise descriptions of the law which contained the essence of truth and were all the more powerful for their brevity, and about the deep inter-dependency of those who collaborate together to produce a teaching tool and an authoritative work to serve our chosen profession.

In 2000, he taught me in retiring about recognizing when one task is finished and another begins.

In 2002, he taught me about suffering and about the courage to accept it with grace.

In all of it—all of those 34 years I knew Lee Hargrave—he taught me that:

- (1) a really good marriage comes from choosing well an equal partner for life;
- (2) institutional memory and the very history of the institution itself is important;
- (3) the true intellectual brilliance of a prodigy is reflected in the humility of never forgetting where you came from;
- (4) triumph over those who wish you ill comes not in some vengeful act but in living and loving well;
- (5) the joy of living is offered each day, so never miss an opportunity to seize it in the company of family and friends;
- (6) laughter is music that heals both anger and profound sadness.

Much of this I wrote him on Wednesday night to be delivered this past Saturday. On Friday afternoon, with a heavy heart, I left that missive to him in a plain paper bag by his front door. But as I was leaving, a gust of wind stirred the wind chimes on his front porch and the air was filled with music.

Not to worry, I said to myself, he had already read it.

In the words of the greatest teacher the world has ever known—"Well done thou good and faithful servant, enter thou into the joy of thy Lord." Matt. 25:21.