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WHAT DOES COVENANT MEAN FOR RELATIONSHIPS?

MARGARET F. BRINIG*
STEVEN L. NOCK**

Both of us have thought substantially about covenant over the past several years.¹ The concept of covenant comes to us originally from religious sources, so we pay explicit attention here to what the Bible and organized religion have to say about it. We also have drawn from our own disciplines of law, economics, and sociology as they explain or draw from the initial concepts.

In this piece, we will first provide an analysis of covenant as we see it. We will continue with an original empirical test of whether covenant relationships differ from others, based upon new data from Louisiana, which offers both covenant and standard marriages. What we will try to argue and prove is that, even granting the differences between couples who choose covenant marriages from those who do not, something special happens to the relationship itself, or the spouses in it, when they choose the covenant marriage option. We conclude by relating what we have found to the more common choice couples make today: whether to marry or to cohabit. Not all of what makes cohabiting relationships less successful than marriages not preceded by cohabitation is a question of differences in the couples beforehand (the selection effect). The more covenantal the relation-

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Margaret F. Brinig is a consultant to the project. See MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT* (2000) [hereinafter FROM CONTRACT TO COVENANT]; Margaret F. Brinig, *Economics, Law and Covenant Marriage*, 16 GENDER ISSUES, Winter-Spring 1998, at 4; Margaret F. Brinig, *Finite Horizons: The American Family*, 2 INT'L J. CHILD. RTS. 293 (1994) [hereinafter Brinig, *Finite Horizons*]; Margaret F. Brinig, *Status, Contract and Covenant*, 79 CORNELL L. REV. 1573 (1994) (book review); Margaret F. Brinig, *The Family Franchise: Elderly Parents and Adult Siblings*, 1996 UTAH L. REV. 393 [hereinafter Brinig, *Family Franchise*].

ship, the more the couple changes in relationship-enhancing ways.

I. AN ANALYSIS OF COVENANT

Though used rarely in law, the term Covenant is beginning to appear when applied to marital relationships. Those who have at least heard of the covenant marriage options in Louisiana² (and, presumably Arizona³ and Arkansas⁴) tend to fall into two camps: those who are strongly in favor⁵ and those who are strenuously opposed.⁶ More than fifty percent of the Louisiana adults surveyed in a Gallup⁷ poll commissioned by Nock and his colleagues had never heard of the concept. Some county clerks advise against it, or fail to pass out the statutorily required brochures because they feel it is silly or too time-consuming. Not surprisingly, couples marrying after the Louisiana legislation took effect have largely opted for "standard marriage," though the number finding covenant marriage attractive has increased from about 1% for the first six months to approximately 2% thereafter.⁸ Most of the considerable media attention has con-

2. See LA. REV. STAT. ANN. §§ 9:272-9:275.1 (West 2000).

3. See ARIZ. REV. STAT. ANN. §§ 25-901 to 25-906 (West 2000).

4. See Union Contract Marriage, ARK. CODE ANN. §§ 9-11-801 to -811 (Michie 2002).

5. See, e.g., *Union Contract: Marriage Bill Back*, TULSA WORLD, Nov. 28, 1998, at 16; Micah A. Clark, *Divorce 'Disease' Demands Cure*, S. BEND TRIB., Dec. 15, 1998, at A11; Maggie Gallagher, *Covenants Inspire Marriages with New Commitment*, SACRAMENTO BEE, July 21, 1997, at B7.

6. See, e.g., Ira Mark Ellman, *Senate Bill Revives Horror of Fault Divorce*, ARIZ. REPUBLIC, Mar. 6, 1998, at B5; Walter Kirn, *The Ties That Bind: Should Breaking Up be Harder to Do?*, TIME, Aug. 18, 1997, at 48; Don McLeese, *Louisiana Legislating Levels of Love*, AUSTIN AM.-STATSMAN, July 29, 1997, at B1; Katha Pollitt, *What's Right About Divorce*, N.Y. TIMES, June 27, 1997, at A29.

7. Gallup Organization surveyed a random sample of 540 Louisiana citizens by phone between July and September of 1998. Only 43.1% indicated they had heard of covenant marriage, and only 35% were aware that the legislation had been enacted. When asked whether covenant marriage was a good idea or not, of those who had heard of covenant marriage, about 25% said it was really too soon to tell; among the remainder, 81% said that it was a "good idea" or a "very good idea." Likewise, 56% of respondents would have a favorable or very favorable reaction to their own child choosing a covenant marriage. See Alan J. Hawkins et al., *Attitudes About Covenant Marriage and Divorce: Policy Implications from a Three-State Comparison*, 51 FAM. REL. 166 (2002).

8. Steven L. Nock et al., *America's Divorce Problem*, SOC'Y, May-June 1999, at 43, 49; Cheryl Wetzstein, *Experts Concerned About Social Cost of Family Collapse*, WASH. TIMES, Dec. 27, 1998, at A1 (reporting that, according to Brigham Young University sociologist Alan Hawkins, 3% of Louisiana couples are now electing covenant marriage).

centrated on the rules for divorce, though the intent of the proponents is to change the nature of marriage.

As the assessments of the Louisiana experiment continue, the concept of covenant itself deserves attention. "Covenant" has been around for many years, at least since Biblical times. It figures in the early common law of contracts as the "promise under seal," but is perhaps better known today as the "covenant not to compete" in employment⁹ and as the "restrictive covenant" in land sales.¹⁰ Even the non-lawyer associates formality with the word and perhaps some feeling of being bound to do something. Here we will reexamine covenant, emphasizing its applications to the family.¹¹ The authors will draw on ideas from sociology, law, economics, religion, and feminist thought in looking at what makes a covenant relationship, as opposed to one that is not. We will empirically examine covenant concepts both in general and through some new findings based upon the Louisiana covenant marriage study. In the end, we conclude that covenant—and particularly the explicit covenant of covenant marriage—depart in significant ways from secular, legal contracts.

A covenant involves at least three interrelated concepts: permanence (even extending beyond the lives of the promising parties themselves), unconditional love, and involvement (or witness) of God, or, at minimum, the larger community. In some ways, these natural law concepts are reflected in law. For example, parties legally cannot change the essential content of their marital or parental responsibilities once they have entered into the relationship.¹² On the other hand, parties to a covenant are *beyond* law in certain respects (though law may attempt to be imperialistic).¹³ If law tries to change or re-define a relationship

9. See, e.g., Catherine L. Risk, *Removing the 'Fuel of Interest' from the 'Fire of Genius': Law and the Employee-Inventor, 1830-1930*, 65 U. CHI. L. REV. 1127 (1998).

10. See, e.g., Leland B. Ware, *Invisible Walls: An Examination of the Legal Strategy of the Restrictive Covenant Cases*, 1999 WASH. U. L.Q. 737 (1999).

11. See also William Johnson Everett, *Contract and Covenant in Human Community*, 36 EMORY L.J. 557 (1987) (a related paper by a religion professor). Many of the ideas in this section of the paper first appeared in Margaret F. Brinig & Steven L. Nock, *Covenant and Contract*, 12 REGENT U. L. REV. 9 (2000).

12. See, e.g., *In re Higgason's Marriage*, 516 P.2d 289 (Cal. 1973) (in banc) (spousal support during marriage); *Kujawinski v. Kujawinski*, 376 N.E.2d 1382 (Ill. 1978) (support of college-aged child following divorce); *Huckaby v. Huckaby*, 393 N.E.2d 1256 (Ill. Ct. App. 1979) (support of child after divorce); *Pappas v. Pappas*, 75 N.W.2d 264 (Iowa 1956) (support of child after divorce); *Buchanan v. Buchanan*, 197 S.E. 426 (Va. 1938) (support of child after divorce).

13. See FROM CONTRACT TO COVENANT, *supra* note 1, Introduction.

like that linking parent and child, such as by saying formal parental obligations end when the child reaches majority, it contradicts the essential nature of the bond. If it says the marriage is cleanly broken when the parties divorce, law flies in the face of the unhappiness of many concerned as well as the teachings of the Church.¹⁴ While the law may define formal, secular obligations in these ways, it does not alter the fundamental enduring nature of those obligations accepted as part of covenant.

As covenant relationships develop, they show distinct patterns of call, response, promise, and sign. Biblical examples of covenant illustrate these patterns clearly, as in the familiar Old Testament story of Noah and the flood.¹⁵ Noah was called¹⁶ because of his righteousness to build the ark to God's specifications and to enter the ark with his family and the animals. He obeyed. The promises God made were that He would send no more devastating floods, that He would keep regular seasons,¹⁷ that He would give people animals as well as plants for food, and that He would make humans fruitful.¹⁸ In this account, we see the clear development of the four points just raised. Noah is called from being a farmer and herder to first building, then equipping, and finally waiting in the ark. He responds by doing what God commands, and is eventually promised God's contin-

14. The Catechism of the Catholic Church points out that:

The consent by which the spouses mutually give and receive one another is sealed by God himself. From their covenant arises "an institution confirmed by the divine law, . . . even in the eyes of society." The covenant between the spouses is integrated into God's covenant with man: "Authentic love is caught up into divine love."

Thus the *marriage bond* has been established by God himself in such a way that a marriage concluded and consummated between baptized persons can never be dissolved. This bond, which results from the free human act of the spouses and their consummation of the marriage, is a reality, henceforth irrevocable, and gives rise to a covenant guaranteed by God's fidelity. . . .

CATECHISM OF THE CATHOLIC CHURCH, §§ 1639–40 (2d ed. 1997) (emphasis in original).

Compare with the statement on divorce by the United Methodist Church: When a married couple is estranged beyond reconciliation, even after thoughtful consideration and counsel, divorce is a regrettable alternative in the midst of brokenness. . . . Although divorce publicly declares that a marriage no longer exists, other covenantal relationships resulting from the marriage remain, such as the nurture and support of children and extended family ties.

THE BOOK OF DISCIPLINE OF THE UNITED METHODIST CHURCH, ¶ 161D (2000).

15. *Genesis* 6–8.

16. *Genesis* 7:1.

17. *Genesis* 8:18–22.

18. *Genesis* 9:1–4.

ued patience and faithfulness. The symbol or sign is the rainbow, which is to remind God and man of God's promise to refrain from again sending a flood.

As useful as Noah's story is for illustrating the common characteristics of covenant as expressed in the Bible, writers have thus far not paid much attention to its implications for families.¹⁹ First, Noah's story obviously involves a family. God might have chosen Noah, his wife, his sons and their wives because, as a group, they could efficiently coordinate the work effort involved.²⁰ He might have chosen this particular configuration because they had reasons to tolerate each other in the close confines of the ark for six months.²¹ From a practical point of view, He might have chosen Noah's family because the young couples could quickly, like the pairs of animals, repopulate the earth.

Noah was also very much the head of the family. Though he may have grumbled,²² and his sons may have muttered as they worked about what a strange father they had, the sons did what their father (acting for the Lord) commanded.²³ Noah was directly in covenant with God but stood for the whole family in its dealings with those outside.²⁴

Finally, Noah's story involves several generations. The older couple, Noah and his wife, would not produce more children but

19. For an exception, see MADELINE L'ENGLE, *MANY WATERS* (1986).

20. The earliest use for families was as economic units. See JEAN-LOUIS FLANDRIN, *FAMILIES IN FORMER TIMES* 85–92 (Jack Goody & Geoffrey Hawthorn eds., Richard Southern trans., 1979); MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 12 (1981); EDWARD SHORTER, *THE MAKING OF THE MODERN FAMILY* 72 (1977) [hereinafter GLENDON, *THE NEW FAMILY*]; Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

21. See 3 JAMES HENRY BERNARDIN DE SAINT PIERRE, *STUDIES OF NATURE* 589 (Henry Hunter trans., 2d ed.) (1799) ("We pass in succession through the love of our family, of our tribe, of our country, before we are instructed to love Mankind.").

22. For a very funny interpretation of the scene, see BILL COSBY, *Noah and the Neighbors*, on *THE BEST OF BILL COSBY* (Warner Bros. Ent. 1987).

23. See, e.g., Yoram Ben-Porath, *The F-Connection: Family, Friends, Firms and the Organization of Exchange*, 3 POPULATION & DEV. REV. 1, 3 (1980) ("Parental decisions to have children and how to behave toward them in infancy and early childhood are unilateral but are probably affected by expectations concerning future mutual relationships.").

24. See *id.* at 12 ("Authority, discipline, altruism, and family solidarity affect the value of the signal, 'family affiliation,' for the rest of the world. The presence of a head of family, serving as director for communication, trust, and redistribution, reduces transaction costs within the family by reducing the need for bilateral relationships.").

stood as a source of wisdom for the younger.²⁵ They were able to see in the long run, not just the short-term.²⁶ Noah's covenant acted to bind future generations in their special relationship with God—in their duty to follow and honor Him. The sons and their wives also had a role, not just to produce more children, which was obviously important, but also in keeping Noah's traditions after he died.²⁷

To see the characteristics of permanence, unconditional love, and God's witness, we need to look beyond Noah's most memorable year and to examine more of the Biblical account of salvation's history. The Easter liturgy of many Christian traditions explains how the covenants begin with Adam and culminate in the death and resurrection of Christ. Let us briefly reflect on the story of Adam before we turn to a more systematic look at the three relational features of covenant.

Biblical covenant relationships promote interdependence and stability,²⁸ and covenant ideas should even be promoted by the human institution of covenant marriage;²⁹ the evidence that we will present here seems to support these propositions. Keep in mind that, unlike contracts, covenants need not extend only to husband and wife, but may also involve parents and children³⁰—even without the child's ability to consent.³¹

Thus, Adam's story³² is in many ways like that of the typical parent-child relationship, since the God of Genesis created Adam without Adam's promise or even knowledge, and, after literally giving him the world, unilaterally imposed the condition of obe-

25. See RICHARD A. POSNER, *AGING AND OLD AGE* 206–07 (1995) (describing roles for the elderly in primitive societies where the elders were likely to have encountered unusual things, such as eclipses, before the young).

26. See Brinig, *Family Franchise*, *supra* note 1, at 412–13.

27. See *id.* at 411–12; see also Theodore C. Bergstrom, *Economics in a Family Way*, 34 J. ECON. LITERATURE 1903 (1996) (providing a discussion of the biological interests of the second generation).

28. See MILTON C. REGAN, *FAMILY LAW AND THE PURSUIT OF INTIMACY* 4, 104, 183 (1993); Brinig, *Status, Contract and Covenant*, *supra* note 1, at 1587–88.

29. See generally Brinig, *Economics, Law and Covenant Marriage*, *supra* note 1.

30. See Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

31. See Brinig, *Finite Horizons*, *supra* note 1, at 300–01. Even implicit contracts are difficult to explain in this context since the child gives no consent. There may appear to be a covenant between the parents, see Scott & Scott, *supra* note 30, but clearly these are more involved than something like the third party beneficiary rule is. For an example of this doctrine applied to families, see *Drake v. Drake*, 455 N.Y.S.2d 420 (N.Y. App. Div. 1982) (holding that the child could not enforce her parents' separation agreement).

32. See *Genesis* 2–3.

dience upon him.³³ God was to walk in the Garden of Eden (keeping Adam company) and gave him all the green plants to eat and the beasts to name. Later, Genesis reports that He created Eve as a helpmate fitting for him. Presumably, Adam at this point had eternal life, for it was only in his disobeying the warning not to eat of the fruit of the tree of knowledge of good and evil that he became subject to death.³⁴ When he became disobedient, God did not turn away, but instead, since man now was “like one of us”³⁵ in knowing good and evil, expelled him from the Garden so he would not be able to eat of the tree of life. Adam then had to till the soil and Eve to experience pain in childbearing, though God promised that the Savior would come from their seed.³⁶

A. *Unconditional Love*

The Lord is merciful and gracious, slow to anger and abounding in steadfast love. He will not always chide, nor will he keep his anger for ever. He does not deal with us according to our sins, nor requite us according to our iniquities. For as the heavens are high above the earth, so great is his steadfast love towards those who fear him; as far as the east is from the west, so far does he remove our transgressions from us. As a father pities his children, so the Lord pities those who fear him. But the steadfast love of the Lord is from everlasting to everlasting upon those who fear him, and his righteousness to children’s children, to those who keep his covenant and remember to do his commandments.³⁷

The story of Hosea illustrates both how unconditional love works in the family and how the Bible analogizes unconditional family love to the love God has for mankind and especially for His people. Unconditional love strikes against the heart of contract law. In the Bible story, Hosea apparently was told by God to marry a woman of loose reputation and easy virtue. She had a series of lovers both before and after their marriage.³⁸ Nonetheless, the prophet continued to love her and, though he was angry at her unfaithfulness, he always took her back. He does not

33. For a beautiful fictional account of the story, see C.S. LEWIS, *PERELANDRA* (1943). Another parent-child relationship is explained in *Hosea* 11, where God is pictured as a father who teaches Israel to walk and nurtures him.

34. See *Genesis* 3:19, 3:22–24.

35. *Genesis* 3:22–23 (Revised Standard).

36. *Genesis* 3:15–17.

37. *Psalms* 103:8–13, 103:17–18 (Revised Standard).

38. *Hosea* 1:3–5.

desert the promises he has made. Hosea's wife is of course the allegorical counterpart to Israel, which time and again was unfaithful to the covenants made by Abraham, Isaac, and Jacob. A contract-based world allows a breach of promises so that one party may engage in a better opportunity.³⁹ This is called the concept of efficient breach.⁴⁰ Contract also implies a need to pay some attention to balances between contracting parties. It is clear from the Christian Bible that if God kept such a balance, without the redeeming work of Christ, we would always fall short.⁴¹

In stable, covenant-based families, couples do not keep precise track of what they do for each other. Couples that *do not keep* precise track of who owes what to whom have more stable marriages. For example, in the National Survey of Families and Households, couples were asked in 1987–88 how much time they and their spouse spent each week on various household tasks.⁴² The second wave of the study tracked the same people five years later, in 1992–94. Some of the couples had divorced or separated during those five years, others remained intact. Those who thought the division of labor in the household and in the labor market was “just about fair” were more likely to divorce or separate than those who thought the division of work and household tasks were *unfair to the other person*.⁴³

In contrast, a Virginia divorce case involves a wife who thought a contract-like tit-for-tat exchange was necessary. She testified that after the first several years of marriage she felt that a psychological wall was being erected between her and her husband.⁴⁴ Each time he did something that wronged her another brick was added to the wall so that, finally, she could not communicate with him at all.

Similarly, both Nock and Brinig have known couples who kept track of how many arguments they had, how many chores each did, or how often they engaged in sexual intercourse. (One

39. See Brinig, *Status, Contract and Covenant*, *supra* note 1, at 1586.

40. See, e.g., Ian Macneil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1983).

41. *Romans* 3:23; 2 *Corinthians* 3:4–6, 3:12–14.

42. See JAMES SWEET ET AL., CENTER FOR DEMOGRAPHY AND ECOLOGY, UNIV. OF WISCONSIN-MADISON, *THE DESIGN AND CONTENT OF THE NATIONAL SURVEY OF FAMILIES AND HOUSEHOLDS* (National Survey of Families and Households, Working Paper No. 1, 1988).

43. Steven L. Nock & Margaret F. Brinig, *Weak Men and Disorderly Women: Divorce and the Division of Labor*, in *THE LAW AND ECONOMICS OF MARRIAGE & DIVORCE* 185 (Antony W. Dnes & Robert Rowthorn eds., 2002) [hereinafter Nock & Brinig, *Weak Men*].

44. *Spratt v. Spratt*, 355 S.E.2d 881, 882 (Va. 1987).

doomed couple whose home Brinig visited in the early seventies displayed a calendar with heart stickers posted on the days when they had had sexual intercourse.) Such keeping track, or expecting loving gestures to be returned, flies in the face of a covenant relationship. We may say covenant relationships are characterized by duty or responsibility⁴⁵ rather than by “inherently dynamic emotional states.”⁴⁶ Author Helen Fisher discusses biological evidence suggesting that two different hormones (or pheromones) are given off during relationships.⁴⁷ During the initial stage of the relationship, the hormones create sexual passion and total concern with the other. After several years, these hormones fade and are replaced by ones of a different sort—the kind that characterizes affection rather than passion.⁴⁸ Another way of looking at the phenomenon is to note that contracts frequently involve short-run relationships or even instantaneous exchanges (more like the passion).⁴⁹ Covenants, because they are designed to be permanent, assume that the balances will be righted eventually—that things will be “a wash,”⁵⁰ or that any imbalance does not matter. (This is more like the affectionate relationships Fisher describes.) Their participants are thus more altruistic than are participants in contracts.

Keeping score of who does what and who owes whom appears to produce less satisfactory unions. Nevertheless, extensive dependencies are central to producing good marriages.⁵¹ In other words, married people appear to thrive when they depend

45. See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 121–30 (1991) [hereinafter GLENDON, *RIGHTS TALK*].

46. REGAN, *supra* note 28, at 67.

47. See Helen Fisher, *The Four Year Itch: Do Divorce Patterns Reflect our Evolutionary Heritage?*, 96 NAT'L HIST. 22 (1987).

48. See *id.* at 26.

49. See generally Anthony Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORG. 1 (1985).

50. See *Hosea* 6:4–6. “What shall I do with you, O Ephraim? What shall I do with you, O Judah? Your love is like a morning cloud, like the dew that goes early away.” *Id.* (Revised Standard). In contrast, see G.K. CHESTERTON, *WHAT'S WRONG WITH THE WORLD* 64, 67 (1910).

The child must depend on the most imperfect mother; the mother may be devoted to the most unworthy children; in such relations legal revenges are vain. . . . The essential element is not so much duration as security. Two people must be tied together in order to do themselves justice; for twenty minutes at a dance or for twenty years in a marriage.

Id.

51. See, e.g., Nock, *Commitment and Dependency*, *supra* note 1 at 512–13; see also Martha A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2191 (1995). But see MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH-CENTURY TRAGEDIES* 166

on one another yet do not keep score. Sociologists and economists have investigated factors that foster *commitment* in marriage. Such research seeks to determine why some individuals are more likely than others to remain in a marriage. Commitment is typically understood as the perceived costs of ending the marriage. If an individual envisions no costs whatsoever to ending his or her marriage, then we may say such a person has no commitment to the union. Some economic theory argues that dependency is a primary factor in producing commitment.⁵² As couples negotiate the demands of married life, they come to depend on one another more and more. The routine demands of household labor, for instance, require a complex arrangement for shopping, cleaning, caring for children, keeping the checkbook, and many other things. As couples settle into routines, they become increasingly interdependent. There are also very objective bases for dependency. Most wives earn less than their husbands and, therefore, may be presumed to be dependent on their spouse's earnings.⁵³

Research shows that objective dependencies do foster commitment. When partners depend on one another for income or social status, there is greater commitment to the marriage. However, objective dependencies of that sort are much less important than spousal *obligations*. In an analysis of the National Survey of Families and Households, Nock showed that the strongest predictor of individual commitment to a marriage is the imagined consequences of separation *for the spouse*.⁵⁴ After removing the effects of objective types of dependencies (i.e., income, education, occupational status, children), the belief that separation would negatively affect one's husband or wife was significantly more important for individual commitment to a marriage than anything else. The imagined consequences of divorce for one's partner may be taken as a crude measure of an individual's sense of his or her marital obligations or their enduring nature.⁵⁵ Both husbands and wives who believe their partners depend on them are much more committed to their marriages. Such

(1995) (arguing that the dependency of a wife upon her husband is precisely what ails marriage from a woman's point of view).

52. See generally GARY S. BECKER, A TREATISE ON THE FAMILY 30-79 (1991).

53. Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 522-23 (1997); see also Katherine T. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U.L. REV. 65 (1998).

54. Nock, *Commitment and Dependency*, *supra* note 1, at 513.

55. For an extended discussion of such obligations, see Carl E. Schneider, *Marriage, Morals and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503 (1994).

research suggests that marriages founded on extensive dependencies are stronger. It also suggests that married couples who envision mutual, long-term, and enduring obligations to each other have stronger marriages.

B. *Permanence*

I will sing of thy steadfast love, O Lord, for ever; with my mouth I will proclaim thy faithfulness to all generations.

For thy steadfast love was established for ever, thy faithfulness is firm as the heavens.

Thou hast said, "I have made a covenant with my chosen. I have sworn to David my servant: 'I will establish your descendants for ever, and build your throne for all generations.'"⁵⁶

The Biblical story of David and Jonathan⁵⁷ is one of the many that could be selected to show the permanence of covenant relationships—a concept closely related to the unconditional love discussed above. Jonathan made a covenant with David, because, the Bible reports, he "loved David as his own soul,"⁵⁸ and he gave David his own robe and sword and bow and girdle.⁵⁹ David said that if he had any guilt involving Jonathan's father Saul, Jonathan should slay David himself.⁶⁰ Jonathan asked God to be witness that he would disclose faithfully whether Saul would do David harm or not; later,⁶¹ Jonathan blessed David and asked him not to cut off his loyalty from his house forever. "When the Lord cuts off every one of the enemies of David from the face of the earth, let not the name of Jonathan be cut off from the house of David⁶² And as for the matter of which you and I have spoken, behold, the Lord is between you and me for ever."⁶³ According to the Bible, God's covenant is thus an everlasting covenant.

A complication was introduced by the Mosaic Law, which appeared later in Jewish history. Nevertheless, as St. Paul explains:

56. *Psalms* 89:1–4 (Revised Standard).

57. 1 *Samuel* 18–20.

58. 1 *Samuel* 18:3 (Revised Standard).

59. 1 *Samuel* 18:4.

60. 1 *Samuel* 20:8.

61. 1 *Samuel* 20:6–13. David had become Saul's son-in-law by killing two hundred Philistines. 1 *Samuel* 18:27.

62. 1 *Samuel* 20:15–16 (Revised Standard).

63. 1 *Samuel* 20:23 (Revised Standard).

To give a human example, brethren: no one annuls even a man's will, or adds to it, once it has been ratified. Now the promises were made to Abraham and to his offspring. It does not say, "and to offsprings," referring to many; but, referring to one, "and to your offspring," which is Christ. This is what I mean: the law, which came four hundred and thirty years afterward, does not annul a covenant previously ratified by God so as to make the promise void.⁶⁴

The Hebrews repeatedly broke God's law, given to Moses in the form of the Ten Commandments, not just in the time of Moses, but also in the succeeding generations. According to St. Paul, this written covenant did not replace the essential one God had made from the beginning—one that was finally fulfilled in Christ.⁶⁵

In the same way, various human rules and regulations (and even the law of the parties signified by their personal contract) cannot change the essential nature of the parent-child or husband-wife relationship. If we have a law requiring us to support

64. *Galatians* 3:15–17 (Revised Standard).

65. *See id.*; *see also Jeremiah* 31:31–34.

Behold, the days are coming, says the Lord, when I will make a new covenant with the house of Israel and the house of Judah, not like the covenant which I made with their fathers when I took them by the hand to bring them out of the land of Egypt, my covenant which they broke, though I was their husband, says the Lord. But this is the covenant which I will make with the house of Israel after those days, says the Lord: I will put my law within them, and I will write it upon their hearts, and I will be their God, and they shall be my people. And no longer shall each man teach his neighbor and each his brother, and say 'Know the Lord,' for they shall all know me, from the least of them to the greatest, says the Lord; for I will forgive their iniquities and I will remember their sin no more. . . .

Id. (Revised Standard).

The distinction between law and covenant also forms part of the background for the question put to Jesus by the Sadducees reported in *Luke* 20:27–36. A woman had married a series of men after their brothers died, according to the laws of Moses. If the marriage promises were forever, how could she be faithful to all of them? Jesus replied that in the world of men, there are marriages by the law of man. In heaven, the laws of man are no more. *Id.* *See also Jeremiah* 32:38:

They shall be my people, and I will be their God. I will give them one heart and one way, that they may fear me for ever, for their own good and the good of their children after them. I will make with them an everlasting covenant, that I will not turn away from doing good to them; and I will put the fear of me in their hearts, that they may not turn from me. I will rejoice in doing them good, and I will plant them in this land in faithfulness, with all my heart and all my soul.

Id. (Revised Standard).

aged parents,⁶⁶ this does not change our *moral* need to do so⁶⁷ even beyond the poverty level,⁶⁸ because such services “are presumably rendered in obedience to natural promptings of love and affection, loyalty, and filial duty, rather than upon an expectation of compensation.”⁶⁹ To take another example, our marriage vows to love one another are stronger than those the state makes against assault⁷⁰ or marital rape,⁷¹ or even the divorce grounds of cruelty.⁷² Laws against child abuse cannot replace our duty as parents to meet our children’s trust as well as to educate and properly raise them.⁷³ The covenant is thus like the “deeper magic” that C.S. Lewis writes of in *The Lion, The Witch and the Wardrobe*.

“It means,” said Aslan, “That though the Witch knew the Deep Magic [of blood sacrifice for sin], there is a magic deeper still which she did not know. Her knowledge goes back only to the dawn of Time. But if she could have looked a little further Back, into the stillness and the darkness before Time dawned, she would have read there a different incantation. She would have known that when a willing victim who had committed no treachery was killed in a traitor’s stead, the Table would crack and Death itself would start working backwards.”⁷⁴

66. See, e.g., VA. CODE ANN. §§ 20–61 (Michie 2000) (providing for misdemeanor punishment for any person deserting or willfully neglecting or refusing to pay support of an adult child or aged parent who is handicapped or otherwise incapacitated when the child or parent is in necessitous circumstances).

67. Cf. 2 *Corinthians* 3:4–6, 3:12–14.

[S]uch is the confidence that we have through Christ toward God. Not that we are sufficient of ourselves to claim anything as coming from us; our sufficiency is from God, who has qualified us to be ministers of a new covenant, not in a written code but in the Spirit; for the written code kills, but the Spirit gives life. . . .

2 *Corinthians* 3:4–6 (Revised Standard).

68. Mitchell-Powers Hardware Co. v. Eaton, 198 S.E. 496, 499–500 (Va. 1938) (stating that the obligor “must do more than relieve the pangs of hunger, provide shelter and furnish only enough clothes to cover the nakedness of the parent”).

69. Jacobs v. Church, 36 Va. Cir. 277, 1995 WL 1055844 at *3 (Spotsylvania Co. 1995).

70. See, e.g., VA. CODE ANN. § 18.2-57 (Michie 1996); Counts v. Counts, 266 S.E.2d 895, 896 (Va. 1980).

71. See, e.g., VA. CODE ANN. § 18-67 (Michie 1996); Weishaupt v. Commonwealth, 315 S.E.2d 847, 848 (Va. 1984).

72. VA. CODE ANN. § 20-91(6) (Michie 2000).

73. See Brinig, *Finite Horizons*, *supra* note 1, at 296.

74. C.S. LEWIS, *THE LION, THE WITCH AND THE WARDROBE* 132–33 (1950).

According to Hebrews 8, Christ acts as our high priest but mediates a better covenant, because God's response is no longer contingent upon Israel's (or the believer's) faithfulness. The law has been placed in people's minds and written on their hearts: "I will be their God, and they shall be my people. . . . I will remember their sins no more."⁷⁵ As the mediator of the new covenant, Christ is said to promise an eternal inheritance. For the first (Mosaic) covenant was ratified only at death and the scattering of blood, while Christ through the shedding of His blood offers forgiveness of sins. Unlike Aaron or the Old Testament priests, St. Paul posits that Christ entered not a sanctuary that was a copy of heaven but into heaven itself to appear in the presence of God on our behalf.⁷⁶

C. *Involvement of God as Witness*

And Joshua wrote these words in the book of the law of God; and he took a great stone, and set it up there under the oak in the sanctuary of the LORD. And Joshua said to all the people, "Behold, this stone shall be a witness against us; for it has heard all the words of the LORD which he spoke to us; therefore it shall be a witness against you, lest you deal falsely with your God."⁷⁷

Many of the Biblical descriptions of covenants involving God as witness are horizontal; that is, they involve covenants between people instead of promises made exclusively between man and God. With these horizontal covenants, between leaders or between kings and their people, God was called upon to serve as a witness. Then, if one of the parties was not present at the making of the promise or the promise needed to be executed sometime in the future, God (or a stone or a pillar, standing for God) was thought to remember since the covenant was permanent.

The commercial contract is typically a spot contract, with expectations of immediate or nearly immediate performance.⁷⁸ Covenants, or especially important contracts like wills⁷⁹ or deeds,⁸⁰ require other (disinterested) witnesses to be involved since everyone knows that both parties to the promise may not be

75. *Hebrews* 8:10, 12 (Revised Standard).

76. *See Hebrews* 9:24.

77. *Joshua* 24:26–27 (Revised Standard). Similar words appear with Jacob in *Genesis* 32, Moses, in *Exodus* 3 and *Leviticus* 26:44–45, and David in 2 *Samuel* 5. King Josiah makes a similar covenant in 2 *Kings* 23.

78. *See generally* Kronman, *supra* note 49, at 38–39.

79. VA. CODE ANN. § 64.1-49 (requisites for validity) (Michie 2002).

80. VA. CODE ANN. §§ 55-48, 55-106 (acknowledgement of deed) (Michie 2003).

around at the critical time. Many of the Biblical covenants of this type involved kingship or the Levitic priesthood.

The Jacob story⁸¹ is a good one to use as an example since again it involves families. Jacob, whose youth and even birth involved some rather shady doing at his brother's expense,⁸² also had a stormy relationship with his father-in-law Laban. Laban had forced Jacob to serve twice the customary length of time to obtain his chosen bride, having to earn access to Leah before obtaining Rachel.⁸³ The two men also dispute ownership over large numbers of goats, which Jacob through artifice has caused to bear his markings rather than Laban's.⁸⁴

When the covenant between the two men is made,⁸⁵ Jacob gets his kinsmen to help him set up a pile of stones. The two promise mutual non-aggression, and Laban gets Jacob to swear that he will not mistreat his wives (Laban's daughters) nor their children. Jacob leaves with the two wives, their considerable households, and the large fortune in disputed goats. This act shows the actual cleaving of Rachel and Leah from their father,⁸⁶ as well as that God is to act as witness to the men's promises.

This heap is a witness, and the pillar is a witness, that I will not pass over this heap to you, and you will not pass over this heap and this pillar to me, for harm. The God of Abraham and the God of Nahor, the God of their father, judge between us.⁸⁷

Jacob and his kinsmen ate that day by the heap, and after the mutual swearing of promises, Jacob offered a sacrifice on the mountain and called his kinsmen to eat, and they ate bread and spent the night on the mountain. The next morning Laban arose and kissed his grandchildren and his daughters and blessed them before returning home.⁸⁸

Secular explanations for the importance of God's witness have been advanced by sociologists for over a century. French

81. *Genesis* 30–31. A beautiful fictional parallel is KATHERINE PATERSON, *JACOB HAVE I LOVED* (1992).

82. These events are reported in *Genesis* 25:19–34, 27:1–28:1.

83. *Genesis* 29:1–30.

84. *Genesis* 30:25–43.

85. *Genesis* 31:43–55.

86. *Genesis* 2:24. This "cleaving" is what Judith S. Wallerstein and Sandra Blakeslee assert makes up the first important step in successful marriages. JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *THE GOOD MARRIAGE: HOW AND WHY LOVE LASTS* (1995).

87. *Genesis* 31:52–53 (Revised Standard).

88. *Genesis* 31:54–55.

sociologist Emile Durkheim⁸⁹ argued that religion influences behavior because individuals experience social norms *as divine*. In trying to understand the influence of religion on the family, it is tempting to focus on individuals' religious beliefs or values. But Durkheim argued that another element is also important, perhaps more so.

The idea of a purely private religion is unthinkable, as is the idea of a purely private language. Religion is also a social institution. A person's private faith is not a religion until it is held by others.⁹⁰ A community of believers is a social reality. It is not necessarily a group of persons—a congregation, for example. Those who share a religious faith are bound together in a fundamentally social relationship. They all conform, to some degree, to the rules, norms, moral values, and beliefs *of fellow believers*. Durkheim argued that the ability of religious beliefs to direct behaviors is inherently social. The social pressure to conform to group norms, he argued, is experienced as a divine power—something not springing from the group, but arising outside of it.

Although modern people may form covenants with God, and our vocations (or “callings”) do this, the making of these usually involves the witness of others as well as the indicia with which this discussion began.

D. *Conclusions and Implications for Modern Relationships*

Marriage, but not cohabitation, involves a covenant. Marriage is much more permanent than is cohabitation,⁹¹ and more apt to be characterized by unconditional love.⁹² Almost by definition, the marriage ceremony involves at least the witness of the community,⁹³ and frequently the witness and blessing of God.⁹⁴

89. EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 237 (Joseph Ward Swain trans., Free Press 1965) (1915).

90. See, e.g., *Welsh v. United States*, 398 U.S. 333, 342 (1970) (holding that a conscientious objector cannot refuse service on the basis of his “merely personal moral code”); *Johnson v. Prince William County Sch. Bd.*, 404 S.E.2d 209, 211–12 (Va. 1991) (holding that bona fides of religious belief for home schooling not met when opposition to school attendance came from a “merely personal moral code”).

91. See generally LYNNE M. CASPER & SUZANNE BIANCHI, *CONTINUITY AND CHANGE IN THE AMERICAN FAMILY* (2002).

92. See Nock, *Commitment and Dependency*, *supra* note 1, at 505.

93. See, e.g., W. VA. CODE ANN. § 48-2-404 (Michie 2001) (“We are gathered here, in the presence of these witnesses, to join together this man and this woman in matrimony.”). There can be no secret common law marriage, for the “holding out” to the general public is one of the most important ingredients.

Covenant marriage, to the extent that it is more likely to be permanent than “traditional marriage” because of more pre- and post-marital counseling⁹⁵ and because the “transaction costs” of divorce are higher,⁹⁶ is still more likely to reflect the kind of covenants discussed earlier. We will examine both gradations of adult relationships.

Parent-child covenants illustrate some of the problems occasioned when law tries arbitrarily to cut off relationships at a given time.⁹⁷ Because the parent-child relationship is a permanent one, the idea that children suddenly reach independence from parents at age eighteen is unrealistic, and perhaps undermines the earlier relationship.⁹⁸ The fact that contemporary adults feel that they ought to be financially and often physically independent even when they become very old⁹⁹ also contradicts the idea of covenant.¹⁰⁰

No-fault divorce, to the extent that it pretends a “clean break” can occur between spouses of long standing,¹⁰¹ and particularly between parents,¹⁰² also contradicts the characteristics of covenant. This suggests that rules of joint custody¹⁰³ or of cus-

See, e.g., In re Estate of Dallman, 228 N.W.2d 187, 190 (Iowa 1977); *Ex parte Threet*, 333 S.W.2d 361, 364 (Tex. 1960).

94. *See FROM CONTRACT TO COVENANT*, *supra* note 1, at 4.

95. Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1567–69 (1998).

96. Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At-Fault People*, 18 INT'L REV. L. & ECON. 325, 325 (1998) (arguing that no-fault divorce produces increase in rates of divorce) [hereinafter Brinig & Buckley, *No-Fault Laws*].

97. Brinig, *Finite Horizons*, *supra* note 1, at 300–03.

98. The responsibility-based relationship is explained in *Adams v. Palmer*, 51 Me. 480, 484–85 (1863):

It is rather a social relation like that of parent and child, the obligations of which arise not from the consent of concurring minds—but are the creation of the law itself; a relation the most important as affecting the happiness of individuals, the first step from barbarism to incipient civilization, the purest tie of social life, and the true basis of human progress.

Id.

99. *See generally* John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988) (arguing that while still working, modern adults will prepare for their old age by investing in pension plans and other savings, and for their children by investing in their “human capital”).

100. *See FROM CONTRACT TO COVENANT*, *supra* note 1, at 196–200.

101. Brinig, *Family Franchise*, *supra* note 1, at 422–23; Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1117–21 (1989).

102. Brinig, *Family Franchise*, *supra* note 1, at 419–20.

103. Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L. J. 393, 393 (1998).

tody shared to the extent that it was before the parties separated¹⁰⁴ may better promote the substantial and unconditional loving that should take place between parent and child.

Covenant is a concept that takes us beyond contract. Indeed, the idea that marriages (or society, for that matter) could be organized solely around contracts is flawed. In every contract there are actually two: one is the contract we make with another person, but the other is the hidden contract we all make among ourselves to obey the rules of the first contract.¹⁰⁵ Behind the idea of contracts, in other words, is the more fundamental idea of trust that contracts will be honored. While contracts presume rational self-interest and seek to promote and protect it, trust is inherently non-rational. Covenant is more like trust than contract. Alternatively, covenant is faith not based on rationality.

1. Permanence

We introduced our topic with a notion of three things required of covenantal relationship, which we will repeat again here as a series of more modern takes on the topics of permanence, unconditional love, and community. An alternative way of thinking about the need for permanence looks at what happens if we know that a relationship is not permanent, and in fact is about to terminate very soon. Economists refer to decision-making when the actor knows the end is in sight as the last period problem.¹⁰⁶ Even if the decision maker has behaved in a cooperative way previously, in the last period he (or she) has every incentive to take advantage of the situation and try to cheat the other. In fact, this will lead to the “unraveling” of any cooperative deals made since the other actor will also know of the likely defection and will take precautions.¹⁰⁷

A commercial contractual example of the last period problem is the case of *Bak-A-Lum Corp. of America v. Alcoa Bldg. Prods., Inc.*¹⁰⁸ A distributor had served for some years as the exclusive distributor of ALCOA's goods. Eventually ALCOA arranged with

104. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 2.09 (2002); see also, John S. Murray, *Improving Parent-Child Relationships within the Divorced Family: A Call for Legal Reform*, U. MICH. J.L. REFORM 563, 584–600 (1986).

105. Thus, the principled objection to “efficient breach” is that as a society we lose respect for this hidden contract. See Macneil, *supra* note 40.

106. Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99, 119 (1989); Mitu Gulati, *When Corporate Managers Fear a Good Thing is Coming to an End: The Case of Interim Nondisclosure*, 46 UCLA L. REV. 675, 713-16 (1999).

107. RICHARD A. POSNER, *AGING AND OLD AGE* 58–61 (1995).

108. 351 A.2d 349 (N.J. 1976).

others to sell its products in the same geographic area, but did not tell the distributor, which meanwhile expanded its warehouse and spent significant sums advertising ALCOA's goods. When the distributor sued, the manufacturer explained its behavior as follows:

The men at [ALCOA] in charge of sales thought a period of secrecy ending with a sudden announcement to Mr. Diamond [plaintiff Bak-A-Lum's president] of the accomplished fact of new distributors would avoid any risk of cooling plaintiff's interest in selling ALCOA products during the several months before the new distributors were named and made ready to go.¹⁰⁹

The legal result in *Bak-A-Lum* was that ALCOA had to pay for what the distributor would have profited over a long enough period of time to enable it to wind down the investments made in reliance on the continuation of the contract. In other words, the court was aware of the temptation that ALCOA feared: to take advantage in a self-serving way once a definite end of the relationship is in sight.

2. Unconditional Love

The second basic characteristic of covenant relationships is unconditional love. We will see that marriage, unlike more fleeting relationships, features unconditional giving rather than a series of reciprocal gift-giving.¹¹⁰ The many things spouses do for each other cannot simply be regulated as a series of contracts because so much of the giving is unconditional.

3. Partnership of God and Community

Finally, covenant relationships feature the presence or "partnership" of God and the community. Marriage is unique because it involves the presence and partnership with God, or at least the larger community. Marriage is not simply contract or sexual connection involving only the couple themselves. The involvement of people in a community of others who share common beliefs and values, and who regularly celebrate them in unchanging fashion, helps to infuse customary behaviors with a sense of awe and sacredness. This is the function of ritual.

Ritual gives us a sense of being able to relax in what is counted on, as Antoine de St. Exupery, speaking through the

109. *Id.* at 351.

110. See ALLEN PARKMAN, *The Importance of Gifts in Marriage*, ECONOMIC INQUIRY (forthcoming) (manuscript on file with the authors).

fox, explains in *The Little Prince*.¹¹¹ In the book, the fox notes that it is important to set a regular hour of meeting with the Prince so the fox can look forward to it and prepare in joyful expectation. Such regularity will help prepare for unhappy events as well: if we know that a certain evil is coming, we can “rest up” to meet it. Thus the fox, knowing human schedules, gets a regular “day off” from the hunters who go drinking every Thursday.

The relationships among the religious faithful similarly come to be experienced as divine as a result of *rituals*. Durkheim noted that every religious tradition is based on scrupulous adherence to conventional rituals. Religion may be thought of as an institution that divides the world into two spheres: the sacred and the profane. The profane is understandable and ordinary. The sacred is mysterious. Rituals serve to connect the sacred with the profane. By reciting prayers, singing verses, kneeling, bowing, fasting, or feasting according to strict rules, individuals collectively experience the *profane as sacred*. Most individuals will say or sing things out loud in collective prayer or song that they probably would not say in conversation. Something about the ritual makes it possible to say such things. According to Durkheim, something about the ritual transforms the profane into the sacred. And that something is the presence of other people doing exactly the same things.

The religiously faithful conform to standards of conduct held out as worthy by those of their faith. And Durkheim argued that such conformity springs from shared (i.e., collective) religious conviction. Individuals do not experience such conformity

111. ANTOINE DE SAINT-EXUPÉRY, *LE PETIT PRINCE* 68 (Reynal & Hitchcock 1943):

Le lendemain revint le petit prince.

—Il eût mieux valu revenir à la même heure, dit le renard. Si tu viens, par exemple, à quatre heures de l'après-midi, dès trois heures je commencerai d'être heureux. Plus l'heure avancera, plus je me sentirai heureux. A quatre heures, déjà, je m'agiterai et m'inquiéterai: je découvrirai le prix du bonheur! Mais si tu viens n'importe quand, je ne saurai jamais à quelle heure m'habiller le coeur . . . Il faut des rites.

—Qu'est-ce qu'un rite? dit le petit prince.

—C'est aussi quelque chose de trop oublié, dit le renard. C'est ce qui fait qu'un jour est différent des autres jours, une heure, des autres heures. Il y a un rite, par exemple, chez mes chasseurs. Ils dansent le jeudi avec les filles du village. Alors le jeudi est jour merveilleux! Je vais me promener jusqu'à la vigne. Si les chasseurs dansaient n'importe quand, les jours se ressembleraient tous, et je n'aurais point de vacances.

as secular or social. The Ten Commandments are not understood or experienced as social norms. But the sanctions for disobeying them are completely social, whether individuals believe that rewards or punishments will follow in this life, or in another life. In short, the influence of religion according to Durkheim may be thought to reside in personal values, but such values exist in a social environment.¹¹² It is only the witness of others that creates the experience of the divine. That is, religious conformity is a form of social control.

Public secular law cannot, even in principle, enforce the personal commitment embodied in a marriage covenant. Nor should it ever be expected to. The former East Germany had a statute (§ 10 FGB) that mandated that housework was an equal responsibility of husbands and wives.¹¹³ Although this legislation might seem admirable to advocates of equality for women, and although it promoted a higher level of women's employment than did its West German counterpart¹¹⁴ which allowed for negotiation of household management within each family, it did so at a significant cost to the family. Though in 1988 more than twice as many married women were employed in East Germany, crude divorce rates for 1989 were approximately fifty percent higher behind the Iron Curtain.¹¹⁵

Even when couples attempt to share the workload in regard to household and childcare tasks, the balance achieved matters primarily because of how it is experienced and perceived. Some have proposed that the "solution" to the unequal organization of household responsibilities lies in equality like that of the German legislative experiment—achieving equal (or proportionate) shares of responsibility for tasks and responsibilities.¹¹⁶ We stress, however, that equality is not the same thing as equity. The latter refers to the perceived fairness or justice in a particular circumstance. Research has shown that perceived fairness (i.e., perceived equity) is considerably more important in predicting and/or explaining divorce than is equality (or deviations from it).¹¹⁷

112. DURKHEIM, *supra* note 89, at 60–65.

113. Margaret F. Brinig, *Equality and Sharing: Views of Household Across the Iron Curtain*, 7 EUR. J.L. & ECON. 55, 55 (1999).

114. § 1356 Nr. 1 BGB (C.H. Beck 1957).

115. WILLIAM J. GOODE, *WORLD CHANGES IN DIVORCE PATTERNS* 27, 129 (1993).

116. See, e.g., Linda C. McClain, *The Domain of Civil Virtue in a Good Society: Families, Schools, and Sex Equality*, 69 *FORDHAM L. REV.* 1617, 1646 (2001).

117. Nock & Brinig, *Weak Men*, *supra* note 43, at 185; See Liana C. Sayer & Suzanne M. Bianchi, *Women's Economic Independence and the Probability of Divorce: A Review and Reexamination*, 21 *J. FAM. ISSUES* 906 (2000).

On the other hand, recent empirical work by Nock and Brinig¹¹⁸ tends to show that privately negotiated arrangements, even if not strictly “equal” or “fair,” have salutary effects on marital stability.¹¹⁹ This research investigates the consequences of the actual arrangements selected by husbands and wives in the late 1980s. The data from the National Survey of Families and Households¹²⁰ shows that so-called women’s work endangers marriages, regardless of which spouse does it.¹²¹ Greater involvement in traditionally-female housework by either partner is associated with higher chances of divorce or separation.¹²² However, and more relevant for this project, the consequences of the time that husbands and wives spend in various tasks is strongly conditioned by perceptions of fairness. The most stable relationships were those in which husbands correctly perceived that their wives were doing more hours of paid and unpaid work, and agreed with their wives that the arrangement was “unfair to her.”¹²³

Autonomy thus works much better than state mandate, but occasionally couples deviate too far. When the state makes particularly bad guesses, shadow institutions will take over. For example, limits on divorce (legislative divorce) led in the eighteenth century to shadow institutions like informal marriage after one party just took off.¹²⁴ Divorce reform, though it does affect the permanence of marriage, is likely to work the same way. Though a number of states have entertained proposals for mutual consent divorce or limiting “no-fault” divorce when there are minor children, none has passed.¹²⁵ In fact, even the modern covenant marriage legislation may be somewhat hampered by spouses just leaving the jurisdiction when they want to exit the marriage more quickly than their original choice would permit.¹²⁶ We therefore prefer an emphasis on custody reform¹²⁷ or on changing the nature of marriage.

118. Nock & Brinig, *Weak Men*, *supra* note 43.

119. *Id.* at 186–88.

120. See SWEET ET AL., *supra* note 42.

121. Nock & Brinig, *Weak Men*, *supra* note 43, at 186.

122. *Id.*

123. *Id.* at 188.

124. RICHARD CHUSED, *PRIVATE ACTS IN PUBLIC PLACES: A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAWS* 30–32 (1994).

125. See *Divorce Reform Bills to Require Mutual Consent for No-Fault Divorce, and/or Restrict Divorce Where There Are Children*, at <http://www.divorcereform.org/con.html> (last visited Oct. 12, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). For updates, see *id.*

126. F.H. Buckley & Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U. ILL. L. REV. 561, 570; PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 104, § 7.08, at 1004–09.

A recent paper by Nock, Sanchez, Wilson, and Wright¹²⁸ suggests that covenant marriage in Louisiana may in fact be changing the essential nature of marriage.¹²⁹ Covenant marriage couples are different from those who select standard marriage from the very beginning. Covenant couples have marginally higher levels of completed education, are more politically conservative, are more religious, are more likely to seek and receive marriage counseling, and have more support (in terms of approval of the marriage, and for help and assistance). Covenant couples are less likely to have cohabited before marriage. They are also more likely to rely on more pro-social forms of communication and conflict resolution (i.e., they are less likely to engage in destructive or hostile forms of conflict resolution such as avoidance, sarcasm, or hostility). However, at the time they marry, they have very similar incomes and labor force involvements to those of standard marriage couples.

Nock, Sanchez, Wilson, and Wright found that after the end of the second year of marriage, covenant couples were different (had changed) on a number of different indices. They describe the difference as "*institutionalization of the marriage*."¹³⁰ Covenant couples describe their marriages as involving three parties: the husband, the wife, and the marriage itself. For covenant couples, the marriage warrants consideration apart from the individualistic concerns of either partner. In regard to some matters, covenant couples appear to defer to the interests of their marriage even when the individual concerns of the partners may appear to conflict. This orientation to married life arguably helps resolve the customary problems faced by newly married couples in regard to fairness and equity. First, covenant couples endorse traditional marital vows with strong personal commitments (marriage for life, the central role of children in marriage, the role marriage plays in producing a complete individual, etc.) far

127. See Margaret F. Brinig & Douglas W. Allen, "*These Boots Are Made for Walking: Why Most Divorce Filers are Women*," 2 AM. L. & ECON. REV. 126, 138 (2000); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 104, § 2.09, at 236-37. West Virginia adopted the A.L.I. custody reform proposal in 2000. See W. VA. CODE ANN. § 48-9-207 (Michie 2001).

128. STEVEN L. NOCK, LAURA SANCHEZ, JULIA C. WILSON & JAMES D. WRIGHT, CENTER FOR FAMILY AND DEMOGRAPHIC RESEARCH, BOWLING GREEN ST. UNIV., INTIMATE EQUITY: THE EARLY YEARS OF COVENANT AND STANDARD MARRIAGES (Bowling Green St. Univ., Working Paper Series 03-04, 2003-2004), available at <http://www.bgsu.edu/organizations/cfdr/main.html> (presented at the Annual Meeting of the Population Association of America, May 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

129. *Id.*

130. *Id.* at 11.

more often and more strongly than do standard marriage couples. Covenant wives are more traditional with respect to gender ideals, and they have marriages that are seemingly more equitable.

This greater commitment to marriage as an institution and a way of life is why the family incomes of covenant couples grow faster than those of couples in standard marriages in the first two years of marriage. It also explains why covenant couples show greater satisfaction with the marriage and even less obvious improvements such as the sharing of household tasks and child care.¹³¹

II. HOW COMMUNITIES AID MARRIAGE AND MARRIAGE COMMUNITIES

A. *Sources of Information About the Relationships*

Our social networks educate us about our relationships. There is obviously a continuum between the proverbial locker room conversation about sexual exploits and the hopefully more useful things parents teach children about dispute resolution, childbearing, and childrearing and simple manners. Much of this education goes on before we begin grown-up relationships, but parents remain sources of support and guidance long after we become adults. Grandparents and others in the wider community also provide cultural guidelines within which to pursue relationships as well as experience about lasting relationships. This type of help is particularly evident in African-American and first generation American communities. Sometimes such information-passing is more formalized. In some religious traditions, and for those electing covenant marriage in Arizona, Arkansas, and Louisiana, couples must attend marriage preparation classes. Generally speaking, this more formalized community involvement is designed to continue during marriage as well.

1. Investment

Historically, many families seeking to immigrate to this country have sent a potential high earner along first, to establish a foothold and then pay for the others' passage. Such investments by families can also be made by the wider community. In the business and corporate world, much has been made of the ability of new Asian immigrants to the United States to pool assets and earnings to establish funds from which all members can draw. Observers have credited much of the success of the

131. *Id.* at 4-8.

small businesses run by first generation Asian-Americans to such cooperative financial support (along, of course, with the tremendous industry of the individuals involved).¹³²

2. Insurance

As Elizabeth and Robert Scott have written, marriage often serves an insurance function.¹³³ If a marriage contains two potential labor force participants, one can work if the other becomes unemployed or unemployable. Historically, couples might have many children to insure that at least some could support their parents in old age or carry on the family name, and to do the varied necessary tasks around the homestead.¹³⁴ In day-to-day life, many parents will rely on each other's availability to do chauffeuring and other childcare work if a child gets ill or there is a "snow day." One of Brinig's Indian-American students has told her that the wedding ring she wears, which is not a straight but a wavy circlet in the Hindu tradition, signifies each spouse's duty not only to weather hard times but to help pull the other back to a more central path.

3. Dispute Resolution and "Venting"

When we have had rough days at the job, whether outside or inside the home, our families, and particularly our spouses, provide helpful ears for our venting. Social science support for the importance of this function is quite extensive. In fact, a paper by Bryant and Conger¹³⁵ both reviews the literature and establishes a new point—even in marriages of more than fourteen years, relationship-specific support significantly predicted more stable and successful marriages, while friends in common and general personal support did not.

Families are often the best settings to resolve disputes, especially when the wider support group is brought in. The Native American community began the Navajo Peacemaker Court in 1982 because the procedures of civil state courts were contrary to Navajo tradition of having the perpetrator and the victim directly "talk out" the problem and enlisting help from family and

132. Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133, 165-75 (1996).

133. Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1311-12 (1998).

134. See generally GLENDA RILEY, *THE FEMALE FRONTIER: A COMPARATIVE VIEW OF THE PRAIRIE AND THE PLAINS* (1988).

135. Chalandra M. Bryant & Rand D. Conger, *Marital Success and Domains of Social Support in Long-Term Relationships: Does the Influence of Network Members Ever End?*, 6 J. MARRIAGE & FAM. 437, 447 (1999).

clans.¹³⁶ For example, in domestic violence situations, the Peacemaker Court would restore the victim to her former self-called her state of *hozho*.¹³⁷ The perpetrator, with the assistance of his family and clan, does the restoring.¹³⁸

4. Conventions, Behavior-Channeling, and Union-Building

Spouses, families, and the wider community are useful in establishing morals, or, more broadly, culture. Culture in this sense includes such mundane items as whether and in what way to celebrate one's anniversary (hence the lists of gifts, from paper to diamonds), Valentine's Day, or Father's Day. More importantly, conventions and behavior-channeling include expectations about the duration of marriage; what justifies leaving or divorcing one's spouse; what kind of conduct is acceptable, what cruel. Empirical research shows, for example, that the percentage of divorced people living in the state where a person lived when sixteen (and in that year) predicts the age at which one would marry (a higher percentage of divorced people predicts an older age at first marriage) and even how much education a woman would receive (a higher divorced percentage predicts fewer completed years of school).¹³⁹ We know, for example, that in places where there are more births to unwed parents or more divorces, in other words, a culture of single parenting or divorce, more occur, even holding other explanatory variables constant.¹⁴⁰

5. The Central Place of Religion in Relationships

Many of the earlier observations suggest a linkage between the wider community involvement and religion. Obviously religious authorities can marry people (and in some countries this is exclusively true). Marriages "in" a religion can subject couples to a set of ecclesiastical rules as well as secular ones. Certainly there are strong marriages that are not part of a religious tradition. But, if Catholics and fundamentalist Protestants, for example, divorce at about the same rate as does the general public, is it

136. James W. Zion & Elsie B. Zion, *Hozho' Sokee'—Stay Together Nicely: Domestic Violence Under Navajo Common Law*, 25 ARIZ. ST. L.J. 407, 423 (1993).

137. *Id.* at 415.

138. *Id.* at 407, 424–25.

139. JOHN H. JOHNSON & CHRISTOPHER J. MAZINGO, THE ECONOMIC CONSEQUENCES OF UNILATERAL DIVORCE FOR CHILDREN 24, 26 (2000), available at <http://nber.org/~confer/2000/si2000/johnson.pdf> (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

140. Brinig & Allen, *supra* note 127; Margaret F. Brinig & F.H. Buckley, *The Price of Virtue*, 98 PUB. CHOICE 111 (1999).

strong religious tradition or personal adherence that is important in maintaining marital stability?¹⁴¹

Most studies find that the stated religious preference at the time of marriage has very little effect on marital stability. Two Methodists marrying, holding other things constant, will divorce about as often as two Catholics, two Jews, or two atheists. A study by the George Barna research group found that Born-Again Christians are slightly more likely to divorce than the average American (with rates of 27 as opposed to 23 percent of a group of more than 3,000 randomly selected adults).¹⁴² A more recent Associated Press article¹⁴³ published statistics showing that the so-called Bible Belt states had higher divorce rates than the national average. Although this piece noted that Protestants seem to divorce more often than Catholics, the difference seems to be decreasing.¹⁴⁴ (Remarriage for Catholics happens less frequently, however).¹⁴⁵ Since those with lower incomes and unstable employment have higher divorce rates, however, one would expect more divorce in poorer regions of the country (the Bible Belt, especially).

However, religious intensity seems more important than affiliation, so that difference in religious observance and the importance of God in one's life do affect the couple's ability to stay together over the period in question.¹⁴⁶ Call and Heaton found that when both spouses attend religious services regularly, the couple has the lowest risk of divorce, while a difference in church attendance increases the risk of divorce. They posit that church attendance "can either provide a common forum for a couple's religious orientation and family commitment or become a conflict for couples who do not share the same levels of personal dedication."¹⁴⁷ They note that joint participation in

141. See Maja Beckstrom, *Pollster's Data Tell Churches How Their Believers Behave*, COMMERCIAL APPEAL, Aug. 17, 1996, at 16A (reporting that divorce rates are higher for born-again Christians than for the general population).

142. *Id.*

143. Associated Press, *Bible Belt States Struggling with Divorce*, IOWA CITY PRESS-CITIZEN, Nov. 13, 1999, at 7A.

144. See William Sander, *Catholicism and Marriage in the United States*, 30 DEMOGRAPHY 373, 377-83 (1993); Bob Mims, *Stats Show Mormons Buck Secularization*, SALT LAKE TRIB., Mar. 6, 1999.

145. MEGAN M. SWEENEY, REMARRIAGE OF MEN AND WOMEN: THE ROLE OF SOCIOECONOMIC PROSPECTS 14 (Univ. of Wis., CDE Working Paper No. 95-08, 1995), available at <http://www.ssc.wisc.edu/cde/cdewp/95-08.pdf>. (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

146. Vaughn R.A. Call & Tim B. Heaton, *Religious Influence on Marital Stability*, 36 J. SCIENTIFIC STUD. RELIG. 382, 389-90 (1997).

147. *Id.* at 391.

church gives a family a sense of purpose and similar values that increase family commitment and social integration. Like other studies, the Call and Heaton study found that all significance religious *affiliation* (though not strength of religious belief and/or behavior) influences disappear once the authors controlled for demographic differences. Call and Heaton continued to find significant results in cases where the spouses differed in church activities, because "joint socialization in religious teachings that support family values and stability affirm the importance of marriage and family," and "joint participation in friendship networks provides a greater potential for interaction with friends in a context that generally supports positive communication between spouses."¹⁴⁸

6. The Rationale for Community Involvement

Does the community become involved to strengthen marriages—advancing the individual goals of the couple—or is the relationship more circular than that—one where marriages also strengthen the community? Some historical context will be useful here, too, since marriages historically were so integral to the passing on of land and creation of wealth.¹⁴⁹

Is community involvement and participation necessary for a strong marriage? The sociological evidence reported above suggests that frequent contact with support mechanisms, family, and community helps marriages. We will see that covenant marriage provides traditions after the marriage ceremony itself that encourage such participation, but we can see how the modern emphasis on autonomy and mobility work against involvement except when the married ask for it. Children somehow turn marriages into communities.¹⁵⁰ Many studies have noted that the dissolution rate, which includes divorce and separation, falls during the first two years after the first childbirth to married couples.¹⁵¹ The interesting question for this paper is why that occurs. The obvious reasons include a sense of responsibility,¹⁵²

148. *Id.*

149. See generally GLENDON, *THE NEW FAMILY*, *supra* note 20; Langbein, *supra* note 99.

150. Teresa Stanton Collett, *Marriage, Family and the Positive Law*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y 467, 476 (1996). See POPE JOHN PAUL II, *FAMILIARIS CONSORTIO* (U.S. Catholic Conference 1982) ("On the Role of the Christian Family in the Modern World").

151. See e.g., Linda J. Waite et al., *The Consequences of Parenthood for the Marital Stability of Young Adults*, 50 AM. SOC. REV. 850, 854-55 (1985).

152. See GLENDON, *RIGHTS TALK*, *supra* note 45 and accompanying text; Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 25 (1990).

inculcation of altruism,¹⁵³ cost of childcare,¹⁵⁴ or joy in creation.¹⁵⁵ Perhaps a more subtle reason is that children teach us to give unconditionally and to think of others first. Their presence insures a more permanent relationship between the adults involved (since parenting will go on after divorce, even if marital relations do not).¹⁵⁶ Hence, two of the three conditions we ascribe to the covenantal nature of families are present even without outside involvement.

III. COMPARISONS BETWEEN COVENANTAL AND CONTRACT-LIKE RELATIONSHIPS

Two legal doctrines limit the concept of marital communities and have their source in other family law values: autonomy and pluralism. Parental autonomy is now constitutionally protected by *Troxel v. Granville*¹⁵⁷ as a liberty interest and will operate to keep third parties, including the state, from interfering in ongoing family relationships.¹⁵⁸ This liberty interest closely parallels the limitations set by the First Amendment: separation of church and state.¹⁵⁹

The other limitation on culturally bound community is pluralism. Sometimes laws designed to fit the covenantal relationships of most simply will not do for groups with cultural differences. For example, when Brinig and Nock began comparing kinship care to transracial adoption, data limitations (the small number of black children adopted by white parents) in their sample moved them instead to compare foster care with adoption, for all children and for black children and black parents who care for them. During the time frame for the study, the National Longitudinal Study of Adolescent Health, done at the Carolina Population Center at the University of North Carolina, found many of the black children who were cared for by nonparents, at least half of all black children nationally, were

153. See Brinig & Buckley, *supra* note 96, at 393.

154. Andrew Cherlin, *The Effect of Children on Marital Dissolution*, 14 DEMOGRAPHY 265 (1977).

155. Anthony T. Padovano, *Marriage: The Most Noble of Human Achievements*, 238 CATH. WORLD 140, 141 (1995).

156. See JUNE CARBONE, FROM PARTNERS TO PARENTS 239–240 (2000).

157. 530 U.S. 57, 72 (2000).

158. See Margaret F. Brinig, *Troxel and the Limits of Community*, 32 RUTGERS L.J. 733, 734 (2001).

159. Compare *Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (preventing the State from compelling Amish parents to cause their children to attend formal high school to age sixteen), and *Kilgrow v. Kilgrow*, 107 So.2d 885, 889 (Ala. 1958) (holding that an equity court lacked jurisdiction to intervene in an ongoing family dispute as to a child's attendance at parochial or public school).

being cared for by kin.¹⁶⁰ For these children, then, the comparison was between kinship care and adoption (by black parents, related or not). What we have found empirically is that foster care does not compare favorably with adoption for any children, regardless of race. Adopted children, regardless of race, perform about as well as children remaining with biological families. But foster children do worse on both internal (depression and morbidity) and external (substance abuse and juvenile delinquency) measures. The differences are statistically significant and the coefficients are large.

We also discovered that, to our surprise, kinship care has different consequences for children of different racial (or cultural) groups. For African-American children, kinship care cannot be statistically distinguished from living with a birth family or being adopted. (See Table 1). Not surprisingly, it is African-Americans who claim a long tradition of reliance on extended families in times of crisis. The children were identified as living in kinship care if they were not living with a parent, but indicated that either their aunt or their grandmother took the place of their mother. Children who mentioned no biological, foster, or adopted parent were asked if anyone in the household acted in that role. Grandparents and aunts were the overwhelming choices in such circumstances. We designated all 472 such situa-

160. See generally J. Richard Udry, Jo Jones, & Peter S. Bearman, Carolina Population Center, The National Longitudinal Study of Adolescent Health Research Design, at <http://www.cpc.unc.edu/projects/addhealth/design.html> (last modified Nov. 8, 2002) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). The description, found on their website, reads as follows:

Add Health is a school-based study of the health-related behaviors of adolescents in grades 7–12. It has been designed to explore the causes of these behaviors, with an emphasis on the influence of social context.

That is, Add Health postulates that families, friends, schools and communities play roles in the lives of adolescents that may encourage healthy choices of activities or may lead to unhealthy, self-destructive behaviors. Data to support or refute this theory were collected in surveys of students, parents, and school administrators.

The Add Health study was funded by the National Institute of Child Health and Human Development (NICHD) and 17 other federal agencies. Fieldwork was conducted by the National Opinion Research Center of the University of Chicago.

Id.

A description of the research design can be found at <http://www.cpc.unc.edu/projects/addhealth/resdesign/index.htm> (last modified Apr. 17, 1998) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). The URL for the study is at <http://www.cpc.unc.edu/projects/addhealth/datasets.html> (last modified May 8, 2003) (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

tions as “kinship care.” We had no way of knowing whether the living situation was formalized through a guardianship designation or through payments to the kin caregivers through the foster care system. We know, however, that the adolescents we identified as living with kin did not describe their relationships primarily as “foster care” or “guardianship.”

For other racial (or cultural) groups, kinship care produced effects that resemble those of foster care, a much less cheerful picture (See Table 1). These children, depending on their race, were more depressed, more likely to be delinquent, more likely to use alcohol, tobacco, and marijuana and more likely to fear early death or being killed than children living with birth or adoptive parents.

Community matters when we talk about relationships. The power of custom, convention, ritual, and social norms cannot easily be replaced by individual bargains or personal commitments. We are now able to demonstrate this point convincingly by comparing two seemingly similar intimate unions: marriages and informal (cohabiting) relationships. What is wrong with informal relationships? Many legal scholars presume nothing is amiss. For example, while the rules governing sharing appearing earlier in the American Law Institute Principles were primarily designed to function in marriage,¹⁶¹ the domestic partnership rules¹⁶² assume they can apply equally well in relationships that are “exchange” in nature, most often impacting heterosexual cohabitants, as well as regulating dissolutions of same-sex partners or partners in void marriages, and discounting those who do not want marriage-like relationships (as is true for some same-sex couples).

The cohabiting relationship itself is qualitatively different from marriage.¹⁶³ To some couples this may be exactly what they wanted. Couples who cohabit, though they may boast of the strength of their love, as the song tells us, express less interdependence than typical married couples.¹⁶⁴ In the United States,

161. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 104, at ch. 4–5.

162. *Id.* at ch. 6.

163. This set of effects is hard to sort out. Do couples cohabit because they are precisely the sort who are less likely to be dependent upon one another, or does causation work the other way?

164. Laura Nyro, *Wedding Bell Blues*, on TIME AND LOVE: THE ESSENTIAL MASTERS (Sony 2000) (stating “I love you so, I always will And though devotion rules my heart I take no bows Oh Bill you know I wanna take my wedding vows”). Whether the couple in the song are cohabiting as opposed to just in love is unclear from the lyrics. See also the statement in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (Opinion of the Trial Court on Remand, Superior Court

at any rate, social class, measured by educational attainment and economic standing, does much to determine those who cohabit rather than marry. Among 19–44 year old women, nearly sixty percent of high school drop-outs cohabited compared to under thirty-seven percent for college educated women.¹⁶⁵ The strong health effects seen by married couples—especially men, though women, too—are not as pronounced.¹⁶⁶ Sex is reportedly not as good for cohabiters.¹⁶⁷ Fathers are less likely to stay involved with their children, or to support them when child and father live apart.¹⁶⁸

From a positive perspective, we can argue that the institutional form of the relationship—marriage—augments bonding with wives and daughters that comes naturally to fathers of sons. From a pessimistic viewpoint, father absence because of the break-up of cohabiting may have the unintended effect of further disadvantaging girls as compared to boys. Our evidence for these lines of reasoning is a new paper by Lundberg and Rose¹⁶⁹ which suggests that although men respond with more work and higher wages at the birth of a child, they do so significantly more

of Los Angeles County (1979)), reprinted in CARL E. SCHNEIDER & MARGARET F. BRINIG, *AN INVITATION TO FAMILY LAW* 501, 504 (2d ed. 2000):

On cross-examination, plaintiff testified that they were “always very proud of the fact that nothing held us. We weren’t—we weren’t legally married.” After the breakup she declared to an interviewer: “We used to laugh and feel a great warmth about the fact that either of us could walk out at any time.”

Id.

165. Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children’s Family Contexts in the United States*, 54 *POPULATION STUD.* 29, 32 (2000); see also Pamela J. Smock & Sanjiv Gupta, *Cohabitation in Contemporary North America*, in *JUST LIVING TOGETHER* 53, 61–62 (Alan Booth & Ann C. Crouter eds., 2002).

166. Amy Mehraban Pienta et al., *Health Consequences of Marriage for the Retirement Years*, 21 *J. FAM. ISSUES* 559, 580–581 (2000) (finding that the “benefits of marriage reflect advantages” in “key health domains” such as “chronic diseases, impairments, functional problems, and disability”); see also Susan L. Brown, *Child Well-Being in Cohabiting Families*, in *JUST LIVING TOGETHER* 173, 175 (Alan Booth & Ann C. Crouter eds., 2002) (stating that the psychological well-being, in terms of depression, of cohabiters is worse than for marrieds).

167. Cf. Linda J. Waite & Kara Joyner, *Emotional Satisfaction and Physical Pleasure in Sexual Unions: Time Horizon, Sexual Behavior, and Sexual Exclusivity*, 63 *J. MARRIAGE & FAM.* 247, 261 (2001) (finding that “both emotional satisfaction and physical pleasure from sex are greater for men and women who expect their relationship to last”).

168. Wendy D. Manning, *The Implications of Cohabitation for Children’s Well-Being*, in *JUST LIVING TOGETHER* 121, 143 (Alan Booth & Ann C. Crouter eds., 2002).

169. Shelly Lundberg & Elaina Rose, *The Effects of Sons and Daughters on Men’s Labor Supply and Wages*, 84 *REV. ECON. & STAT.* 251 (2002).

in response to births of sons than to the births of daughters. The authors stated, “[O]ur results are consistent with a model in which the gender composition of a couple’s offspring affects the returns to marriage.”¹⁷⁰ They found no difference of an effect of child gender on the labor market outcomes of mothers.

While we suspect that many of the undesirable features we have detailed above come from cohabitation itself, we know proving our guess will require a hard sell. To begin with, studies in the United States simply have not collected the right data.¹⁷¹ Empirically, causation is difficult to tease out.¹⁷² For example, did a couple cohabit (and then divorce) because they were less dependent on each other, or did the smaller degree of interdependence cause the instability (or both)? Or did the cohabitation produce some other effects that led to unhappiness, but in a case where divorce would have been practical only if the couple were not dependent?

Why might marriage work when *not* preceded by cohabitation? There are a number of reasons marriage might be more successful when the spouses did not cohabit first. One we can

170. *Id.* at 251.

171. Some questions that we would like answered in addition to those currently on the National Survey of Families and Households include:

If you answered yes to whether you cohabited with your spouse prior to marriage, for how long? Were you already engaged when you moved in together? Did you anticipate you’d be marrying even though you had made no formal pledge? How long did you live together prior to marriage? What made you decide to get married? When did you decide to marry? Which of you first proposed getting married? Did you cohabit because you were unsure whether you wanted to marry? Have you ever cohabited with someone other than your spouse? Why did your relationship end? Did you decide that you’d found out too many things about the other person, or about your relationship, to make a marriage work? Did you simply tire of each other? Did you receive any financial settlement from that other relationship? How did your relationship change when you got married?

172. See, e.g., Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, 26 DEMOGRAPHY 615, 624 (1989) (concluding that a “number of background variables affect the propensity to cohabit”); Neil G. Bennett et al., *Commitment and the Modern Union: Assessing the Link Between Premarital Cohabitation and Subsequent Marital Stability*, 53 AM. SOC. REV. 127, 136 (1988) (stating that “evidence is too indirect and fragmentary to pinpoint the precise cause of higher marital dissolution rates among cohabitators”); William G. Axinn & Arland Thornton, *The Transformation in the Meaning of Marriage*, in THE TIES THAT BIND 147 (Linda J. Waite ed., 2000); Bumpass & Lu, *supra* note 165; Smock & Gupta, *supra* note 165, at 59–60 (reviewing other studies).

discard out of hand in this era, for the vast majority of cases, is that the couple saved sexual intimacy until marriage.¹⁷³

It might be that the novelty of a couple's new life together outweighs the strain of adjustment to marriage. Thus the honeymoon was a time set apart to explore each other sexually but also to begin the process of adjusting to living with a new person. In various accounts of newlyweds, we hear of them setting up their new things and feeling as though they are "playing house."

Marriage, unlike cohabitation, also signifies commitment to a decision to in some ways scrap one's individuality for a new identity and responsibilities.¹⁷⁴ At this point each spouse views the other as someone whose well-being must always be taken into account. Further (and obviously circular in a discussion of why marriage should be given legal protection), the marriage, in this respect like a corporation, becomes a legal person, an identity.

From a sociological perspective, cohabitation is not a social status, while marriage is. Once married, the same people on the outside, such as parents, friends, and employers, treat the couple differently. That difference may be a problem for couples who cohabit first, but it will not be for those who directly enter marriage.

If relationships are envisioned developmentally, we may expect that early experiences inform and influence subsequent ones. The evidence from the United States suggests that the early experiences of cohabitation may establish relationship trajectories that conflict with the expectations of legal marriage. The most obvious way in which American cohabitation might do this is by fostering greater individuality or independence while discouraging commitment. American cohabitators, in fact, are more independent, more egalitarian in who does what in the household, and less committed to conventional systems of beliefs about lifelong marriage. Marriage, on the other hand, is well defined in American culture and law, and the elements that constitute American marriages¹⁷⁵—pledge of lifetime commitment, dependency, childbearing, etc.—differ notably from the typical pattern observed among cohabiting couples.

Most heterosexual cohabiting couples fall into one of two groups. They may be on their way to marriage,¹⁷⁶ in which case

173. See NORVAL GLENN & ELIZABETH MARQUARDT, INSTITUTE FOR AMERICAN VALUES, *HOOKING UP, HANGING OUT, AND HOPING FOR MR. RIGHT* 13 (2001).

174. See Nock, *Commitment and Dependency*, *supra* note 1; NOCK, *MARRIAGE IN MEN'S LIVES*, *supra* note 1, at 51–59.

175. See Nock, *Commitment and Dependency*, *supra* note 1.

176. See Bumpass & Sweet, *supra* note 172, at 615.

the abolition of heartbalm actions¹⁷⁷ by legislatures and common law suggests a public policy to treat them differently from married persons.

Another set of couples affirmatively wishes to reject marriage.¹⁷⁸ As Canadian academic Nicholas Bala writes: "The motivations for living together outside of marriage are complex, but these relationships frequently arise because one party (often the man) is unwilling to make the commitment of marriage and does not want to undertake the legal obligations of marriage."¹⁷⁹ The Comments to the American Law Institute's Principles of the Law of Family Dissolution note that Chapter 6 on Domestic Partnerships "diminishes the effectiveness of that strategy" of avoiding responsibility.¹⁸⁰ To the extent that the goal of other chapters involving property distribution and "compensatory payments" is to encourage specialization between spouses and investment in the family,¹⁸¹ applying the same principles to dissolving domestic partnerships flies in the face of reality: cohabiting couples are less specialized than married couples, are less interdependent, and have far more embedded equality goals.¹⁸²

On the other hand, couples can be in relationships featuring permanence, which encourages unconditional love. At this point we have what "looks like" a family: people who are committed to each other over the very long time horizon and who are giving to each other without an expectation of immediate return (or perhaps any return). In Steve Nock's terminology, they are living in the past and future, in a world of debts and futures, rather than the present.¹⁸³ At this point, society (the community, meaning the religious community, the state, and even

177. See generally Miller v. Ratner, 688 A.2d 976 (Md. Ct. Spec. App. 1997); Margaret F. Brinig, *Rings and Promises*, 6 J.L. ECON. & ORG. 203 (1990).

178. See Bumpass & Sweet, *supra* note 172, at 615; PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 104 at § 6.02, cmt.a.

179. Nicholas Bala, Book Review, ISUMA, Summer 2001, at 140, 141-142 (reviewing MARGARET BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY (2000)).

180. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION, *supra* note 104, at 916.

181. See Ira Mark Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1, 40-48 (1989); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953, 988-89 (1991); Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L. J. 2423 (1994); Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35 (1978).

182. Nock & Brinig, *Weak Men*, *supra* note 43, at 208.

183. See Steven L. Nock, *Turn-Taking as Rational Behavior*, 27 SOC. SCI. RES. 235, 239-41 (1998) [hereinafter Nock, *Turn-Taking*].

extended families) will act to support the family.¹⁸⁴ There will be laws promoting families¹⁸⁵ giving constitutional rights, as in *Troxel v. Granville*,¹⁸⁶ and protecting the entity from outside assault.¹⁸⁷ There will be benefits that flow from being in such a family¹⁸⁸ and obligations that “are the threads from which intimacy is woven.”¹⁸⁹ The members of the family live in covenant.

Cohabiting partners thus have less commitment to each other than do married spouses¹⁹⁰ and are more likely to think in terms of short-term rather than long-term consequences. In fact, cohabitation is usually an exchange relationship, which produces less satisfaction¹⁹¹ than one taking an “internal stance”¹⁹² central to a meaningful interpersonal relationship. In marriage, a relationship centered upon short-run gains signals instability.¹⁹³

IV. COVENANTAL MARRIAGE EXPLORED: AN EMPIRICAL INVESTIGATION

As we noted earlier, secular law cannot enforce the personal commitment embodied in a marriage covenant. But law may celebrate and encourage covenant, as it may any culturally valued principle. The most conspicuous example of such a trend is the legal innovation known as covenant marriage. Covenant marriage is the clearest example yet of a developing trend in the United States that considers the benefits of marriage and costs of divorce from new perspectives. A stable two-parent family long has been the goal of much public policy and law, and policymakers increasingly view promoting marriage and discouraging divorce as legitimate public policy objectives.¹⁹⁴ Likewise, aca-

184. See Brinig, *Family Franchise*, *supra* note 1.

185. See Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1997).

186. 530 U.S. 57 (2000).

187. For example, consider the household exemption from bankruptcy and the “family estate” or tenancy by the entireties that shields marital property from creditors.

188. *E.g.*, VT. STAT. ANN. tit. 15, § 1204(c) (2000) (Vermont Civil Union Legislation).

189. Nock, *Turn-Taking*, *supra* note 183, at 243.

190. Nock, *Commitment and Dependency*, *supra* note 1, at 53.

191. Gary L. Hansen, Moral Reasoning and the Marital Exchange Relationship, 131 J. SOC. PSYCH. 71 (1991).

192. REGAN, *supra* note 28, at 24.

193. Margaret F. Brinig, *The Influence of Marvin v. Marvin on Housework During Marriage*, 76 NOTRE DAME L. REV. 1131, 1336–1339 (2001).

194. A review and discussion of federal and state efforts in regards to families and households is provided by Karen Bogenschneider, *Has Family Policy Come of Age? A Decade Review of the State of U.S. Family Policy in the 1990s*, 62 J. MARRIAGE & FAM. 1136, 1147–48 (2000). The National Conference of State

demics are now engaging in diverse debates about the meanings of contemporary marriage and family life and shifts in family law.¹⁹⁵ The poles of the debate range from the view that marriage is a failing or dying institution¹⁹⁶ to the view that the United States and other Western nations are simply facing family reorganization in response to new economic, technological, and cultural realities.¹⁹⁷

Legal covenant marriage is based on the premise that many individual and social problems caused by marital dissolution can be lessened by helping people take their marriage vows more seriously and by making divorce somewhat more difficult to obtain. The obvious question, therefore, is whether this public policy has any such demonstrable effect.

Here we summarize some of the findings of an original study designed to evaluate the implementation and consequences of the covenant marriage legislation. Our findings are based on interviews with state elites, clerks of court, clergy, and individuals who entered both covenant and standard marriages in 1998.¹⁹⁸

Legislatures reviews such efforts at <http://www.ncsl.org/programs/cyf/marriagefact.htm> (last visited Jan. 26, 2004) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). For a review of such efforts throughout the United States, see Mary Parke and Theodora Ooms, *More Than a Dating Service? State Activities Designed to Strengthen and Promote Marriage*, CLASP POLICY BRIEF 1 (Center for Law and Social Policy, Policy Brief, Couples and Marriage Series No. 2, 2002) available at http://www.clasp.org/DMS/Documents/1034879939.91/Marriage_Brief2.pdf (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

195. See, e.g., LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000); Scott Coltrane, *Marketing the Marriage 'Solution': Misplaced Simplicity in the Politics of Fatherhood*, 44 SOC. PERSP. 387 (2001); Elizabeth Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225 (1998).

196. See George Gilder, *The Myth of the Role Revolution*, in GENDER SANITY 239-41 (Nicholas Davidson ed., 1989); David Popenoe, *American Family Decline, 1960-1990: A Review and Appraisal*, 55 J. MARRIAGE & FAM. 527, 527-42 (1993).

197. See FRANCES K. GOLDSCHIEDER & LINDA J. WAITE, *NEW FAMILIES, NO FAMILIES? THE TRANSFORMATION OF THE AMERICAN HOME* 1-6 (1991); JUDITH STACEY, *In the Name of the Family: Rethinking Family Values in the Postmodern Age* 6-11 (1996); Judith Stacey, *Good Riddance to 'the Family': A Response to David Popenoe*, 55 J. MARRIAGE & FAM. 545, 545-547 (1993).

198. Nock conducted personal interviews with Rep. Anthony Perkins (Republican State Representative for District 64 and co-sponsor of the initial covenant marriage legislation in 1996) in May, 1998. Nock has conducted two interviews with Katherine S. Spaht, author of the legislation, over the course of the past four years. Spaht is a member of our advisory board on the research project and is in frequent contact with Nock. Trained graduate student research assistants conducted a total of fifty-six interviews with court clerks and an additional seventy-three interviews with members of the clergy in 1999. The same clerks were re-interviewed in spring of 2001. All interviews have been con-

There is obviously no way to prove that the choice of a covenant marriage actually causes different outcomes. First, we cannot conduct a randomized experiment in which half of all couples are assigned to covenant and the other half standard marriages (a design usually regarded as providing the best evidence of cause and effect). And second, there are enormous differences between the types of people who select one or the other form of marriage. These “selection” differences create different patterns when the two groups are compared.

To help deal with the obvious differences that exist between the two groups of couples, we designed the study to allow us to consider how individuals change over time. Thus, our focus is on change between the first round of surveys (at about four to six months of marriage) and the second (at the end of two years of marriage) on each issue studied. We compare men and women in each type of marriage in terms of their rates of change, and not in terms of their average differences.¹⁹⁹

Our focus on change is noteworthy. When change in one dimension produces change in another, this is the strongest statistical evidence available for cause and effect, short of a true randomized experiment. We are unable to specify which change came first in this analysis, however. Accordingly, we simply note that a causal connection between the factors investigated plausibly exists. That is, we do not know why exactly couples selected covenant versus standard marriage. It is possible that the same factor, say, religiousness of the parents of each spouse, both influences the tendency to select covenant marriage and, for example, increased religiosity several years after marriage. We control for this as best we can by holding the religiosity of each spouse during the first wave constant when we consider the difference between covenant and standard marriages in the second wave.

As we will show, covenant couples change in uniformly positive directions as they adjust to marriage. Standard couples also change, but not as much, and not uniformly in positive directions. Thus, it isn't surprising that covenant couples are more apt to respond positively to the statement: “Marriage is an

ducted with structured questionnaires and transcriptions (or detailed notes) and filed in the offices of Marriage Matters at the University of Virginia.

199. The simple difference-of-differences regression approach (technically static-score regression) takes the score of a scale at the second wave (two years of marriage) as our dependent variable, and the score of the same scale at the first wave (six months of marriage) as a control. The control for the value at Wave 1 means that any unexplained variation is change. We then ask whether the type of marriage explains such differences.

unbreakable covenant with God, not just a legal contract." After all, they have selected a marriage type called covenant that required them to sign a statement to the effect that marriage was permanent, they have undergone significant counseling (usually by a member of the clergy), and will have substantial obstacles placed in their way should they seek a divorce. What is interesting is that these couples feel *more* strongly about the concept three years into marriage, and that the difference in how they feel is significantly greater than the difference in how the standard marriage couples feel about the same statement.

We rely on original data collected in the past three years from scientific samples of individuals married in the state of Louisiana in 1998–99. Half of such couples entered covenant marriages and half standard marriages. The data are from the first two waves of a 5-year study of newlywed couples who married in Louisiana in 1998–2000. The sample selection criteria consisted of two steps. First, 17 out of 60 parishes (counties) were selected randomly and proportionate to size. Second, from these 17 parishes, all covenant marriage licenses and the matched standard marriage licenses filed next to the covenant licenses were drawn. From this sample of marriage licenses, we used listed information about the couple, couples' parents, marriage officiator and witnesses to find the couple's location and telephone recruit them into the 5-year mail questionnaire study. The result was a scientific sample of new marriages in the state, half entered as covenant and half as standard marriages.²⁰⁰

For this study, we use a sample of married partners who completed both waves of questionnaires. In the first wave, 584 husbands and 686 wives responded. Eighteen months later, 494 of these husbands and 585 of the wives did.

This analysis relies on the 494 husbands (230 covenant, 264 standard) and 585 wives (274 covenant, 311 standard) who provided both waves of information. Covenant couples are somewhat older than their standard counterparts. The mean ages of covenant husbands and wives are 30 and 28 respectively, while

200. Of the 1,714 licenses that were validly part of our sampling frame, 218 couples were never found or confirmed and 105 refused to participate in the study. We eventually confirmed 1,310 couples (potentially 2,620 individuals) for a confirmation rate of 76.4%. Our response rate for the mail survey is 60% (1,572 of 2,620 individuals actually contacted). The response rate for the second-wave questionnaire was 92% excluding the couples that divorced or separated between waves. This 92% response rate included respondents either interviewed via mail survey questionnaires (the preferred method) gleaned about a 75% response rate, and telephone interviews with mail survey non-respondents (moving us from a 75% to a 92% response rate).

the mean ages of standard husbands and wives are 33 and 30. The difference in age is statistically significant. There are not, however, racial or ethnic differences between the two types of couples. The racial/ethnic composition of our covenant married sample is 9.5% both black, 80.1% both white, and 10.4% with other racial/ethnic combinations. For our standard married sample, 12.9% spouses are both black, 74.9% are both white, and 12.2% are other racial/ethnic combinations. The difference in racial composition between the covenant and standard married couples is not significant.

A. *Who Gets a Covenant Marriage?*

The initial purpose of assembling these data was to determine selection differences between those who sought a more rigorous marriage regime and those who did not. The Louisiana General Assembly passed covenant marriage in 1997. It authorizes couples seeking marriage to enter one of two legal forms now available in the state (similar to Arizona²⁰¹ and Arkansas²⁰²). Covenant marriage requires that a couple receive counseling about *the lifelong commitment being made*, *the seriousness of marriage*, *the obligation to seek counseling* should problems arise, and the *more restrictive grounds for divorce* (fault-based or extended waiting periods). The couple must also execute a 'declaration of intent' stating that they know all the relevant information needed about their partner, that they have received counseling,²⁰³ and that they pledge to seek counseling should problems arise in their marriage.²⁰⁴ Finally, the couple must agree that a divorce will be granted under the terms of a covenant marriage only. This requires proof of fault on one party's part (adultery, conviction of a felony leading to death or life in prison), physical or sexual abuse of the other partner or a child, abandonment, or a two-year separation (versus six months in standard Louisiana marriages).²⁰⁵

As anticipated, those who select covenant marriages are different from those who do not in many ways. We have spent con-

201. ARIZ. REV. STAT. § 25-901 (1998).

202. ARK. CODE ANN. § 9-141-201 et seq. (Michie 2002).

203. LA. REV. STAT. ANN. § 9:273(A)(2)(a) (West Supp. 1998) (requiring mandatory premarital counseling).

204. LA. REV. STAT. ANN. § 9:273(A)(1) (West Supp. 1998) (requiring Declaration of Intent that if problems arise in the marriage, spouses will take all "reasonable efforts to preserve [the] marriage, including marriage counseling").

205. LA. REV. STAT. ANN. § 9:307 (West Supp. 1998) (limiting grounds for divorce to misconduct by a spouse or two years living separate and apart).

siderable time investigating this issue and have discovered several prominent dimensions in which the two types of couples differ most obviously. Covenant couples have marginally higher levels of completed education, are more politically conservative, are more religious, are more likely to seek and receive marriage counseling, and have more support (in terms of approval of the marriage, and for help and assistance).²⁰⁶ Covenant couples are less likely to have cohabited before marriage. They are also more likely to rely on more pro-social forms of communication and conflict resolution (i.e., they are less likely to engage in destructive or hostile forms of conflict resolution such as avoidance, sarcasm, or hostility).²⁰⁷

B. *Are Covenant Marriages More Covenantal?*

Do couples that enter legal covenant marriages have more covenantal relationships, as we have defined that term in this paper? As seemingly simple as the question appears, there are difficulties involved in answering it. The most challenging difficulty is how one might know whether or not a relationship involves such things as unconditional love, permanence, or witness. Our approach involves the development of various indicators of each of these three concepts. We argue that while none of our indicators is, itself, sufficient to indicate the presence or absence of one of these concepts, together they provide clues that allow us to infer the plausible presence or absence of each. In short, we consider several measures of permanence, of unconditional love, and of witness and compare how they change over time in the lives of covenant and standard partners.

1. Permanence

We begin with the concept of permanence. To measure this concept we rely on two related dimensions. First, we assess each individual's level of *commitment* to his or her marriage. The scale we use treats commitment as the imagined consequences of ending the relationship. The individual who perceives no consequences to ending her marriage is, relatively, uncommitted to it. The person who perceives great costs to ending his or her marriage is, therefore, more committed to it.²⁰⁸

206. See generally Laura Sanchez et al., *Setting the Clock Forward or Back? Covenant Marriage and the Divorce Revolution*, 23 J. FAM. ISSUES 91-120 (2001).

207. See Laura Sanchez et al., *Covenant Marriage Turns Five Years Old*, 10 MICH. J. GENDER & L. (forthcoming 2003).

208. Measures: Commitment is measured as the perceived costs of ending a relationship. This measurement strategy is consistent with economic perspec-

The second indicator of permanence consists of thoughts and *beliefs about having children*.²⁰⁹ Our presumption is that such beliefs provide an indication of the perceived permanence of the marriage. Those who express no concerns about having children are presumably more convinced of the enduring nature of the marriage. A series of questions were asked to measure worries and concerns about having children, anticipated benefits of having children, and anticipated sacrifices of having children.

2. Unconditional Love

To capture the concept of unconditional love, we focus on two core dimensions. First, we consider the overall *quality of the*

tives on commitment as a source of consistency in a line of action. Five questions are used to create a scale of commitment. "Even though it may be very unlikely, think for a moment about how various areas of your life might be different if you separated. For each of the following areas, how do you think things would change: a) your standard of living, b) your social life, c) your career opportunities, d) your overall happiness, e) your sex life, f) being a parent." Answers: 1 = Much worse, 2 = Worse, 3 = Same, 4 = Better, 5 = Much better. Range = 5 to 25. *n.b.* Higher scores indicate lower levels of commitment. Means (averages): Husband first six months and at three years, 11.7 and 12.1; Wife first six months and at three years, 11.4 and 11.7.

209. Measures: A long series of questions about children was asked. The series began with this statement: "Below is a list of things that some people consider when thinking about having a child, or another child. For each item in the list, please tell us how important it is to you in your thinking about whether to have a child, or another child at the present time. Circle the number between 1 and 5, where 5 means the issue is *Very Important* and 1 means the issue is *Not Important at All*." The answers were factor-analyzed, and three scales were produced. The labels for these scales are approximate and reflect nothing more than the apparent themes of the items in them.

1. Worries/concerns about having children. a) Uncertainty about how fairly parenting tasks will be shared, b) Having time and energy for my career, c) Uncertainty about whether my marriage will last, d) Being able to have an equal division of household tasks, e) Having someone to care for me in old age. Range = 5 to 25. Means (averages): Husband first six months and at three years, 12.2 and 12.3; Wife first six months and at three years, 12.7 and 12.5.

2. Benefits of having children. a) Having someone to love, b) My partner's thoughts about having a child, c) Being appreciated and respected, d) Living according to the rules of my faith, e) Having a complete and happy family life. Range = 5 to 25. Means (averages): Husband first six months and at three years, 12.2 and 12.3; Wife first six months and at three years, 18.0 and 17.6.

3. Sacrifices of having children. a) Uncertainty about my ability to support a child, b) The stress and worry of raising children, c) Being able to make major purchases, d) Being able to buy a home or better home, e) My age. Range = 5 to 25. Means (averages): Husband first six months and at three years, 16.8 and 16.5; Wife first six months and at three years, 17.0 and 16.3.

marriage.²¹⁰ This measure taps such key domains as agreement, expressions of affection, satisfaction with various aspects of the relationship, and sharing. Our presumption is that unconditional love is associated with higher levels of each.

The second measure of unconditional love is the centrality of marriage, *per se*, to the relationship.²¹¹ This scale is designed

210. Measures: Dyadic Adjustment Scale (Graham B. Spanier, *Measuring Dyadic Adjustment: New Scales for Assessing the Quality of Marriage and Similar Dyads*, 38 J. MARRIAGE & FAM. 15 (1976)). Subscales included the following.

1) Consensus: "Please indicate the extent of agreement or disagreement between you and partner for each item on the following list:" a) Handling family finances, b) How we spend our leisure time, c) Religious matters, d) My friends, e) My partner's friends, f) Philosophy of life, g) Dealing with parents and in-laws, h) Our aims and goals, and things believed important, i) The amount of time we spend together, j) Who does what around the house, k) Career decisions. Answers were: Always agree = 5, Almost always agree = 4, Sometimes disagree = 3, Frequently disagree = 2, Almost always disagree = 1, Always disagree = 0. Range = 0 to 55. Means (averages): Husband first six months and at three years, 43.6 and 42.9; Wife first six months and at three years, 42.2, 43.4.

2) Affection: "Extent of agreement or disagreement between you and partner (see above) about: a) Showing physical affection, b) Our sex life, and c) Amount of agreement with the statement: I love my partner." Answers were: Strongly agree = 5 to Strongly disagree = 1. Range = 1 to 15. Mean (averages): Husband first six months and at three years, 8.1 and 7.7; Wife first six months and at three years, 8.2 and 7.8.

3) Satisfaction: "About how often do you personally: a) Consider ending your marriage? b) Leave the house after a fight? c) Think that things between you and your partner are going well? d) Confide in your partner? e) Regret that you got married? f) Quarrel? g) Get on each other's nerves? h) Kiss?" Answers: All the time = 0, Most of the time = 1, More often than not = 2, Occasionally = 3, Rarely = 4, Never = 5. "Compared to other marriages you know about, would you say your marriage is:" Answers were: Much worse than most = 0, Somewhat worse than most = 1, About the same as most marriages = 2, Somewhat better than most = 3, Much better than most = 4. Range = 0 to 44. Mean (averages): Husband first six months and at three years, 35.7 and 35.2; Wife first six months and at three years, 35.7 and 35.0.

4) Cohesion: "How often do you and your partner: a) Engage in outside interests together? b) Have a stimulating exchange of ideas? c) Laugh together at something? d) Calmly discuss an issue? e) Work together on a project?" Answers were: Every day = 5, Several times a week = 4, Weekly = 3, Sometimes = 2, Rarely = 1, Never = 0. Range = 0 to 25. Mean (averages): Husband first six months and at three years, 18.4 and 17.0; Wife first six months and at three years, 17.9 and 16.8.

211. Measures: "Please indicate whether you Strongly agree (= 5), Agree (= 4), Neither agree nor disagree (= 3), Disagree (= 2), OR Strongly disagree (= 1) with each of the following questions about marriage and divorce: a) No matter how successful he is, a man is not truly complete as a person unless he is married, b) No matter how successful she is, a woman is not truly complete as a person unless she is married, c) Being married is one of the most important things in life, d) Marriage is an unbreakable covenant with God, not just a con-

to measure the centrality accorded an institutional (traditional) view of marriage by husbands and wives. It taps the extent to which spouses see their relationship as something more than a two-person partnership. It was constructed by assembling questions pertaining to the centrality of marriage in life, the centrality of children in marriage, the life-long commitment implied by marriage vows, and the sacred nature of wedding vows. We believe that those who experience marriage as an entity, who accord importance to the status itself, and whose focus extends beyond the individualistic concerns of each partner, embody unconditional love as we have described it above.

3. Witness of God and/or Community

This is probably the most elusive and challenging aspect of covenant to assess. Since we cannot know directly whether God or a community actually is involved in a relationship, we rely on indirect indicators of such involvement. First, we consider various aspects of the wedding. How many people attended the ceremony? Was the ceremony religious, civil, or both? And to what extent did significant others approve of the couple's plan to marry?²¹² Our clear presumption is that weddings celebrated before more people, and affirmed in a religious ceremony with the clear approval of relatives and friends exhibit greater witness of God and others. To bolster our sense of witness, we also consider various indicators of a couple's expressed degree of *religiousness*.²¹³

tract recognized by the law, and e) Marriage is a lifetime relationship and should never be ended except under extreme circumstances." Range = 5 to 25. Means (averages): Husband first six months and at three years, 16.6 and 16.8; Wife first six months and at three years, 17.2 and 17.9.

212. Measures: Each person in our study was asked (immediately after getting married), "When you and your partner first announced that you were getting married, did the following people generally approve or disapprove of the marriage? What was their reaction when they first learned about your plans to get married? a) Your father, b) Your mother, c) Your partner's father, d) Your partner's mother, e) Your brothers and sisters, f) Your partner's brothers and sisters, g) Your friends, h) Your partner's friends." Answers: Strongly approved = 4, Approved = 3, Disapproved = 2, Strongly disapproved = 1, or Does not apply (excluded from analysis). This same sequence of questions was repeated in each wave. ("Now that you and your partner have been married for a while, do these people generally approve or disapprove of your current marriage?") We added the number of "3" and "4" answers. This provides a rough indicator of the extent of others' approval of the marriage.

213. Measures: Four items (out of a total 10) were included in an index to measure the degree of religiousness. These four were sufficient to capture the variation contained in the others. The four items in the scale are the following:

V. FINDINGS

The tabulated results from our investigation are presented formally in Tables 2 and 3. Here we summarize those findings.

A. *Is There Greater Permanence in Covenant Marriages?*

1. How Committed Are Partners to Their Unions?

Covenant husbands and wives are more committed (more subjectively dependent) on their marriages than their standard counterparts. Covenant wives and husbands start their marriages with higher degrees of commitment than do their standard counterparts. And over the course of the first three years, both covenant husbands and wives become even more committed (by .59 points for wives, .87 points for husbands).

2. Do Couples Have Concerns about Having Children? Do They See Benefits in Having Children? Do They Expect to Make Sacrifices for Children?

There are modest differences between the two types of partners. Covenant wives worry less than standard wives about having children. Covenant husbands see fewer sacrifices than standard husbands from having children. Covenant wives' concerns/worries about children decline more than a point (-1.14) more than standard wives in the first three years of marriage. Covenant husbands' perceived sacrifices as a result of having children decline almost a point (-.88) more than is found for standard husbands.

B. *Is There Greater Unconditional Love in Covenant Marriages?*

1. What Is the Overall Quality of the Marriage?

Covenant couples report better marriages, but only with respect to consensus (agreement), and only when wives do the reporting. There is greater improvement in covenant wives'

a) "About how often do you attend religious services?" Answers were: Never = 0, Once or twice a year or less = 1, Several times a year = 2, About once a month = 3, Nearly every week = 4, Every week or more = 5.

b) "Do you and your partner attend services together?" Answers were: No, never = 0, Yes, from time to time = 1, Yes, usually = 3, Yes, always = 5.

c) "About how often do you pray?" Answers were: Never = 0, Less than once a week = 1, Once a week = 2, Several times a week = 3, Once a day = 4, Several times a day = 5.

d) "How important is religious faith in your life?" Not important at all = 1, Not too important = 2, Somewhat important = 3, Very important = 4, Extremely important = 5. Range = 1 to 20. Means (averages): Husband first six months and at three years, 16.6 and 16.8; Wife first six months and at three years, 17.2 and 17.9.

reports of consensus (by over one point). On the other three measures of marital quality (consensus, affection, and satisfaction) there is no indication of significant differences between covenant and standard partners.²¹⁴

2. How Central is Marriage, Per Se, to the Couple's Relationship? Alternatively, Is Marriage, Itself, Accorded a Role in the Relationship Between the Husbands and Wives?

There are large and consistent differences between the two types of couples. Covenant husbands and wives see their marriage as a central aspect of their lives and personal relationships. They are more likely than standard partners to accord marriage a role in their relationships. Covenant wives' scores increase by almost a point (.81) more than standard wives in the first three years of marriage. Likewise, covenant husbands' scores increase by almost a point (.88) more than standard wives in the first three years of marriage. Interestingly, there are no differences between the two types of couples in the actual number of births during the first two years of marriage.

Covenant marriages were far less prone to end in divorce than were standard marriages: at any given day during the study period, the covenant marriage was only 45% as likely to be disrupted, controlling for all other factors.²¹⁵ Alternatively, the chances of divorce for covenant couples are a little less than half that of standard couples matched on relevant background factors.

C. *Is There Greater Witness of God and/or Community in Covenant Marriages?*

1. How Many People Attended the Ceremony?

Covenant marriages are witnessed by more people than are standard marriages. On average, the covenant ceremonies had 178 people in attendance. The average number at standard ceremonies was 109.

214. This finding may help answer the criticism of feminists concerned that covenant marriage might lead to more abuse simply because exit was more difficult. *See supra* note 6.

215. LAUREN A. SANCHEZ ET AL., CAN COVENANT MARRIAGE FOSTER MARITAL STABILITY AMONG LOW-INCOME, FRAGILE NEWLYWEDS? 18 tbl. 3 (Bowling Green St. Univ., Working Paper Series 03-07, 2003), at http://www.bgsu.edu/or_ganizations/cfdr/research/pdf/2003/2003_07.pdf (last visited Jan. 27, 2004) (on file with the Notre Dame Journal of Law, Ethics & Public Policy). This paper was presented at the National Poverty Center Conference on Marriage and Family Formations Among Low Income Couples: What Do We Know from Research? Georgetown University, Washington D.C., Sept. 4-5, 2003.

2. Was the Ceremony Religious, Civil, or Both?

Covenant weddings are more likely to be celebrated as religious ceremonies. Almost all (97%) of covenant ceremonies were religious compared with 65% of standard marriages (29% of standard, and 1% of covenant marriages were civil ceremonies).

3. Did Significant Others Approve of the Plan to Get Married? Do They Approve of the Marriage Now?

Covenant couples are more likely to have the approval of family and friends. Of the eight possible sources of approval, covenant couples (using the wife's report) reported that 6.9 on the scale reported above approved. Among standard couples, the figure was 6.3.

Over the course of two years, covenant couples report that approval of their marriage improves more than it does among standard couples. On average, approval of covenant marriages by others increases by .24 (wives) and .48 (husbands) points ($F_{sig} < .05$ for each).

4. How Religious Are the Partners?

Covenant husbands and wives are much more religious than their standard counterparts. Covenant wives and husbands are each much more religious than standard wives at the time of marriage. Moreover, over the course of the first two years of marriage, covenant wives and husbands become even more religious.

VI. SUMMARY OF STATISTICAL ANALYSES

The statistical analyses of the first three years of marriage confirm the basic points we made throughout this paper about the meaning of covenant. Based on the measures available, we found that covenant marriages involve greater beliefs and perceptions of permanence, a stronger sense of unconditional love, and witness of God and community.

We found evidence to suggest that covenant partners are more committed to the core ideal of permanence in their relationship. Both spouses express greater commitment, and that commitment increases more in covenant than standard marriages. Finally, there is minimal evidence that covenant partners worry less about children, and perceive fewer sacrifices for having them.

In terms of unconditional love, we found that the overall quality of marriage is similar for the two types of marriages, though wives report that agreement (consensus) between the

partners increases in a covenant marriage. The centrality of marriage itself to the relationship is greater among covenant couples, and it grows stronger in the first years of covenant marriages.

With respect to the witness of God and community, covenant marriages garner greater approval by relatives and friends, and are much more likely to be celebrated in a religious ceremony. Covenant couples are more religious, generally, and a covenant marriage seems to foster even greater devotion to faith.

In sum, those who elect to marry in a legal covenant regime also appear to embrace the Biblical concept of marriage as a covenant. Whether such a view is subject to influence by the state is unknown. However, the evidence we have assembled is consistent with the view that legal provisions may bolster and enhance such a covenantal view of marriage by celebrating and codifying it.

In this essay, we have traced the idea of covenant from the religious ideal to its modern secular counterpart. We have shown its essential characteristics and why covenant relationships are more likely to be successful than contract-governed or less formal alternatives. We do not suggest that the state *require* couples to enter into status relationships like marriage rather than simply cohabit. However, in most situations society ought to prefer and privilege them by setting up conditions where the marriage (or other covenant relationship) is most likely to work.

TABLE 1: EFFECTS OF ADOPTION, FOSTER PLACEMENT,
AND KIN CARE BY RACE.

EFFECT BY RACE	DEPRESSION	DRUG USE (#/month)	JUVENILE DELINQUENCY	PERCEIVED CHANCE OF DYING
<i>Adopted Child:</i>				
-White	0.466 ns	-0.013 ns	0.640 ns	0.012 ns
-Black	1.434 ns	-0.163 ns	0.671 ns	0.003 ns
-Asian	2.874*	-0.578 ns	0.660 ns	-0.005 ns
-Native Am.	N/A	2.217*	0.252 ns	N/A
-Other Race	0.625 ns	2.095*	0.616 ns	0.021 ns
<i>Fostered Child:</i>				
-White	0.196 ns	2.884**	-0.682 ns	0.011 ns
-Black	5.251**	-0.578 ns	0.086 ns	0.107*
-Asian	5.585 ns	N/A	5.682**	0.363*
-Native Am.	N/A	-2.034 ns	3.214 ns	N/A
-Other Race	6.461*	2.055 ns	6.500*	0.024 ns
<i>Kin-Care Child:</i>				
-White	1.464*	0.467 ns	2.340**	0.017 ns
-Black	0.164 ns	-0.097 ns	0.247 ns	-0.011 ns
-Asian	3.092 ns	1.488*	4.003*	0.102*
-Native Am.	N/A	1.315 ns	5.474*	N/A
-Other Race	3.236*	0.327 ns	2.128 ns	0.017 ns
<i>R² / N:</i>				
-White	0.042**/ 9905	0.057**/ 9745	0.032**/ 9825	0.023**/ 9882
-Black	0.048**/ 3135	0.035**/ 3045	0.028**/ 3090	0.019**/ 3113
-Asian	0.068**/ 793	0.050**/ 781	0.086**/ 794	0.049**/ 797
-Native Am.	0.075ns/ 253	0.144**/ 248	0.106*/248	N/A
-Other Race	0.062**/ 1213	0.056**/ 1188	0.043**/ 1203	0.036*/ 1213

Note: All equations control for household structure, child's gender, household income, mother's age, mother's current and previous marital status, mother's education, and mother's race.

** = Statistical significance is .01 or less

* = Statistical significance is .05 or less

ns = Not statistically significantly different from zero

N/A = Insufficient number of cases or insignificant equation

TABLE 2: COMPARISONS OF COVENANT AND STANDARD MARRIAGES AT THE TIME OF THE WEDDING (WIFE'S REPORT).

	NUMBER AT WEDDING	TYPE OF CEREMONY (PERCENTAGE)			APPROVAL OF SIGNIFICANT OTHERS (OUT OF 8 MAXIMUM)
		Religious	Civil	Both	
Covenant Marriage	177.68	97.3	1.5	1.4	6.94
Standard Marriage	109.09	64.8	28.5	6.7	6.39
Statistical Significance	F=66.52 (df: 1/683) Sig. < .001	Chi-Sq=107.44 (df: 2) Sig. < .001			F=20.13 (df: 1/547) Sig.< .001

TABLE 3: CHANGES IN COVENANT AND STANDARD MARRIAGES. AVERAGE DIFFERENCE IN CHANGE BETWEEN FIRST (2-6 MONTHS) AND SECOND INTERVIEWS (24 MONTHS).

MARITAL QUALITY				
	CONSENSUS	AFFECTION	SATISFACTION	COHESION
Covenant vs. Standard				
-Husbands	0.840	0.001	0.362	0.114
N	371	407	378	367
R ²	.429	.207	.360	.348
Sig.	.064	.926	.307	.662
-Wives	1.04*	0.209	0.300	0.170
N	471	504	494	480
R ²	.458	.336	.370	.324
Sig.	.013*	.105	.334	.575

OTHER			
	OTHERS' APPROVAL OF MARRIAGE	CENTRALITY OF MARRIAGE	RELIGIOUSNESS
Covenant vs. Standard			
-Husbands	0.482*	0.876*	0.771*
N	520	411	380
R ²	.048	.334	.688
Sig.	.045*	.003*	.004*
-Wives	0.238	0.813*	0.632*
N	512	516	496
R ²	.334	.376	.734
Sig.	.016	.001*	.006*

* Significant at $p < .05$

Note: All equations were estimated as follows. The dependent variable was the value of the variable at 24 months. The independent variables were: a) the value of the same variable at 4-6 months, and b) an indicator of whether the marriage was covenant or standard. The coefficients reported for Husbands and Wives are those associated with the variable covenant/standard (1 = covenant, 0 = standard). Therefore, they represent the difference in the amount of change comparing covenant and standard partners on the same dependent variable. When this coefficient is significant, it means that the amount of change was significantly larger/smaller for covenant than standard at $p < .05$. The sign of this coefficient indicates the direction of change in the dependent variable (higher or lower).

TABLE 3 (CONT'D)

	BELIEFS ABOUT CHILDREN			
	COMMITMENT	WORRIES	BENEFITS	SACRIFICES
Covenant vs. Standard Marriage				
-Husbands	-.871*+	-.597	.462	-.880*
N	361	391	392	390
R ²	.398	.247	.247	.180
Sig.	.001*	.158	.255	.045*
-Wives	-.594*+	-1.138*	.587	-.387
N	439	485	499	487
R ²	.319	.248	.204	.160
Sig.	.010	.002*	.113	.318

* Significant at $p < .05$

Note: All equations were estimated as follows. The dependent variable was the value of the variable at 24 months. The independent variables were: a) the value of the same variable at 4-6 months, and b) an indicator of whether the marriage was covenant or standard. The coefficients reported for Husbands and Wives are those associated with the variable covenant/standard (1 = covenant, 0 = standard). Therefore, they represent the difference in the amount of change comparing covenant and standard partners on the same dependent variable. When this coefficient is significant, it means that the amount of change was significantly larger/smaller for covenant than standard at $p < .05$. The sign of this coefficient indicates the direction of change in the dependent variable (higher or lower).

+ Negative values imply greater commitment. See text for scale details.