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# FOR THE SAKE OF THE CHILDREN: RECAPTURING THE MEANING OF MARRIAGE

*Katherine Shaw Spaht\**

*Though American divorce law was never intended in principle to be as unusual as it has turned out in fact, it nevertheless carries a powerful ideology, sending out distinctive messages about commitment, responsibility, and dependency. . . . The American story about marriage, as told in the law and in much popular literature, goes something like this: marriage is a relationship that exists primarily for the fulfillment of the individual spouses. If it ceases to perform this function, no one is to blame and either spouse may terminate it at will.<sup>1</sup>*

## I. INTRODUCTION

As Mary Ann Glendon has remarked, the content of the story told in American marriage has shifted dramatically over time. She describes the transformation of the meaning of marriage in the following terms: "The redefinition of marriage from a relationship that could be legally terminated before the death of one of the spouses

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\* Jules F. and Frances L. Landry Professor of Law, Louisiana State University Law Center. The author drafted the Louisiana Covenant Marriage law.

The author wishes to acknowledge the influence and inspiration of Mary Ann Glendon whose letter is taped to the wall by my computer, a letter that acknowledges the wisdom of St. Ignatius Loyola, "to work as though everything depended on you and await the results as though everything depended on Him"; the extraordinary opportunity afforded the author to work closely with Representative Tony Perkins, the legislator who selected "Covenant Marriage" as the solution to easy divorce in Louisiana; the powerful contributions of Barbara Dafoe Whitehead's article *Dan Quayle Was Right*, THE ATLANTIC MONTHLY, Apr. 1993, at 47, and of Maggie Gallagher's book THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE (1996), which the author used as a prop during testimony before the Louisiana legislative committees; the encouragement of those interested in the "Marriage Movement," such as The Institute for American Values; the invaluable advice and editorial assistance of her brother, Marshall Shaw; and the dedicated effort and valuable assistance of Candace Cenac, her research assistant, and Madeline Babin, who continually revised this manuscript.

1 MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 106, 108 (1987) [hereinafter GLENDON, ABORTION AND DIVORCE].

only for grave reasons, if at all, to one which is increasingly terminable upon the request of one party did not take place overnight in Western nations."<sup>2</sup> The process of change began well before the 1960s and 1970s, when "no-fault" divorce was generally adopted in the United States. In fact, divorce legislation in developed countries has proceeded for the last two hundred years in one general direction: it has become easier and easier for a dissatisfied spouse to escape the marital relationship and, consequently, his familial responsibilities.

What has happened to alter so radically the American conception of marriage? Unquestionably, powerful social, economic, and cultural forces have been at work, eroding traditional notions of moral responsibility, and changes in the law have reflected such trends. The ideology of "no-fault" divorce conforms to fashionable theories that abhor objective value judgments<sup>3</sup> and promote an obsessive concentration on each individual's subjective self-fulfillment.<sup>4</sup> It is perhaps mere co-

2 *Id.* at 64-65. See also MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 7 (1981) [hereinafter GLENDON, *THE NEW FAMILY*].

3 In *Abortion and Divorce*, Glendon wrote that:

In the United States, the "no-fault" idea blended readily with the psychological jargon that already has such a strong influence on how Americans think about their personal relationships. It began to carry the suggestion that no one is ever to blame when a marriage ends: marriages just break down sometimes, people grow apart, and when this happens even parents have a right to pursue their own happiness. The no-fault terminology fit neatly into an increasingly popular mode of discourse in which values are treated as a matter of taste, feelings of guilt are regarded as unhealthy, and an individual's primary responsibility is assumed to be to himself. Above all, one is not supposed to be 'judgmental' about the behavior and opinions of others. As Bellah [Robert Bellah in *Habits of the Heart*] points out, the ideology of psychotherapy not only refuses to take a moral stand, it actively promotes distrust of "morality."

GLENDON, *ABORTION AND DIVORCE*, *supra* note 1, at 107-08.

4 See Peter D. Kramer, *Divorce and Our National Values*, N.Y. TIMES, Aug. 29, 1997, at A23.

We are rightly accustomed to viewing our self-reliance and independence as sources of some of our greatest strengths. . . . We are less conscious, however, of the dangers that Tocqueville warned us could flow from overemphasizing them. . . . [I]n the end, a people in a country where liberty has been severed from other republican virtues can paradoxically display both individualism and conformity, restlessness and huddling, rejection of authority and political impotence.

GLENDON, *ABORTION AND DIVORCE*, *supra* note 1, at 119. See also GLENDON, *THE NEW FAMILY*, *supra* note 2, at 120, 138.

When one considers how individualistic our society has become, what Maggie Gallagher says about the marriage commitment is true: "To dare to pledge our whole selves to a single love is the most remarkable thing most of us will ever do. With the

incidence, as Professor Glendon suggests, that the label “no-fault” migrated into marriage law from tort law, where the innovative notion of “no-fault” automobile insurance had captured the legal and cultural imagination,<sup>5</sup> but the term effectively sums up the new attitudes Americans began to assume toward marriage and familial responsibility.<sup>6</sup>

It might well be asked, however, whether there is not something wrong with the story being told now by American law. *Should* marriage be reduced to “a relationship that exists primarily for the fulfillment of the individual spouses?”<sup>7</sup> What about the individual spouses’ joint commitment to children born of their union? What effect do “no-fault” assumptions have upon the creation of stable families, the first communities into which human beings are born? If “no one is to blame” for the failure of a marriage, then why should anyone be forced by legal means to bear the financial and emotional burdens unavoidably imposed by parenthood?

Those questions lead to a further line of inquiry. How complete is the story told by current American law when it omits from its concluding pages any mention of the gurgling young characters introduced in the second chapter? Can the average American reader perhaps believe that this story has been unsatisfactorily abridged? Would she perhaps not yearn to re-write the story, to supply it with a happy ending?

To some Americans, indeed, the story told by American marriage law has begun to take on the characteristics of a tale told by Poe, un-

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abolition of marriage that last possibility for heroism has been taken from us.” GALLAGHER, *supra* note \*, at 265. In the same vein, Barbara Dafoe Whitehead writes: “A voluntary pledge taken in abject ignorance of the future, imposing lifelong obligations and secured only by mutual affections, is an extravagant thing, impossible and unsustainable without the cultivation of certain beliefs, habits, and shared understandings about the nature and purpose of such voluntary bonds.” BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE*, 194 (1997).

5 In *Abortion and Divorce*, Glendon wrote that:

It seems to have been a legal coincidence that caused the move to breakdown grounds to be translated back into ordinary language as “no-fault” divorce. . . . Once it [“no-fault”] was established in tort law, it was practically inevitable that the “no-fault” label should then migrate to the new divorce law, where proposed legal changes were similarly designed to eliminate litigation over issues of fault.

GLENDON, *ABORTION AND DIVORCE*, *supra* note 1, at 79–80.

6 “Discontent with fault-based divorce seems to have been felt more acutely by mental-health professionals and academics than by the citizenry in general.” *Id.* at 66.

7 *Id.* at 108.

folding within a cultural landscape that equates to urban blight.<sup>8</sup> This horror story has important societal effects:

When divorce and illegitimacy become normal, when single parenthood begins first to compete with and then displace marriage, when not just a few, but many or most parents adopt a risky pattern of child rearing, the result is not just a bit more suffering for a few more children, but the impoverishment of the society and the none-too-slow erosion of American civilization.<sup>9</sup>

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8 For a sampling of proposals to address the increasingly disturbing prevalence of divorce, *see, e.g.*, DAVID BLANKENHORN, *FATHERLESS AMERICA* (1995); GALLAGHER, *supra* note \*; GLENDON, *ABORTION AND DIVORCE*, *supra* note 1; GLENN S. STANTON, *WHY MARRIAGE MATTERS: REASONS TO BELIEVE IN MARRIAGE IN POST-MODERN SOCIETY* (1997); WHITEHEAD, *supra* note 4; Maggie Gallagher & David Blankenhorn, *Family Feud*, in *THE AMERICAN PROSPECT* 12 (1997); Allen M. Parkman, *Reform of the Divorce Provisions of the Marriage Contract*, 8 *BYU J. PUB. L.* 91 (1993); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 *VA. L. REV.* 9 (1990); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 *BYU L. REV.* 79; Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 *CORNELL L. REV.* 45 (1981).

Even His Holiness, Pope John Paul II, has had occasion to describe the battle in the following terms:

At a moment in history in which the family is the object of numerous forces that seek to destroy it or in some way to deform it, and aware that the well-being of society and her own good are intimately tied to the good of the family, the Church perceives in a more urgent and compelling way her mission of proclaiming to all people the plan of God for marriage and the family, ensuring their full vitality and human and Christian development, and thus contributing to the renewal of society and of the People of God.

APOSTOLIC EXHORTATION OF JOHN PAUL II: *THE ROLE OF THE CHRISTIAN FAMILY IN THE MODERN WORLD* (1994).

A solid case can be made that the baby-boom generation, coming from the strong families of the 1950s, took the family for granted. To this generation, self-expression and self-fulfillment were the pressing values of the age—at least in their years of prolonged youth. To their children, however, often battle scarred from family turmoil, the world looks quite different. As many national studies—as well as the sentiments of my students—have indicated, the children of divorce, although their statistical chances of a successful marriage may not be so great, are outspokenly supportive of the importance of marital permanence and strong divorce-free families . . . . It may be no coincidence that we are seeing the rise of a new *familism* just thirty years after the momentous cultural changes of the 1960's.

David Popenoe, *Fostering the New Familism: A Goal For America*, *RESPONSIVE COMMUNITY*, Fall 1992, at 33–34 (emphasis added).

9 GALLAGHER, *supra* note \*, at 4.

The prosperity of our nation—indeed perhaps its very survival—depends upon the health of its constituent families,<sup>10</sup> yet our laws presume to treat the existence of the central institution of family life as if it were merely a matter of individual personal preference, with no consequences for the children of the marriage or for society in general.<sup>11</sup>

Of all the scholars in America who have written with understanding about the specifically legal dimensions of our cultural crisis, perhaps no one has been more influential than Mary Ann Glendon. Her books and articles about law, marriage, and the family have enriched our understanding of how the law regulating family life has developed, not only in the United States but throughout the Western world.<sup>12</sup> Her influence, however, does not end there. Professor Glendon in her writings has also pointed out pragmatic ways in which legal reformers can act to recapture the traditional meaning of marriage:<sup>13</sup>

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10 Sociologist Daniel Yankelovich connected economics with the health of the family as follows:

There exists a deeply intuitive sense that the success of a market-based economy depends on a highly developed social morality—trustworthiness, honesty, concern for future generations, an ethic of service to others, a humane society that takes care of those in need, frugality instead of greed, high standards of quality, and concern for community. These economically desirable social values, in turn, are seen as rooted in family values. Thus the link in public thinking between a healthy family and a robust economy, though indirect, is clear and firm.

Daniel Yankelovich, *Foreign Policy After the Election*, 71 *FOREIGN AFF.* 1, 3–4 (1992).

11 See Kramer, *supra* note 4.

12 Professor Mary Ann Glendon's series of books on law and the family: *STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE* (1977); *THE NEW FAMILY*, *supra* note 2; *ABORTION AND DIVORCE*, *supra* note 1; *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989); and to some extent *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* (1991) [hereinafter, *GLENDON, RIGHTS TALK*], enhance the understanding of developments in the law regulating the family through a comparison of the law of various countries.

13 "For marriage to thrive, and perhaps even to survive, we need to recapture our vision of the undertaking, to reimagine it as worthy for its own sake." GALLAGHER, *supra* note \*, at 264.

A first step toward that goal [dismantling the divorce culture] will involve recapturing a sense of the purposes of marriage that extend beyond the self. . . . More centrally, the notion of protecting the essential properties of the self from incursions by another is antithetical to marital commitment in which one must desire and accept as a matter of faith the giving over of oneself to another.

WHITEHEAD, *supra* note 4, at 193.

marriage understood as a permanent institution serving as a gateway to a stable and nurturing family life.

This essay first addresses some theoretical problems which Professor Glendon has raised about law, marriage, family, and community during the course of her career, and it concludes with a brief review of Louisiana's recently enacted covenant marriage legislation. It is submitted that Louisiana's experiment in marriage-law reform can be viewed as a pragmatic realization of Professor Glendon's juridical thought on marriage, family, and community.

## II. WHY STRENGTHEN MARRIAGE? FOR THE SAKE OF THE CHILDREN

Professor Glendon has been a strong advocate for using law to strengthen marriage. Despite increasing American relativism during the 1970s and 1980s about family structure, the most recent empirical evidence now available establishes what Americans instinctively know—a child benefits measurably by having a married mother (a female) and father (a male) in the home. The benefits are physical,<sup>14</sup> emotional, psychological, and economic. In their authoritative book on single-parent families, Sara McLanahan and Gary Sandefur compared educational attainment, idleness/labor-force attachment, and pre-marital childbearing of the children of single-parent and two-parent families.<sup>15</sup> According to their study, “[t]he data clearly shows that children who live with only one parent are at much higher risk of dropping out of high school.”<sup>16</sup> Furthermore, “young men from one-

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14 See Patrick F. Fagan et al., *The Child Abuse Crisis: The Disintegration of Marriage, Family, and the American Community*, BACKGROUNDER, June 3, 1997. The report compiled data drawn from the following studies: ANDREA J. SEDLAK & DIANE BROADHURST, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, *THE THIRD NATIONAL INCIDENCE STUDY OF CHILD ABUSE AND NEGLECT* (1996), and ROBERT R. WHELAN, FAMILY EDUCATION TRUST, *BROKEN HOMES & BATTERED CHILDREN: A STUDY OF THE RELATIONSHIP BETWEEN CHILD ABUSE AND FAMILY TYPE* (1994).

There is strong evidence from the British research that the structure of the family is related directly to the safety of mothers and children. The most dangerous place for a woman and her child is in an environment in which she is cohabiting with a boyfriend who is not the father of her children. The rate of child abuse may be as much as 33 times higher. Even cohabiting with the children's father may lead to a rate of abuse as much as 20 times higher. *Marriage provides the safest environment for children.* It therefore truly makes a difference in advancing the safety and well-being of America's children.

Fagan et al., *supra*, at 14.

15 See SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE-PARENT: WHAT HURTS, WHAT HELPS* (1994).

16 STANTON, *supra* note 8, at 105 (summarizing the findings of McLanahan and Sandefur and then quoting them as follows: “Regardless of which survey we look at,

parent families are about 1.5 times as likely to be idle (out of school and not working) as young men from two-parent families."<sup>17</sup> Young women from single-parent homes fare little better.<sup>18</sup> When compared to a young woman from a two-parent home, a young woman from a single-parent home bears a far greater risk of giving birth to a child out of wedlock, a risk that significantly increases when her father is not around.<sup>19</sup> In addition to all of these factors, the children reared in single-parent homes experience more poverty than their counterparts in two-parent homes:<sup>20</sup> "[T]he vast majority of children who are raised entirely in a two-parent home will never be poor during childhood. By contrast, the vast majority of children who spend time in a single-parent home will experience poverty."<sup>21</sup>

In addition to the comparisons made by McLanahan and Sandefur, other studies establish that children who live in single-parent homes "experience lower physical and mental health scores."<sup>22</sup> Not surprisingly, the two-parent family affords children access to the resources, economic and emotional, of two adults and provides a "two heads are better than one" quality of parenting. Furthermore, the demonstrated benefits of a family in which the two parents are related to the child biologically recognizes that the biological connection of parents to the child "increases the likelihood that the parents . . . identify with the child and [are] willing to sacrifice for that child, and . . . reduces the likelihood that either parent would abuse the child . . . ."<sup>23</sup> Of course, the category of children who live in single-parent homes includes illegitimate children whose biological parents were never married, as well as children who live with one parent

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children from one-parent families are about twice as likely to drop out of school as children from two-parent families." McLANAHAN & SANDEFUR, *supra* note 15, at 41).

17 McLANAHAN & SANDEFUR, *supra* note 15, at 48-49.

18 See STANTON, *supra* note 8, at 10 (summarizing McLanahan and Sandefur's findings).

19 See *id.* at 114.

20 "It is no exaggeration to say that a stable, two-parent family is an American child's best protection against poverty." KAMARCK & GALSTON, PROGRESSIVE POLICY INSTITUTE, PUTTING CHILDREN FIRST: A PROGRESSIVE FAMILY POLICY FOR THE 1990s 12 (1990).

21 DAVID T. ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY 46 (1988).

22 STANTON, *supra* note 8, at 119. See David B. Larson, et al., *The Costly Consequences of Divorce: Assessing the Clinical, Economic, and Public Health Impact of Marital Disruption in the United States* 122, 132 (research-based seminar for National Institute for Healthcare Research, on file with author).

23 McLANAHAN & SANDEFUR, *supra* note 15, at 38. Their conclusions about the likelihood of abuse have been confirmed by a recent study in Britain referred to in Fagan et al., *supra* note 14.



after divorce. One author, Maggie Gallagher, draws an interesting connection between divorce and illegitimacy: "There seems to be a tipping point at which marriage becomes so fragile and divorce so common that an increasing number of women decide it may be safer to dispense with marriage altogether: Illegitimacy surges in the wake of a surge in divorce."<sup>24</sup>

In comparison with children of intact first marriages, children of divorce suffer in virtually every measure of a child's well-being, whether educationally, economically, physically, psychologically,<sup>25</sup> or emotionally.<sup>26</sup> In 1987, Lenore Weitzman documented the devastating economic effect of divorce on children.<sup>27</sup> Mary Ann Glendon and Judith Younger, two law professors, had earlier offered different solutions to what each recognized as the problems created by the increasing incidence of divorce. Professor Glendon proposed dividing a couple's property at divorce subject to the "children-first" principle,<sup>28</sup> which required that the resources of both spouses first be used to satisfy the financial needs of the child; and Professor Younger proposed a divorce law that did not permit a couple with minor children to obtain a divorce unless the couple could prove to the satisfaction of the court that the children would be better off after the divorce than before.<sup>29</sup> But it was Barbara Dafoe Whitehead's now famous 1993 arti-

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24 GALLAGHER, *supra* note \*, at 123.

25 See John Guidubaldi, *Differences in Children's Divorce Adjustment across grade level and gender: A Report from NASP-Kent State Nationwide Project*, in CHILDREN OF DIVORCE: EMPIRICAL PERSPECTIVES ON DIVORCE (Sharlene A. Wolchik & Paul Karoly eds., 1988); David Demo & Alan Acock, *The Impact of Divorce on Children: An Assessment of Recent Evidence*, 50 J. MARRIAGE & FAM. 619, 622 (1988).

26 Stanton's book, *Why Marriage Matters*, *supra* note 8, is one of the most recent of all the books written by authors who wish to emphasize the positive effects of marriage. Stanton compiles all of the sociological data to date on the detrimental effects of divorce. See *id.* Chapter 5, "Shattering the Myth: The Broken Promises of Divorce and Remarriage" at 123-58. See, e.g., D'Arcy Jenish, *Can Kids Cope? Debating the Effect of Divorce on Children*, MACLEAN'S, June 20, 1994, at 38; Jenifer Kunz, *The Effects of Divorce on Children*, in 2 FAMILY RESEARCH: A SIXTY-YEAR REVIEW, 1930-1990, 325 (Stephen Bahr ed., 1992).

27 See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNINTENDED SOCIAL AND ECONOMIC CONSEQUENCES ON WOMEN AND CHILDREN IN AMERICA* (1987). Despite disagreements about Weitzman's calculations of the disparity between post-divorce income and standard of living for men and for women and children, few dispute that women and children suffer more economic hardship than men after divorce.

28 Mary Ann Glendon, *Family Law Reform in the 1980s*, 44 LA. L. REV. 1553, 1559 (1984). See also GLENDON, *ABORTION AND DIVORCE*, *supra* note 1.

29 See Younger, *supra* note 8. See also S. 160, Reg. Sess. (La. 1997), which amended LA. CIV. CODE ANN. arts. 102 and 103 (West 1993) and added a new article to prohibit couples with children under the age of 18 from obtaining a divorce with-

cle published in *The Atlantic Monthly* entitled "Dan Quayle Was Right"<sup>30</sup> which finally penetrated, and to some extent shattered, the widely popular public perception that divorce is a positive personal experience<sup>31</sup> and that children are resilient and suffer only short-term harm from their parents' divorce. Even before her most recent report, Judith Wallerstein, in a book with Sandra Blakeslee, wrote: "Divorce is a different experience for children and adults because the children lost something that is fundamental to their development—the family structure."<sup>32</sup>

In June 1997, Judith Wallerstein announced the results of her most recent follow-up interviews with the children of divorce she had been tracking for twenty-five years.<sup>33</sup> The children had been between the ages of two and six at the time of the divorce.

Unlike the adult experience, the child's suffering does not reach its peak at the breakup and then level off. On the contrary. Divorce is a cumulative experience for the child. Its impact increases over time. At each developmental stage the impact is experienced anew and in different ways . . . . The impact of divorce gathers force as they reach young adolescence, when they are often insufficiently su-

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out proof of fault. The bill failed to pass the Senate floor on a vote of twelve to twenty-five.

30 Whitehead, *supra* note \*. Much that appeared in that article now is incorporated in her book, *THE DIVORCE CULTURE*, *supra* note 4. She discusses some of her conclusions in an excellent PBS video, *Videotape: Children of Divorce* (on file with the Public Broadcasting Service), a part of the National Desk Series. Judith Wallerstein appears in this video, too, along with children of divorce interviewed on camera.

31 See Arland Thornton, *Changing Views Towards Family Issues in the United States*, 51 J. OF MARRIAGE AND FAMILY 873, 875 (1989). See also CONSTANCE AHRONS, *THE GOOD DIVORCE* (1985). The title of this book alone makes the case for divorce as a potential positive *personal* experience.

In fact, one of Stanton's chapters is entitled "Only a Piece of Paper: The Benefits of Marriage for Adults." STANTON, *supra* note 8, at 71. In that chapter, Stanton argues that first-time married adults, when compared to single, divorced or *remarried* adults, fare better in virtually every measurement of the quality of life.

See also JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *THE GOOD MARRIAGE: HOW AND WHY LOVE LASTS* (1995) (isolating the characteristics and qualities of a married couple that lead to a rich and long marriage). Interestingly, Wallerstein wrote this book with Blakeslee after reporting that eighty percent of the women and fifty percent of the men reported feeling more content with the quality of their lives ten years after divorce. JUDITH S. WALLERSTEIN, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* (1989).

32 WALLERSTEIN & BLAKESLEE, *supra* note 31, at 11.

33 See JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980); WALLERSTEIN & BLAKESLEE, *supra* note 31 (publishing the results of Wallerstein's interviews with these children at earlier points in time after their parents' divorce).

pervised and poorly protected, and when, additionally, they are required then (if not earlier) to adjust to new stepparents and stepsiblings. The impact gathers new strength again at late adolescence when they are financially barred from choosing a career or obtaining an education equivalent to that of their parents. And again, at young adulthood, when their fears that their own adult relationships will fail like those of their parents rise in crescendo. The effect of the parents' divorce is played and replayed throughout the first three decades of the children's lives.<sup>34</sup>

Despite criticism of the sample of children she chose to use,<sup>35</sup> it is the only study of its kind based upon in-depth follow-up interviews over such a substantial period of time. Furthermore, most, but surely not all, subsequent studies have essentially confirmed her findings.<sup>36</sup>

As intriguing as Judith Wallerstein's most recent report is, three new studies "suggest . . . that if parents are experiencing not violence but unhappiness in their marriages, their children would be better off if they stayed married rather than if they divorced."<sup>37</sup> As Dr. Wade E. Horn commented recently in a newspaper article published in *The Washington Times*, "conventional wisdom tells us that it's better for the children if their parents divorce than if they stay in an unhappy marriage . . . . Only trouble is, both conventional wisdom and the experts, it turns out, are wrong. Three new studies point to divorce—not marital conflict—as the problem."<sup>38</sup> One of the studies to which Dr. Horn refers is included in a book by Paul Amato and Alan Booth entitled *A Generation at Risk*, in which they comment about the results of their study as follows: "Spending one-third of one's life living in a marriage that is less than satisfactory in order to benefit children—children

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34 Judith S. Wallerstein & Julia Lewis, *The Long-Term Impact of Divorce on Children: A First Report from a 25-Year Study*, Presentation at the Second World Congress of Family Law and the Rights of Children and Youth in San Francisco, California (June 2-7, 1997) (copy on file with author).

35 See *id.* The study sample included face-to-face interviews with 130 children and both parents. The children came from middle-class northern California homes. Their parents were well-educated.

36 See STANTON, *supra* note 8, at 123-58, for the results of those studies.

37 Wade E. Horn, *Strong Case for Staying Together Despite Discord*, WASHINGTON TIMES, Jan. 6, 1998, at E2. The first study was conducted by Rex Forehand and others, Rex Forehand et al., *Is Adolescent Adjustment Following Parental Divorce a Function of Predivorce Adjustment?*, 25 J. ABNORMAL CHILD PSYCHOL. 157 (1997). The second study is contained in PAUL R. AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* (1997). The third study appears in RONALD L. SIMONS, *UNDERSTANDING DIFFERENCES BETWEEN DIVORCED AND INTACT FAMILIES: STRESS INTERACTION AND CHILD OUTCOME* 203-05 (1996).

38 HORN, *supra* note 37, at E2. One of the studies is included in AMATO & BOOTH, *supra* note 37.

that parents elected to bring into the world—is not an unreasonable expectation.”<sup>39</sup>

Among her other findings about the effect of divorce on children twenty-five years later, Judith Wallerstein’s study concluded that the quality of the relationships between the divorced parents and the children varied often based upon with whom the children lived and spent the majority of their time. In her interviews with the children she “found that parent-child relationships that have been cut loose from their moorings to the marital bond within which they developed are inherently less stable than those in intact families.”<sup>40</sup> The relationship between the non-custodial father and his children was particularly precarious. Despite legal assumptions that the child of divorce can be expected to maintain a close relationship with the father if the mother does not interfere, the reality is far more complex. A divorced father’s interest in his children varied according to his “sense of success or failure in the other parts of his life”<sup>41</sup> and his remarriage.<sup>42</sup>

David Blankenhorn, in his seminal work *Fatherless America*,<sup>43</sup> marshals the evidence in chapter after chapter that the father’s presence in the home cannot be underestimated:<sup>44</sup> “In virtually all human societies, children’s well-being depends decisively upon a relatively high level of paternal investment.”<sup>45</sup> A father in the home invests in the family and his children by providing physical protection, material resources, cultural transmission, and day-to-day nurturing; his paycheck in the form of child support is a poor substitute.<sup>46</sup> Blankenhorn observes that “the preconditions for effective fatherhood are twofold: coresidence with children and a *parental alliance with the mother*.”<sup>47</sup> Judith Wallerstein’s study supports his observation about co-residency

39 AMATO & BOOTH, *supra* note 37, at 238.

40 Wallerstein & Lewis, *supra* note 34.

41 *Id.*

42 *See id.*

43 *See* BLANKENHORN, *supra* note 8, at 148–70.

44 *Id.* at 25. “The honest truth, McLanahan discovered, was that a father and husband is more than a breadwinner. His presence matters in the lives of his children, and his absence creates what Irwin Garfinkel and McLanahan have called ‘a new American dilemma.’” IRWIN GARFINKEL & SARA S. MCLANAHAN, *SINGLE MOTHERS AND THEIR CHILDREN: A NEW AMERICAN DILEMMA* (1986). *See* STANTON, *supra* note 8, at 103.

45 BLANKENHORN, *supra* note 8, at 25.

46 “From the child’s perspective, child-support payments even if fully paid, do not replace a father’s economic provision. More fundamentally, they do not replace a father.” *Id.* at 127.

47 *Id.* at 18 (emphasis added).

of the biological father with his children and a parental alliance with the mother:

All but three men in this sample remarried soon after the divorce. One third remarried three or more times while the child was growing up. Contact with the child also varied with the father's remarriage, with the attitude of the new wife and the presence of children within the new family. It varied again with the father's second divorce. Stepmothers, especially if they had children of their own, were often frank to say that they resented the children of the husband's first marriage and saw them as intruders. While some second wives grew to love the father's children, many did not. As one woman said, "I wanted the man. Not the kids." These attitudes were powerful influences. Understandably, the father was eager for the new marriage to succeed and gave it priority. Fathers who sent their stepchildren to college did not always provide financial support for their own.<sup>48</sup>

If the only effective way to tie a father to his biological children is through an alliance with the mother, then the most effective way to tie the father to the mother and assure his critical presence in the home is through marriage.<sup>49</sup> "Broken homes. Broken promises. Broken hearts. Broken marriages. Broken ideals. Broken lives. Broken minds. Broken laws. Broken bodies. Broken societies. Broken people. Broken . . . everything is broken."<sup>50</sup>

With the prediction that sixty-five percent of all new marriages in the United States will end in divorce and most of those will involve minor children,<sup>51</sup> what can the law do to repair what it contributed to breaking?

48 Wallerstein & Lewis, *supra* note 34.

49 See BLANKENHORN, *supra* note 8, at 223. Interestingly, in an essay by Lance Morrow, he expresses what he believes to be the view of men toward marriage:

But off in a range of the male psyche audible only to guys and dogs, there vibrated the sneaking thought that the fugitive groom—however big a jerk, nay, slimeball—had made good an escape that men, in the yet undomesticated zones of their hearts, always applaud. *Something in every man abhors a wedding.* Not for nothing are such ceremonies performed by authority—and—punishment figures in black—clergy, judges. And as a guy contemplates the \$125,000 trap, his premature hanging, with rosebuds flown in from France, the something in that man's mind cheers a miracle of last-minute escape—even if it is an ignominious miracle. Huck has lit out for the territory.

Lance MORROW, *Goodbye, Miss Havisham*, TIME, Dec. 8, 1997, at 114 (emphasis added).

50 STANTON, *supra* note 8, at 159.

51 See GALLAGHER, *supra* note \*, at 5; Larry L. Bumpass, *What's Happening to the Family? Interaction Between Demographic and Institutional Change*, 27 DEMOGRAPHY 483, 485 (1990).

### III. RECAPTURING THE MEANING OF MARRIAGE IN THE LAW: STRENGTHENING THE STORY THE LAW TELLS ABOUT MARRIAGE

My contention, however, is that the law is not neutral. In treating marriage as a contract revocable at the will of either party, the law adopts one of the competing views of marriage.<sup>52</sup> . . . The ideal of autonomy, an autonomy so broad as to preclude fixed, permanent, lifelong commitments, is the foundation of our contemporary marriage laws. It is a substantive moral ideal.<sup>53</sup>

The role of law in shaping the behavior of human beings remains a matter of fierce debate. Without question there is an interrelationship between the culture, the behavior of human beings, and the law.<sup>54</sup> Professor Glendon has always recognized the influence and role of law on the culture.<sup>55</sup> She has opined that in the United States law has always had an influence on the culture: “[P]olitical and legal ideas have played no small part in forming the distinctively American way of imagining the individual in his or her relationships to others in the family and larger communities.”<sup>56</sup> Concerning divorce law in the United States, as Professor Glendon has observed, it has come “to embody the idea that termination of a marriage [is] a matter of individ-

52 Christopher Wolfe, *The Marriage of Your Choice*, FIRST THINGS, February, 1995, at 37.

53 *Id.* at 41.

54 Among philosophers, St. Thomas Aquinas sets out perhaps the most profound view of law's influence on human behavior. In *St. Thomas Aquinas on Law and Justice*, James Gordley explains that Aquinas' view of law is especially relevant since it “profoundly influenced the development of Western law.” JAMES R. GORDLEY, *Introduction, in ST. THOMAS AQUINAS ON LAW AND JUSTICE* 6 (1988). “Thomas regarded law as a rule leading man to good . . .” Aquinas' treatise on law “recognized the nature of man and the will of God as sources of law,” and that “[t]he rules made by human authority are not law unless they rest on principles taken from these sources.” *Id.* For Aquinas, human law rests on natural law and both human law and natural law rest on eternal law.

According to Thomas, law as well as virtue is a concept that must be defined in terms of an ultimate end that constitutes the good for man. Virtue is inside a person moving him to good. Law is outside a person moving him to good. Law does so by serving as a rule or measure of human actions . . . . Law is “[1] an ordinance of reason [2] for the common good [3] made by him who has care of the community and [4] promulgated.”

*Id.* at 11 (quoting SUMMA THEOLOGICA 1-11, q. 90, a. 4). Law's power to coerce assures “an efficacious inducement to virtue.” *Id.* at 12 (quoting SUMMA THEOLOGICA 1-11, q. 90, a. 3, rep. 2).

55 See GLENDON, *THE NEW FAMILY*, *supra* note 2, at 119-25.

56 GLENDON, *ABORTION AND DIVORCE*, *supra* note 1, at 3. See MARY ANN GLENDON, *A NATION UNDER LAWYERS* (1994).

ual right."<sup>57</sup> The evolving view of divorce as a matter of right is reflective of American notions of a form of individual liberty that contains few restrictions.<sup>58</sup> Other Western nations envision the individual "as situated within family and community; rights are viewed as inseparable from corresponding responsibilities; and liberty and equality are seen as coordinate with fraternity."<sup>59</sup>

In the other Western countries, the civil law generally accepts the classical notion that "the aim of law is to lead the citizens toward virtue, to make them noble and wise,"<sup>60</sup> what Amitai Etzioni has called "opportuning virtue."<sup>61</sup> In the United States, the view that law is no more or less than a command backed up by organized coercion has been widely accepted.

The idea that law might be educational, either in purpose or technique, is not popular among us. . . . The rhetorical method of law

57 GLENDON, ABORTION AND DIVORCE, *supra* note 1, at 113.

58 In *Abortion and Divorce*, Glendon wrote that:

Anglo-American law was susceptible to assimilating modern notions of individual liberty in a more unrestricted form than the civil law systems were. This legal difference seems attributable not only to social factors, but also in part to happenings in the world of ideas: first, by the fact that the common law and civil law systems were influenced, in form and content, by different types of linkage with political theory; and second, by the effect that different branches of Enlightenment thought had on Anglo-American and continental legal mentalities, respectively. I will argue that Anglo-American legal attitudes toward . . . divorce . . . bear the unmistakable traces of certain modern ideas about law that were not so fully accepted on the Continent.

*Id.* at 120. See also GLENDON, RIGHTS TALK, *supra* note 12.

59 GLENDON, ABORTION AND DIVORCE, *supra* note 1, at 133.

60 Commenting on Plato's *Laws*, Professor Glendon observes: "The Athenian Stranger continually brings the discussion around to the classical idea that the aim of law is to lead the citizens toward virtue, to make them noble and wise. The Stranger stresses, further, that the lawgiver has not only force but also persuasion at his disposal as a means to accomplish this aim." GLENDON, ABORTION AND DIVORCE, *supra* note 1, at 6. See also GORDLEY, *supra* note 54. In the same *Introduction*, Gordley bemoans modern legal theorists, even those in Western countries other than the United States and Britain.

Like the thinkers we have just imagined, modern legal theorists often find room for only one source of law. In their cases it is human law. Their writings reflect a Western civilization that has changed considerably since the time of Thomas Aquinas. The Judeo-Christian heritage has ceased to be a matter of public commitment and become one of private belief.

*Id.* at 16.

61 AMITAI ETZIONI & PETER RUBIN, COMMUNITARIAN NETWORK, OPPORTUNING VIRTUE: THE LESSONS TO BE LEARNED FROM LOUISIANA'S COVENANT MARRIAGE LAW: A COMMUNITARIAN REPORT (1997).

making appears not only in the great continental codifications,<sup>62</sup> but also, here and there, in all sorts of contemporary European legislation. It is most especially evident in continental family law.<sup>63</sup>

James Boyd White asserts that "law is most usefully seen not . . . as a system of rules, but as a branch of rhetoric . . . as the central art by which community and culture are established, maintained and transformed."<sup>64</sup> Glendon says, "[w]hether meant to or not, law, in addition to all the other things it does, tells stories about the culture that helped to shape it and which it in turn helps to shape: stories about who we are, where we came from, and where we are going."<sup>65</sup>

There is no question that law played an important role in defining marriage as a relationship without life-long commitment.

No-fault divorce legislation was, from one perspective, merely part of a larger cultural change that expanded personal autonomy, not merely in marriage laws, but in the area of sexuality generally (and more broadly as well). It is surely not the sole cause of declining family stability. On the other hand, even if it is, to a considerable extent, an epiphenomenon of deeper cultural changes, once enshrined in the law, divorce becomes part of the "moral ecology" of our culture and shapes the attitudes and expectations of many citizens about marriage. . . .<sup>66</sup>

State legislatures proclaim that marriages end without fault on the part of either spouse, thus relieving one or both of them of any guilt that the relationship failed. Judicial opinions by the highest court in the country continually define "marriage" down until it has become nothing more than a *personal* right to be pursued by the individual with the intention of accomplishing, at least as articulated, selfish purposes.<sup>67</sup> "[T]he transformation of marriage itself from a legal

62 See GORDLEY, *supra* note 54, at 20–22. Gordley describes the influence of the late scholars on Spanish natural law as well as Grotius on jurists who influenced continental codifications. The late scholastics "tried to synthesize Thomas' moral philosophy with Roman law." *Id.* at 21. See also Wolfe, *supra* note 53.

63 GLENDON, ABORTION AND DIVORCE, *supra* note 1, at 7.

64 James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985).

65 GLENDON, ABORTION AND DIVORCE, *supra* note 1, at 9. See also CLIFFORD GEERTZ, LOCAL KNOWLEDGE: FURTHER ESSAYS IN INTERPRETIVE ANTHROPOLOGY 173 (1983) (Geertz speaks of laws and the "stories they tell, symbols they deploy" and "visions they project.").

66 Wolfe, *supra* note 52, at 37–38.

67 For a review of the United States Supreme Court cases defining marriage, see Katherine S. Spaht, *Beyond Baehr: Strengthening the Definition of Marriage*, 11 BYU J. P. L. (forthcoming 1998), which traces the history of the definition of marriage in the opinions beginning with *Loving v. Virginia*, 388 U.S. 1 (1967), that first recognized



relationship terminable only for serious cause to one increasingly terminable at will, amounted to a dejuridification of marriage."<sup>68</sup> And,

Until the 1950s or 1960s, the connection between family stability and social welfare was taken for granted. The interests of society were understood to require that spouses remain together except in cases of proven serious physical or mental injury. . . . Current policy regarding marital dissolution is fundamentally different. . . . [F]ormal policy no longer requires continuation of marriages that have become unsatisfactory to at least one of the spouses. . . . [C]urrent policy approves their termination. . . . The effect of this new approach . . . is to transfer authority for deciding on the duration of marriage from the law, which once sharply limited the occasion for divorce, to individual spouses.<sup>69</sup>

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marriage as a fundamental *personal right* of every citizen, to *Turner v. Safley*, 482 U.S. 78 (1986), in which almost twenty years later, Justice Sandra Day O'Connor outlined the attributes of marriage sufficient to create a constitutionally protected marital relationship in the prison context. These attributes are: "expressions of emotional support and public commitment, an exercise of religious faith, the expectation that the marriage will be fully consummated, [and] the receipt of government benefits." *Id.* at 94.

Not surprisingly, in 1996 the federal court of appeals in *Shahar v. Bowers*, 70 F.3d 1218 (11th Cir. 1995), concluded that the constitutionally protected right of intimate association includes a lesbian relationship with contours similar to "marriage" as currently defined in judicial opinions: "Though the religious-based marriage in which Shahar participated was not marriage in a civil, legal sense it was intimate and *highly personal* in the sense of affection, commitment, and permanency and, as we have spelled out, it was inextricably entwined with Shahar's exercise of her religious beliefs." *Id.* at 1225 (emphasis added). The opinion was vacated and the *en banc* panel reversed the opinion. *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997). Thereafter, the United States Supreme Court denied certiorari. *Shahar v. Bowers*, 118 U.S. 693 (1998).

See David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 33 (1997); David Orgon Coolidge, *Playin' the Loving Card: Loving v. Virginia, Baehr v. Miike, and the Politics of Analogy*, BYU J. P. L. (forthcoming 1998); Margaret F. Brinig, *The Supreme Court's Impact on Marriage, 1967-87*, How. L. J. (forthcoming 1998). See also Jonathan Rauch, *For Better or Worse? Behind the Movement for Gay Marriage Lies a Deeper Issue: What is Marriage For, and Why is it in Trouble?*, THE NEW REPUBLIC, May 6, 1996, at 18.

68 GLENDON, ABORTION AND DIVORCE, *supra* note 1, at 63-64.

69 Lee E. Teitelbaum, *The Last Decade(s) of American Family Law*, 46 J. LEGAL EDUC. 546, 547-48 (1996).

IV. ASSISTANCE OF OTHER "COMMUNITIES" TO STRENGTHEN AND SUPPORT THE "COMMUNITY" OF MARRIAGE AND FAMILY

*As the families go, so goes civil society.*

—David Popenoe<sup>70</sup>

"Communities," the "seedbeds of civic virtue,"<sup>71</sup> include the family, which is the first community into which human beings are born; the church; the neighborhood; the school; and the myriad of voluntary associations and religious and charitable organizations that exist in this country for the purpose of nourishing the social dimension of human beings.<sup>72</sup> In the book *Seedbeds of Virtue*, Mary Ann Glendon writes in the introduction that all the contributing authors agree that "the simultaneous weakening of child-raising families and their surrounding and supporting institutions constitutes our culture's most serious long-term problem."<sup>73</sup> The reason a weakening of the family is so serious is because our society "relies heavily on families to socialize its young citizens. . . ."<sup>74</sup> It is from the family and its supporting institutions that children learn the liberal virtues.

Alexander de Tocqueville, one of America's most famous visitors and social observers, "expected that families and churches would moderate the effects of individual greed, selfishness, and ambition."<sup>75</sup> These "small, vigorous communities [including the family and the church] necessarily compete for power with the state; they also constrain individual freedom."<sup>76</sup> By competing with the state, these "communities" mediate and serve as buffers between the individual and the state. Furthermore, they serve as a deterrent against individual license disguised as liberty: "The current strain [of individualism] is characterized by self-expression and the pursuit of self-gratification, rather than by self-reliance and the cultivation of self-discipline."<sup>77</sup>

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<sup>70</sup> David Popenoe, *The Family Condition in America*, in *VALUES AND PUBLIC POLICY* 95 (Henry J. Aaron et al. eds., 1994).

<sup>71</sup> *SEEDBEDS OF VIRTUE: SOURCES OF COMPETENCE, CHARACTER, AND CITIZENSHIP IN AMERICAN SOCIETY* (Mary Ann Glendon & David S. Blankenhorn eds., 1995) [hereinafter *SEEDBEDS*] (containing a collection of essays about the "seedbeds" of civic virtue).

<sup>72</sup> See GLENDON, *RIGHTS TALK*, *supra* note 12, at 109–44.

<sup>73</sup> *SEEDBEDS*, *supra* note 71, at 3. "Yet precisely because other social bonds are becoming more undependable and impermanent, the need for strong and lasting family bonds increases, even as the environment that would support strong family bonds weakens." *Id.* at 192.

<sup>74</sup> GLENDON, *RIGHTS TALK*, *supra* note 12, at 135.

<sup>75</sup> GLENDON, *ABORTION AND DIVORCE*, *supra* note 1, at 118.

<sup>76</sup> *Id.*

<sup>77</sup> GLENDON, *RIGHTS TALK*, *supra* note 12, at 173.

Even though the recent results from a survey conducted by the American Association of Retired Persons (AARP) portray Americans still as "joiners,"<sup>78</sup> the "communities" themselves, although they exist, have been permitted to atrophy like a withered muscle from lack of use. Despite the results of the survey by AARP, other evidence suggests that even though a large number of Americans continue to join organizations, they fail to participate actively.<sup>79</sup> Some communities, such as the church, have even been banished from the public square.<sup>80</sup> As a consequence, the "communities" lack the vitality and sense of purpose required to serve as "mediator" between the individual and the state and, as importantly at this juncture in our country's history, as a deterrent against individual license. These "communities," within which the family is situated and which are designed to support it, can be considered, as Professor Glendon has urged, as the equivalent of an ecological system, and the ecological system surrounding the family is fragile.

What is needed is . . . a shift from family *policy* to family *ecology*. Before we can frame "policy" for an institution that is inextricably connected to other institutions, we need to think more carefully about connectedness. . . . Just as individual identity and well-being are influenced by conditions within families, families themselves are sensitive to conditions within surrounding networks of groups—neighborhoods, workplaces, churches, schools, and other associations. Public deliberation about family issues therefore needs to encompass such environments. . . .<sup>81</sup> Recognizing the primitive state of our knowledge about the likely long-term effects of changes in these areas [policies affecting child-raising families], an ecological approach to family policy would proceed modestly . . . encouraging local experiments . . .<sup>82</sup>

How can the participation of these "communities," from the family to the church, be regenerated to serve the essential purposes for which they were designed? More essentially, is the regeneration desirable? Disparate occurrences, such as welfare reform and the break-

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78 *Americans Are Neighborly, Joiners, AARP Survey Finds*, WASHINGTON TIMES, Jan. 4, 1998, at 4.

79 Robert Putnam argues Americans' civic involvement nonetheless has decreased over the past twenty-five years: "There has been a [sixty] percent decline in the number of public meetings members go to, a [fifty] percent decline in the number of club meetings people go to. . . ." *Id.* See also Robert Putnam, *Bowling Alone: America's Declining Social Capital*, 6 J. DEMOCRACY 65 (1995).

80 See RICHARD JOHN NEUHAUS, *THE NAKED PUBLIC SQUARE: RELIGION AND DEMOCRACY IN AMERICA* (1984).

81 GLENDON, RIGHTS TALK, *supra* note 12, at 130.

82 *Id.* at 134.

down of the family, make regeneration not just desirable, but essential. So, how can we breathe new life into these "communities" that provide tutelage for children, that develop the sociality of human beings, and that provide personal service more efficiently, expeditiously, and humanely than government? The regeneration of some of these "communities" provides hope for solving some of our most serious problems. In addition to all of the other attributes previously mentioned, they possess a unique one—the moral leadership to demand virtue from individuals. What local experiments that recognize the ecological system supporting the family should be encouraged? Louisiana's covenant marriage law is just such a local experiment, because more than any other approach to strengthening marriage, it recognizes the ecological system identified by Professor Glendon as affecting and affected by the family.

V. COVENANT MARRIAGE LEGISLATION: A PRAGMATIC REALIZATION OF GLENDON'S JURIDICAL THOUGHT ON MARRIAGE, FAMILY, AND COMMUNITY

Citizens of the state of Louisiana have begun an experiment to recapture the meaning of marriage as life-long<sup>83</sup> through legislation that would persuade and educate, and would seek the participation of other "communities."<sup>84</sup> By encouraging the participation of other "communities" there is the prospect of regenerating those "communities" to serve the purpose of supporting marriage and the family. The "covenant marriage" legislation<sup>85</sup> took effect on August 15, 1997. The legislation permits spouses to *choose* a more binding, more permanent marriage<sup>86</sup> by civil covenant<sup>87</sup> and encourages the participation of the

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83 "[The law] does not permit people to really *bind* themselves to a permanent and exclusive marriage, by reinforcing the personal commitment with the force of the law." Wolfe, *supra* note 52, at 38. "As the current legal order stands, *all* American marriages can be dissolved by divorce decrees." *Id.* at 37.

84 See Coolidge, *supra* note 67, at 53. Coolidge views marriage as a total sexual *community*. From dimensions described in note 86, *infra*, Coolidge derives the following principles for the governance of the *community* of marriage: "Marriage should be male-female (the structural dimension); Marriage should be monogamous (the social dimension); Marriage should be exclusive (the subjective dimension); *Marriage should be permanent (the spiritual dimension).*" (emphasis added.)

85 See 1997 La. Acts 1380. The legislation has been referred to in the *American Bar Association Journal* as "A Stealth Anti-Divorce Weapon." *A Stealth Anti-Divorce Weapon*, ABA J., Sept. 1997, at 28.

86 See LA. REV. STAT. ANN. § 9:272 (West Supp. 1998) (as amended by 1997 La. Acts 1380, § 3):

A. A covenant marriage is a marriage entered into by one male and one female who understand and agree that the marriage between them is a *life-*

church,<sup>88</sup> an institution which possesses moral authority and is uniquely qualified to help in preserving marriage. It would come as no surprise to Professor Glendon that Louisiana, whose private civil law is derived from continental sources consisting principally of French<sup>89</sup> and Spanish sources,<sup>90</sup> would be the first state to address

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*long relationship* . . . . Only when there has been a complete and total breach of the marital covenant commitment may the non-breaching party seek a declaration that the marriage is no longer legally recognized. B. A man and woman may contract a covenant marriage by declaring their intent to do so on their application for a marriage license [LA. REV. STAT. ANN. § 9:225, 234 (West Supp. 1998) (as amended by 1997 La. Acts 1380 § 2)], as provided in [LA. REV. STAT. ANN. § 9:224(C) (West Supp. 1998)], and executing a declaration of intent to contract a covenant marriage, as provided in [LA. REV. STAT. ANN. 9:273 (West Supp. 1998)] . . . .

(emphasis added)

87 See Coolidge, *supra* note 67, at 52. Coolidge proposes a “transmodern” model of marriage consistent with the social pluralist view of marriage. The “transmodern” model contains the following dimensions:

The four central elements of marriage as a total sexual community might be described as follows: Consummation: a bodily union which is open to life (the structural dimension); Companionship: a relationship of mutuality (the social dimension); Consent: a choice to marry a particular individual (the subjective dimension); *Covenant*: a vow of total commitment (the spiritual dimension); Understood this way, entering into marriage is a moral act that embodies substantive premises.

*Id.* (emphasis added)

88 See LA. REV. STAT. ANN. § 9:273(A)(2)(a) (West Supp. 1998) (as amended by 1997 La. Acts 1380, § 3):

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

89 Interestingly, a renowned French professor who taught at the University of Paris, Léon Mazeaud, proposed a solution (very similar to covenant marriage) to what he considered to be the high incidence of divorce in France in the mid-1940s. See Léon Mazeaud, *Solution au Problème du Divorce*, in RECUEIL DALLOZ, JURISPRUDENCE 1945, at 11–12. Subsequently, Henri Mazeaud proposed the solution in CONTRE-PROJET: TRAVAUX DE LA COMMISSION DE REFORMÉ DU CODE CIVIL 498 (1947–48). From pages 499 to 511 in the same publication there is reprinted the discussion of the proposal by the Commission Plenièrè on December 5, 1947. See also HENRI MAZEAUD & LÉON MAZEAUD, LECONS DE DROIT CIVIL: TOME PREMIER 1318–34 (3d ed. Editions Montchrestien). I am indebted to Professor Cynthia Samuel of Tulane University Law School, who discovered these materials.

issues of divorce and the breakdown of families through law that attempts to persuade and educate. In fact, a renowned French law professor proposed a choice for French couples of an indissoluble marriage in 1945.<sup>91</sup>

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90 See A.N. YIANNPOULOS, *THE CIVIL CODES OF LOUISIANA: HISTORICAL POLITICAL, AND LEGAL BACKGROUND OF THE CODIFICATION*, LOUISIANA CIVIL CODE XIX (1998); SYMEON SYMEONIDES, *AN INTRODUCTION TO THE LOUISIANA CIVIL LAW SYSTEM* 61–126 (6th ed. 1991); Mary Ann Glendon, *Family Law Reform in the 1980s*, 44 LA. L. REV. 1553, 1562 (1984).

91 In HENRI MAZEAUD ET AL., *LECONS DE DROIT CIVIL: LA FAMILLE* bk. 1, vol. 3, nos. 1413–15, at 649–52 (Laurent Levenuer ed., 7th ed. 1995), the newest edition of a work begun by Mazeaud, the author at number 1413 opines:

The problem [of divorce] unleashes the passions, for it touches the [most profound] beliefs of man: [those] about religion and politics. Anti-clericalism, it has been noted, has been and remains one of the driving forces behind the partisans of divorce, while many of the adversaries of divorce systematically enclose themselves in their faith. The problem, then, can appear to be intractable . . . .

The author then proceeds to discuss the choice of an indissoluble marriage as a solution. In number 1415, part II at page 654, the text of Léon Mazeaud, entitled *Solution to the Problem of Divorce*, written in 1945 appears:

A people's worth is measured by the number and quality of its men. These men ought to know how to live, to die, and to transmit life. Knowledge and ability. The country, which demands of them their lives, ought to give them life, both material and moral. To do that it is necessary, first of all, *to build up the family forcefully*. That's what makes men numerous and strong. Without it, the people get bent under the cataclysm of "Sodom and Gomorrah." Build up the family. Inscribe its name on the fronts of the temples if one wants; words are erased with the men who trace them. Above all seek out its weaknesses [in order to] bear it aid. The family is made of stability. All [social] cohesion resides in its perpetuity. . . . The French family is, however, an ephemeral group. It is broken up at the whim of its members. Marriage, which founds it, is provisional. It endures as long as the happiness of the spouses endures. Divorce is there in order to rupture marriage. . . . Born from the fight led against the church, divorce is rooted in our laws. The debate ought to cease. It is possible to reach agreement, both in liberty and by liberty. Some want a marriage that divorce dissolves; others, an indissoluble marriage. Then let each choose! Our laws have, in succession, decreed first indissoluble marriage, then dissolvable marriage. Let them [now] decree marriage dissolvable or indissoluble according to the choice of the future spouses! . . . This is the solution to the problem of divorce—a facultatively indissoluble marriage. No one can protest, for each remains free to bind himself up to death or only up to divorce. *No one will protest, save for the hypocrite who, at the same time, promises his life and keeps the disposition of it.*

*Id.* at 654–55 (emphasis added). I am indebted to my colleague, Professor Randy Trahan, for his translation of this very important work.

“Covenant marriage” ensconces in the law the ideal<sup>92</sup> that marriage is to be life-long<sup>93</sup> and permits couples to choose a more binding commitment to their union—from the beginning of their marriage, by a declaration of intent,<sup>94</sup> and throughout the duration of their mar-

92 Mary Ann Glendon observes:

Max Rheinstein, writing in 1972, was nearly alone among family law scholars in declining to condemn the status quo in which strict fault-based divorce laws were maintained on the books, while easy mutual consent divorce was available in practice. This dual approach to divorce was, he said, a “democratic compromise,” which had “resulted in the satisfaction of almost everyone concerned.” It was one way of accommodating the ideals of a large part of the population with the practices of those who could not live up to those ideals—even when, as is often the case, they supported them in principle.

GLENDON, ABORTION AND DIVORCE, *supra* note 1, at 66 (footnotes omitted).

In describing other Western countries approach to divorce, Professor Glendon opines:

The various versions of this compromise all had this in common: they officially maintained the idea of marriage as an enduring relationship involving reciprocal rights and obligations. In the absence of mutual consent, this relationship could be terminated only when one spouse seriously breached his or her marital duties, or when the marriage had ceased to function over a long period of time. The extent to which this official story was meant to be serious is indicated by the length of the mandatory separation period for unilateral divorce and the presence or absence of a hardship clause. Whether it is serious in practice depends on how thoroughly the courts actually look into the facts and enforce the law.

*Id.* at 106–07.

93 In *The Marriage of Your Choice*, Christopher Wolfe writes:

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

Wolfe, *supra* note 52, at 37–38.

94 See LA. REV. STAT. ANN. § 9:273(A)(1) (West Supp. 1998) (as amended by 1997 La. Acts 1380, § 3):

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

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

A COVENANT MARRIAGE

We do solemnly declare that marriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live. We have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into

riage by agreeing to "take all necessary steps, including marriage counseling," if difficulties arise during the marriage.<sup>95</sup> Covenant marriage adopts the notion of marriage as permanent, as a life-long commitment, yet from the beginning recognizes realistically that difficulties will arise and that the couple may need assistance in resolving them. Furthermore, because the grounds for divorce are limited<sup>96</sup>

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this marriage. We have received premarital counseling on the nature, purposes, and responsibilities of marriage. We have read the Covenant Marriage Act, and we understand that a Covenant Marriage is for life. If we experience marital difficulties, we commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling.

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

95 LA. REV. STAT. ANN. § 9:273(A)(1) (West Supp. 1998) (as amended by 1997 La. Acts 1380, § 3). "A declaration of intent to contract a covenant marriage shall contain all of the following: A recitation by the parties to the following effect:

**A COVENANT MARRIAGE**

If we experience marital difficulties, we commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling." *Id.*

96 See LA. REV. STAT. ANN. § 9:307(A) (West Supp. 1998) (as amended by 1997 La. Acts 1380, § 4).

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

- (1) The other spouse has committed adultery.
- (2) The other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor.
- (3) The other spouse has abandoned the matrimonial domicile for a period of one year and constantly refuses to return.
- (4) The other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses.
- (5) The spouses have been living separate and apart continuously without reconciliation for a period of two years.
- (6)(a) The spouses have been living separate and apart continuously without reconciliation for a period of one year from the date the judgment of separation from bed and board was signed.
- (b) If there is a minor child or children of the marriage, the spouses have been living separate and apart continuously without reconciliation for a period of one year and six months from the date the judgment of separation from bed and board was signed; however, if abuse of a child of the marriage or a child of one of the spouses is the basis for which the judgment of separation from bed and board was obtained, then a judgment of divorce may be obtained if the spouses have been living separate and apart continuously without reconciliation for a period of one year from the date the judgment of separation from bed and board was signed.



and, but for one,<sup>97</sup> based on the fault of one spouse, the law restores broader notions of objective morality to conduct within the context of the marital relationship.<sup>98</sup> The law declares that at least in a covenant marriage, which reflects the ideal, some behavior by a spouse toward the other is so reprehensible that despite society's interest in maintaining the marriage, the other spouse is permitted to terminate it. "Fault" grounds for divorce represent society's collective condemnation of certain marital behavior—for example, physical cruelty to a spouse or a child of one of the spouses, which is for the first time

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As originally introduced, a House Bill of the Louisiana Legislature, H.R. 756, Reg. Sess. (La. 1997), which contained the "covenant marriage" legislation, permitted immediate divorce for only two reasons: adultery and abandonment for one year. A legal separation could be obtained only for physical abuse of a spouse or physical or sexual abuse of a child of one of the spouses. Under section 9:307(A) as enacted and quoted above, there are six grounds for divorce. Obviously, the bill was amended significantly during the legislative process.

97 See LA. REV. STAT. ANN. § 9:307(A)(5) (West Supp. 1998) (as amended by 1997 La. Acts 1380, § 4) (for text, see *supra* note 96). By comparison, in Louisiana, in a marriage that is not a "covenant marriage" either spouse may obtain a divorce if the spouses have been living separate and apart for either 180 days after the filing of a petition for a divorce, LA. CIV. CODE ANN. art. 102 (West 1998), or six months before filing a petition for divorce, LA. CIV. CODE ANN. art. 103 (West 1998).

98 Of course, there is fierce opposition from members of the legal profession, practitioners and academics, to a restoration of objective morality to the relationship of marriage. For a sampling, see, e.g., selected essays in *DIVORCE REFORM AT THE CROSSROADS* (Stephen D. Sugarman & Herma Hill Kay eds., 1991); Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719 (1997); J. Thomas Oldham, *ALI Principles of Family Dissolution: Some Comments*, 1997 U. ILL. L. REV. 801, 818–20 (1997). See also *End No-Fault Divorce? Yes: Maggie Gallagher; No: Barbara Dafoe Whitehead*, *FIRST THINGS*, Aug.–Sept. 1997, at 24; Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996).

In addition, two students' articles question returning to fault-based divorce: Laura Bradford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607 (1997); Martha Heller, *Should Breaking Up Be Harder to Do?: The Ramifications of a Return to Fault-Based Divorce Would Have Upon Domestic Violence*, 4 VA. J. SOC. POL'Y. & L. 263 (1996) (emphasis added). "Despite statistics indicating the prevalent financial disadvantages faced by divorced women, the transition from a fault to a no-fault system promoted the financial independence of women by driving them into the labor market." Heller, *supra* at 280.

See also Katha Politt, *What's Right About Divorce*, N.Y. TIMES, June 27, 1997, at A29. "There are good reasons that historical advances in women's legal and social equality, not to mention their self-esteem and longevity, go hand in hand with easier and more equal access to divorce." *Id.* That is a truly incredible sentence to a woman who has been married for twenty-six years and who has three children and always considered herself equal to men legally and socially. Furthermore, to profess that a woman cannot advance her own interests without sacrificing her children's best interests is regrettable, to say the least.

grounds for divorce under Louisiana law and *only* in a covenant marriage. Such collective social condemnation, altogether missing in pure "no-fault" divorce statutes, is powerful and should occur. Guilt and shame, if our society can restore it, often controls human behavior. Furthermore, for Catholics in particular, whose religious beliefs prohibit divorce, the covenant marriage law restores<sup>99</sup> the possibility of a legal separation. The same causes that justify divorce<sup>100</sup> also justify a separation, with two exceptions: mental cruelty and habitual intemperance that render the spouses' life together insupportable are only grounds for a legal separation.<sup>101</sup>

The covenant marriage law chooses to educate the citizenry for the first time by giving them information in pamphlet form about how a marriage can be terminated even before it is celebrated.<sup>102</sup> The same pamphlet contains information about the ideal of marriage in

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99 Separation from bed and board was repealed by the Legislature in 1990. See LA. CIV. CODE ANN. art. 101, cmt. (c) (West 1998) (effective Jan. 1, 1991). Thus, in a marriage that is not a Covenant Marriage, legal separation is not a possibility, and the spouse who desires to alter his or her marital status has only the option of divorce.

100 See LA. REV. STAT. ANN. § 9:307(B) (West Supp. 1998) (as amended by 1997 La. Acts 1380, § 4).

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

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

101 See LA. REV. STAT. ANN. § 9:307(B)(6) (West Supp. 1998) (as amended by 1997 La. Acts 1380, § 4). See *supra* note 98.

102 See 1997 La. Acts 1380, § 5:

The office of the attorney general, Department of Justice shall, prior to August 15, 1997, promulgate an informational pamphlet; entitled "Covenant Marriage Act," which shall outline in sufficient detail the consequences of entering into a covenant marriage. The informational pamphlet shall be made available to any counselor who provides marriage counseling as provided for by this Act.

the form of the covenant marriage. However, the educational efforts of the law do not cease with providing this information. To commit to the ideal of a covenant marriage, a couple must receive more in-depth information about the seriousness of marriage, including the limited grounds for divorce, through mandatory pre-marital counseling after which the couple and counselor sign notarized documents.<sup>103</sup> Thus, the couple who commits to the ideal of a covenant marriage does so deliberately. The declaration of intent signed by the prospective spouses after the counseling restores integrity to the dedicating promise itself, for what we say and mean shapes the nature and destiny of the marriage.<sup>104</sup> A covenant marriage effectively makes each spouse legally accountable for the promise he or she made.

If difficulties arise during the marriage, the couple in a covenant marriage agrees to further education in the form of counseling in an attempt to resolve their differences and preserve the marriage.<sup>105</sup> Hopefully, after the educational process is completed the couple will be persuaded that a covenant marriage reflects their commitment to the marital relationship. The content of the counseling is purposively not specified beyond requiring a discussion of the seriousness of marriage and the mutual intention of the spouses that the marriage be lifelong. To have been more specific about the content of the counseling would have been too intrusive into the appropriate realm of religion in encouraging and preserving marriage. The covenant marriage law sought cooperation and assistance, not coercion.<sup>106</sup>

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See also LA. REV. STAT. ANN. § 9:307(A)(2)(b) (West Supp. 1998) (as amended by 1997 La. Acts 1380, § 4). The pamphlet emphasizes the different grounds for divorce in a "standard" marriage and in a Covenant Marriage.

103 The documents consist of a declaration of intent signed by the parties, an affidavit by the parties that they have received the requisite counseling, and a notarized attestation by the counselor that he provided the requisite counseling. LA. REV. STAT. ANN. § 9:273(A) (West Supp. 1998) (as amended by 1997 La. Acts 1380, § 3).

104 See David Blankenhorn, *I Do?*, FIRST THINGS, Nov. 1997, at 14–15. David Blankenhorn abhors modern American marriage vows because they reflect a "loving relationship of undetermined duration created of the couple, by the couple, and for the couple." *Id.* at 14. He makes the point in his article that the marriage vow is deeply connected to the marriage relationship.

105 On the basis of the declaration of intent signed by the parties this counseling should emphasize the possibility of reconciliation and preserving the marriage, rather than a form of counseling or therapy concerned only with the fulfillment of the individual adult. See William J. Doherty, *How Therapists Threaten Marriages*, RESPONSIVE COMMUNITY, Summer 1997, at 31; Kramer, *supra* note 4, at A23.

106 At least one Louisiana denomination failed to see the distinction. The Bishop Dan E. Solomon of the Methodist Church in Louisiana issued a statement on June 27, 1997, four days after the covenant marriage legislation passed, essentially describing the "covenant marriage" option as "unnecessary," "confusing," and "intrusive." Press

By inviting not only secular counselors<sup>107</sup> but also the church<sup>108</sup> to participate in strengthening marriage through counseling before and during the marriage, the covenant marriage law seeks to reinvigorate religious organizations. This opportunity offered to the church permits religion to reenter the public square and serve people of faith, and the larger community in which those people live, by educating couples about the spiritual dimension of marriage. Ministers, priests, and rabbis are uniquely qualified to emphasize the value of a life-long commitment to another person and to offer assistance to the couple when difficulties arise through the use of mentoring couples or church-based counseling centers. Religious counselors, unlike secular counselors,<sup>109</sup> would focus on preserving the marriage rather than the individual spouse's psyche.

Although enacted in Louisiana, "covenant marriage" originated as a legislative idea in Florida. In 1990, Representative Daniel Webster of Florida introduced a "covenant marriage" bill<sup>110</sup> that was never acted upon by the Florida legislature. Other scholars have offered "covenant" as an explanation of marriage as a legal institution and as a

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Release from the Louisiana Area United Methodist Church (June 27, 1997) (on file with author).

107 See LA. REV. STAT. ANN. § 9:273(A)(2)(a) (West Supp. 1998) (as amended by 1997 La. Acts 1380, § 3) (emphasis added):

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

108 *Id.* "An affidavit by the parties that they have received premarital counseling from a priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect . . ." See *supra* text accompanying note 106; Coolidge, *supra* note 67, at 38. These mediating structures or "communities" that mediate between the individual and the state or the market need nourishing and have long been the general concern of communitarians, such as Mary Ann Glendon. The family is the first community a human being knows so it is of the ultimate importance. See SEEDBEDS, *supra* note 71.

109 See Doherty, *supra* note 105; Kramer, *supra* note 5, at A23.

110 FLA. STAT. §§ 741.32, 61.31 (as added by H.R. 1585 (Fla. 1990)):

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

solution to the lack of seriousness about marriage. Professor Margaret Brinig used the term *covenant* to describe "marriage" in a book review she wrote;<sup>111</sup> Professor Amitai Etzioni suggested the possibility of "super-vows" in an article he wrote in *Time Magazine*,<sup>112</sup> and Professor

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

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

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

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

111 See Margaret F. Brinig, *Status, Contract and Covenant*, 79 CORNELL L. REV. 1573, 1596 (1994) (reviewing MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1994)). "Covenant, even better than status, explains why some aspects of marriage and parenthood cannot be varied by contract. For example, spouses cannot contract around marriage's infinite duration . . ." *Id.* (footnotes omitted). See also Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855 (1988); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 TUL. L. REV. 953 (1991). Margaret F. Brinig has a book forthcoming from Harvard University Press entitled *The Contract and the Covenant*.

112 See Amitai Etzioni, *How to Make Marriage Matter*, TIME, Sept. 6, 1993, at 76. The Communitarian Network has now produced a booklet entitled OPPORTUNING VIRTUE: THE LESSONS TO BE LEARNED FROM LOUISIANA'S COVENANT MARRIAGE LAW: A COMMUNITARIAN REPORT (Amitai Etzioni & Peter Rubin eds., 1997). The publication consists essentially of William Galston, *Making Divorce Harder is Better*, WASHINGTON POST, Aug. 10, 1997, at C3; Amitai Etzioni, *Marriage With No Easy Outs*, N.Y. TIMES, Aug. 13, 1997; Amitai Etzioni, *Give Couples the Tools to Make Marriage Last*, USA TODAY, Nov. 18, 1996, at 25A; Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990). In the introduction to the publication, the editors also refer to an article by Margaret Brinig and Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869 (1994). See also WILLIAM A. GALSTON, PROGRESSIVE FAMILY POLICY FOR THE TWENTY-FIRST CENTURY, BUILDING THE BRIDGE: 10 BIG IDEAS TO TRANSFORM AMERICA, 149, 156 (Will Marshall ed., 1997).

Christopher Wolfe proposed the possibility of an even more binding "covenant marriage," one that could not be dissolved for any reason, a position consistent with Christian doctrine.<sup>113</sup>

What makes the covenant marriage law of historical significance is that it represents the first time in almost two hundred years that the general trend in the United States, as well as most Western societies, to make divorce easier has been reversed. Even though divorce is more difficult in a covenant marriage, the emphasis in the covenant marriage law is upon making marriage more successful. Furthermore, the choice of a covenant marriage belongs to the individual couple.<sup>114</sup> The covenant marriage law is admittedly not perfect, and some have suggested that it could be improved by amendments that: (1) make clearer that the content of the pre-divorce counseling agreed to by the couple should emphasize reconciliation and preserving the marriage, rather than counseling or therapy concerned only with the individual adult; and (2) sever the explanation of the different grounds for divorce in a covenant marriage from the pre-marital counseling so that particular denominations<sup>115</sup> could fully embrace the concept without compromising the integrity of their pre-marital counseling.

113 See Wolfe, *supra* note 52, at 37, 38:

The proposal is this: let us amend state marriage laws so as to make it *possible* for a man and woman to choose freely to enter into an indissoluble marriage. Note: possible, not mandatory. . . . As the current legal order stands, *all* American marriages can be dissolved by divorce decrees. . . . Yet some people might want to have that unbreakable, legally enforceable bond for themselves, on various grounds . . . . This could be viewed as one "strategy" for maximizing the likelihood of a successful marriage. Liberal divorce law not only rejects this strategy as a general one for all marriages—it rules it out *even for those who would freely choose it*.

For Christian authority stating that divorce and remarriage is impermissible, see *Mark* 10:2–12. See also an identical proposal by French law professor Léon Mazeaud in 1945, *supra* note 90.

114 The fact that it is a choice is not of comfort to those who oppose restoration of objective fault to the marital relationship or to those who oppose making divorce more difficult. Wolfe, *supra* note 52, at 39, summarizes the arguments by "liberals" opposing the choice of a more binding marriage contract as follows:

[S]ocial liberals have a great deal of difficulty accepting restrictions on divorce, because those who suffer from such restrictions are immediately and easily observable, while the benefits of such restrictions (because they flow from indirect effects on incentives) are not as easily identifiable. The common element underlying the two views is misplaced—because it is based on excessively short-term views—compassion.

115 The Catholic Bishops of Louisiana issued the following Pastoral Statement on October 29, 1997:

The legislature and the citizens of the state of Louisiana have manifested a commendable concern for the permanence and stability of marriage by en-

The covenant marriage law requires that each couple be reached and convinced that "marriage" is an institution that is intended to be lifelong for the ordering purpose of procreation. Without the unanimous support of the leaders of all religious denominations<sup>116</sup> and with

acting the Covenant Marriage Act. Strong and stable marriages are crucial for children and a healthy society.

....

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

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

*Parishes and the State's New Covenant Marriage License*, 27 ORIGINS 368 (1997). The Catholic Bishops are continuing discussion of the legislation on Covenant Marriage for the purpose of considering curative legislation. Their first meeting was held on November 25, 1997, and ended without definitive action. The next legislative session during which amendments could be offered to sever the divorce instruction from the pre-marital counseling would be 1999.

116 In addition to the Pastoral Statement by the Louisiana Catholic Bishops (*see supra* note 115), the Louisiana Baptist Convention (Southern Baptist) passed the following resolution on November 11, 1997:

WHEREAS, In the regular session of the 1997 Louisiana Legislature, there was passed what some have labeled the Covenant Marriage Act; and  
 WHEREAS, The so-called no-fault divorce laws in Louisiana and throughout the United States, generally are considered by many to be a miserable failure; and

....

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

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

....

the legal and documentary requirements of the law,<sup>117</sup> individual ministers and secular marriage counselors who support the covenant marriage law need to be educated about the counseling and documentary requirements. Furthermore, the citizens of Louisiana need to be informed and educated about the option of a covenant marriage and why it is desirable in a more effective manner than the pamphlet produced by the Attorney General,<sup>118</sup> if for no other reason than that the

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

Louisiana Baptist Convention, Resolution: Covenant Marriage (Nov. 11, 1997) (unpublished resolution, on file with the Louisiana Baptist Convention).

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

Episcopal Bishop-Elect Charles Jenkins of Baton Rouge criticized the law: By bringing couples in covenant marriages back to a fault-based divorce system, with its cynicism and occasional collusion for the sake of a divorce, "It goes back to the bad old days regarding divorce and dissolution of a household," [Bishop] Jenkins said. "We've been there; it doesn't work. Those old ideas compromised the moral character of couples; they compromised the integrity of judges, courts and attorneys."

Bruce Nolan, *Bishops Back Off Covenant Marriage*, TIMES-PICAYUNE, Oct. 30, 1997, at A1. According to the same article Jewish leaders already had signaled little support for the new civil contract, but no official statement was ever issued or reported identifying the Jewish leaders. For the position of the Bishop of the Methodist Church, see *supra* note 106.

117 See LA. REV. STAT. ANN. § 9:273(A) (West Supp. 1998) (as amended by 1997 La. Acts 1380, § 3); see also *supra* note 92.

118 See LA. REV. STAT. ANN. 9:307(A)(2)(b) (West Supp. 1998) (as amended by 1997 La. Acts 1380, § 3) (emphasis added):

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

See also 1997 La. Acts 1380, § 5:

The office of attorney general, Department of Justice shall, prior to August 15, 1997, promulgate an informational pamphlet, entitled "Covenant Marriage Act," which shall outline in sufficient detail the consequences of entering into a covenant marriage. The informational pamphlet shall be made available to any counselor who provides marriage counseling as provided for by this Act.



legislation permits already married couples to designate their marriage a covenant marriage.<sup>119</sup>

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119 See LA. REV. STAT. ANN. § 9:275 (West Supp. 1998) (as amended by 1997 La. Acts 1380, § 3):

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

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

.....

C.(1) A declaration of intent to designate a marriage as a covenant marriage shall contain all of the following:

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

**A COVENANT MARRIAGE**

We do solemnly declare that marriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live. We understand the nature, purpose, and responsibilities of marriage. We have read the Covenant Marriage Act, and we understand that a Covenant Marriage is for life. If we experience marital difficulties, we commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling.

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

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

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

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

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

## VI. CONCLUSION

Ideas have consequences. In the case of Mary Ann Glendon, her body of juridical thought comprehends such diverse areas as marriage, family, and community. Over a span of many years, she has consistently devoted her endeavors to the study of the family, always placing the family in the larger context of community and state. Her scholarship focuses our attention upon the desirability of strong families centered in strong marriages, the influence of the stories law tells on the broader culture, and the strength families draw from other supportive communities.

Professor Glendon's efforts are not in vain. Her ideas have increasing resonance among policy makers who are shaken by the growing consensus that many societal ills can be traced to families that are broken or that are never formed. Her scholarship informs those who must use law to fashion pragmatic solutions.

Louisiana's covenant marriage law is an attempt to fashion a new approach to strengthening marriage for the sake of the children. It seeks to recapture the meaning of marriage as a legally structured institution intended by its nature to be permanent. Intriguingly, the covenant marriage law requires devoted missionaries—missionaries who change people's hearts by Truth, one heart at a time. The Truth that covenant marriage proclaims is that marriage is intended to be life-long for the common benefit of husband, wife, and children,<sup>120</sup> an eternal Truth that in our post-modern era is now confirmed by empirical studies. The new millennium dawns with hope.

