

COVENANT AND CONTRACT

Margaret Brinig*
Steven Nock**

In this article we ask, "What distinguishes a covenant from a mere contract, and what role does this distinction play for natural law?" Both of us have thought substantially about covenant over the past several years.¹ The concept of covenant comes to us originally from religious sources, so we have paid explicit attention to what the Bible and organized religion have to say about covenant. We have also drawn from our own disciplines of law, economics, and sociology as they explain or draw from the initial concepts.

Though used rarely in law, the term "covenant" is beginning to appear when applied to marital relationships.² Those who have at least heard of the covenant marriage options in Louisiana³ (and, presumably, in Arizona⁴) fall into two camps: those who are strongly in favor⁵ and those who are strenuously opposed.⁶ More than fifty percent of the Lou-

* Professor of Law, University of Iowa.

** Professor of Sociology, University of Virginia.

¹ See MARGARET F. BRINIG, FROM CONTRACT TO COVENANT (forthcoming 2000) [hereinafter FROM CONTRACT TO COVENANT]; Margaret F. Brinig, *Economics, Law and Covenant Marriage*, 16 GENDER ISSUES 4 (1998) [hereinafter *Economics, Law and Covenant Marriage*]; Margaret F. Brinig, *The Family Franchise: Elderly Parents and their Adult Siblings*, 1996 UTAH L. REV. 393 [hereinafter *Family Franchise*]; Margaret F. Brinig, *Status, Contract and Covenant*, 79 CORNELL L. REV. 1573 (1994) [hereinafter *Status, Contract and Covenant*]; Margaret F. Brinig, *Finite Horizons: The American Family*, 2 INT'L J. CHILDREN'S RTS. 293 (1994) [hereinafter *Finite Horizons*].

Steven L. Nock is the Principal Investigator of National Science Foundation, Grant #SBR-981956, recently awarded to study the attitudes surrounding and impact of covenant marriage in Louisiana. He is the author of *MARRIAGE IN MEN'S LIVES* (1998) and such related articles as *Commitment and Dependency in Marriage*, 57 J. MARRIAGE & FAM. 503 (1995) [hereinafter *Commitment and Dependency in Marriage*].

² See, e.g., David O. Coolidge, *Same-Sex Marriage?: Baehr v. Mike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 57-58 (1997); Katherine Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547 (1998).

³ LA. REV. STAT. ANN. §§ 9:272-:275 (West Supp. 1999).

⁴ ARIZ. REV. STAT. § 25-901 (1998).

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

⁶ See, e.g., Ira Ellman, *Senate Bill Revives Horror of Fault Divorce*, ARIZONA REPUBLIC, Mar. 6, 1998, at B5; Walter Kirn, *The Ties That Bind: Should Breaking Up be Harder to Do?*, TIME, Aug. 18, 1997, at 48; Don McLeese, *Louisiana Legislating Levels of Love*, AUSTIN AM. STATESMAN, July 29, 1997, at B1; Katha Pollitt, *What's Right About Divorce*, N.Y. TIMES, June 27, 1997 at A3.

isiana adults surveyed by Gallup⁷ had never heard of the concept. Some county clerks advise against it or fail to pass out the statutorily required brochures because they feel it is silly or too time consuming.⁸ Not surprisingly, couples marrying after the Louisiana legislation took effect have largely opted for "standard marriage." However, the number finding covenant marriage attractive has increased from about 1 percent for the first six months to 2.5 percent for the second.⁹ Most of the considerable media attention has concentrated on the rules for divorce, though the intent of the proponents is to change the nature of marriage.¹⁰

Since August 15, 1997, couples wishing to marry in Louisiana are required to choose between two marriage regimes: the standard marriage with virtually unrestricted access to no-fault divorce or a covenant marriage designed to be somewhat harder both to enter and to exit. The covenant option specifically acknowledges that marriage is a life-long commitment and, as enacted in Louisiana, differs from conventional marriage in a number of additional ways:

- Covenant marriage requires premarital counseling. Counseling must include discussions of the seriousness of marriage, the life-long commitment being made by the couple to their marriage, the obligation to seek marital counseling if problems arise later in the marriage, and the exclusive grounds for divorce or legal separation in a covenant marriage. Couples must sign an affidavit acknowledging their commitment and must prove that they have received counseling on these issues.
- Likewise, divorce from a covenant marriage requires the couple to have sought marriage counseling and to have made a good-faith effort to resolve their differences.
- Although a no-fault divorce is still possible for covenant marriages, the new law requires that the couple live separate and

⁷ The Gallup Organization surveyed a random sample of 540 Louisiana citizens by phone between July and September of 1998. Only 43.1% indicated they had heard of covenant marriage, and only 35% were aware that the legislation had been enacted. When asked whether covenant marriage was a good idea, of those who had heard of covenant marriage, about 25% said it was really too soon to tell; among the remainder, 81% said that it was a "good idea" or a "very good idea." Likewise, 56% of respondents would have a favorable or very favorable reaction to their own child choosing a covenant marriage.

⁸ Telephone Interview with Katherine Spaht (Dec. 1998).

⁹ Steven L. Nock et al., *Louisiana Covenant Marriage: A Solution to the American Divorce Problem?*, SOCIETY (forthcoming 1999); Cheryl Wetzstein, *Erosion of Marriage, Morals Seen in Millennium: Experts Concerned About Social Cost of Family Collapse*, WASH. TIMES, Dec. 27, 1998, at A1 (reporting that according to Brigham Young University family sciences professor Alan Hawkins 3% of Louisiana couples are now electing covenant marriage).

¹⁰ Tony Perkins, *Dateline NBC: Breaking Up is Hard to Do: Louisiana Offers Covenant Contract to Couples* (NBC television broadcast, Dec. 15, 1998).

apart for two years (versus six months under the current marriage regime) or be legally separated for eighteen months.

- Dissolving a covenant marriage in less than two years requires one person to prove fault on the part of the other. Acceptable "faults" are the traditional ones: felony conviction, abuse, abandonment, or adultery. Irreconcilable differences, general incompatibility, irretrievable breakdown of the marriage, or "we just don't get along any more" are not acceptable grounds for divorce, so if these are the problem, then the couple must wait the full two years.
- Newly marrying couples must choose either the covenant or the standard regime. It is not true that the law requires new marriages to be covenants or abolishes the standard regime (a point about which there has been some confusion).
- And finally, the law allows currently married couples to convert (or as proponents prefer, "upgrade") to covenants.

As the assessments of the Louisiana experiment begin, the concept of covenant itself deserves attention. "Covenant" has been around for many years, at least since Biblical times. It figures in the early common law of contracts as the "promise under seal,"¹¹ but is perhaps better known today as the "covenant not to compete" in employment¹² and as the "restrictive covenant" in land sales.¹³ Even the non-lawyer associates formality with the word, and perhaps some feeling of being bound to do something. This interdisciplinary paper will reexamine covenant, emphasizing its applications to the family.¹⁴ The authors will draw on ideas from sociology, law, economics, religion, and feminist thought¹⁵ in looking at what makes a covenant relationship, as opposed to one that is not. In the end, we conclude that covenant departs in significant ways from secular, legal contracts. A covenant involves at least three interrelated concepts: permanence (even extending beyond the lives of the promising parties themselves), unconditional love, and involvement (or witness) of God, or, at minimum, the larger community. In some ways, these natural law concepts are reflected in law. For example, parties legally cannot change the essential content of their marital or parental responsibilities

¹¹ MICHAEL J. TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* (1997).

¹² Catherine L. Fisk, *Removing the 'Fuel of Interest' from the 'Fire of Genius': Law and the Employee-Inventor, 1830-1930*, 65 U. CHI. L. REV. 1127 (1998).

¹³ Donald W. Hansford, *Injunction Remedy for Breach of Restrictive Covenants: An Economic Analysis*, 45 MERCER L. REV. 543 (1993).

¹⁴ For a related paper by a religion professor, see William J. Everett, *Contract and Covenant in Human Community*, 36 EMORY L.J. 557 (1987).

¹⁵ For a related piece, not in the context of the family, see Janet Moore, *Covenant and Feminist Reconstructions of Subjectivity Within Theories of Justice*, 55 LAW & CONTEMP. PROBS., Summer 1992, at 159, 171.

once they have entered into the relationship.¹⁶ On the other hand, parties to a covenant are *beyond* law in certain respects (though law may attempt to be imperialistic).¹⁷ If law tries to change or re-define relationships like those linking parent and child, such as by saying formal parental obligations end when the child reaches majority, it contradicts the essential nature of the bond.¹⁸ If it says the marriage is cleanly broken when the parties divorce, law flies in the face of the unhappiness of many concerned¹⁹ as well as the teachings of the Church.²⁰ While the law may define formal, secular obligations in these ways, it does not alter the fundamental enduring nature of those obligations accepted as part of covenant.

As covenant relationships develop, they show the distinct patterns of call, response, promise, and sign.²¹ Biblical examples of covenant illustrate these clearly, as in the familiar Old Testament story of Noah and the flood.²² Noah was called²³ because of his righteousness to build the ark to God's specifications and to enter the ark with his family and the animals. He obeyed. The promises God made were that He would send

¹⁶ See, e.g., *In re Marriage of Higgason*, 516 P.2d 289 (Cal. 1973) (spousal support during marriage), *overruled on other grounds by In re Marriage of Dawley*, 551 P.2d 323 (Cal. 1976); *Kujawinski v. Kujawinski*, 376 N.E.2d 1382 (Ill. 1978) (support of college-aged child following divorce); *Huckaby v. Huckaby*, 393 N.E.2d 1256 (Ill. 1979) (support of child after divorce); *Pappas v. Pappas*, 75 N.W.2d 264 (Iowa 1956) (same), *overruled on other grounds by Brown v. Brown*, 269 N.W.2d 819 (Iowa 1978); *Buchanan v. Buchanan*, 197 S.E. 426 (Va. 1938) (same).

¹⁷ See FROM CONTRACT TO COVENANT, *supra* note 1, at i.

¹⁸ See *Family Franchise*, *supra* note 1, at 427. This concept is feminist because it rejects the dichotomy of child and adult, accepting instead a more gradual and nuanced change in the relationships.

¹⁹ See MILTON C. REGAN, *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

²⁰ The Catechism of the Catholic Church points out that:

The consent by which the spouses mutually give and receive one another is sealed by God himself. From their covenant arises "an institution confirmed by the divine law . . . even in the eyes of society." The covenant between the spouses is integrated into God's covenant with man . . . "Authentic love is caught up into divine love." . . . Thus the marriage bond has been established by God himself in such a way that a marriage concluded and consummated between baptized persons can never be dissolved. This bond, which results from the free human act of the spouses and their consummation of the marriage, is a reality, henceforth irrevocable, and gives rise to a covenant guaranteed by God's fidelity.

CATECHISM OF THE CATHOLIC CHURCH, at 1639, 1640.

²¹ See Father James N. Gould, Speech at St. Agnes Church, Arlington, VA (Nov. 1998).

²² See *Genesis* 6-8.

²³ See *Genesis* 7:1.

no more devastating floods, that He would keep regular seasons,²⁴ that He would give people animals as well as plants for food, and that He would make humans fruitful.²⁵ God also made it clear that man was to have a special worth. Not only was He to be feared by all the animals, but also “[w]hoever sheds the blood of man, by man shall his blood be shed; for God made man in his own image.”²⁶ In this account, we see the clear development of the four points just raised. Beginning as a farmer and herder, Noah is called to build, to equip, and finally to wait in the ark. He responds by doing God’s command, and is eventually promised God’s continued patience and faithfulness. The symbol or sign is the rainbow, which is to remind God and man of God’s promise to refrain from again sending a flood.

As useful as Noah’s story is for illustrating the common characteristics of covenant as expressed in the Bible, writers thus far have not paid much attention to its implications for families.²⁷ First, Noah’s story obviously involves a family. God might have chosen Noah, his wife, his sons and their wives because as a group they could efficiently coordinate the work effort involved.²⁸ He might have chosen this particular configuration because they had reasons to tolerate each other in the close confines of the ark for six months.²⁹ From a practical point of view, He might have chosen Noah’s family because the young couples could quickly, like the pairs of animals, repopulate the earth.

Noah was also very much the head of the family. Though he may have grumbled,³⁰ and his sons may have muttered as they worked about what a strange father they had, the sons did what their father (acting for

²⁴ See *Genesis* 8:21.

²⁵ See *Genesis* 9:1-4.

²⁶ See *Genesis* 9:6 (Revised Standard); cf. POPE PAUL VI, *HUMANAE VITAE* (1968) (contraception).

²⁷ For an exception, see MADELINE L’ENGLE, *MANY WATERS* (1986).

²⁸ The earliest use for families was as economic units. See JEAN-LOUIS FLANDRIN, *FAMILIES IN FORMER TIMES* 118-30 (1979); MARY ANN GLENDON, *THE NEW FAMILY AND THE NEW PROPERTY* 12 (1981); EDWARD SHORTER, *THE MAKING OF THE MODERN FAMILY* 72 (1977); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 *HARV. L. REV.* 1497 (1983).

²⁹ See ST. PIERRE’S *STUD. NAT. III* 589 (H. Hunter, trans.) (1799) (“We pass through the love of our family, to love Mankind.”).

³⁰ For a very funny interpretation of the scene, see BILL COSBY, *Noah and the Neighbors*, on *THE BEST OF BILL COSBY* (Warner Brothers 1987).

the Lord) commanded.³¹ Noah was directly in covenant with God but stood for the whole family in its dealings with those outside.³²

Finally, Noah's story involves several generations. The older couple, Noah and his wife, did not produce more children but stood as a source of wisdom for the younger.³³ They were able to see in the long run, not just the short-term.³⁴ Noah's covenant bound future generations in their special relationship with God—in their duty to follow and honor Him. The sons and their wives also had a role, not just to produce more children (obviously important), but also to keep Noah's traditions after he died.³⁵

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

Biblical covenant relationships promote interdependence and stability,³⁶ while covenant ideas should even be promoted by the human institution of covenant marriage.³⁷ Keep in mind that unlike contracts, covenants need not extend only to husband and wife,³⁸ but may also involve parents and children, even without the child's ability to consent.³⁹

³¹ See, e.g., Yoram Ben-Porath, *The F-Connection: Family, Friends, Firms and the Organization of Exchange*, 3 POP. DEV. REV. 1, 3 (1980) ("Parental decisions to have children and how to behave toward them in infancy and early childhood are unilateral but are probably affected by expectations concerning future mutual relationships.").

³² See *id.* at 12 ("Authority, discipline, altruism, and family solidarity affect the value of the signal, 'family affiliation,' for the rest of the world. The presence of a head of family, serving as director for communication, trust, and redistribution, reduces transaction costs within the family by reducing the need for bilateral relationships.").

³³ See RICHARD POSNER, *AGING AND OLD AGE* 203, 206-07 (1995).

³⁴ See *Family Franchise*, *supra* note 1, at 412-13.

³⁵ See *id.* at 411-12. For a discussion of the biological interests of the second generation, see Theodore C. Bergstrom, *Economics in a Family Way*, 34 J. ECON. LIT. 1903 (1996).

³⁶ See REGAN, *supra* note 19, at 4, 104, 183; *Status, Contract and Covenant*, *supra* note 1, at 1587-88.

³⁷ See *generally Economics, Law and Covenant Marriage*, *supra* note 1.

³⁸ See Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995).

³⁹ See *Finite Horizons*, *supra* note 1, at 300-01. Even implicit contracts are difficult to explain in this context since the child gives no consent. There may appear to be a covenant between the parents, see Scott & Scott, *supra* note 38, but clearly these are more involved than something like the third party beneficiary rule is. For an example of this doctrine applied to families, see *Drake v. Drake*, 455 N.Y.S.2d 420 (N.Y. App. Div 1982) (child could not enforce her parents' separation agreement).

Adam's story⁴⁰ is in many ways like that of the typical parent-child relationship since the God of Genesis created Adam without Adam's promise or even knowledge. After literally giving him the world, God unilaterally imposed the condition of obedience upon him.⁴¹ God walked in the Garden of Eden (keeping Adam company) and gave Adam green plants to eat and beasts to name. Later, Genesis reports that He created Eve as a helpmate fitting for him. Presumably, Adam at this point had eternal life, for it was only in his disobeying the warning not to eat of the fruit of the tree of knowledge of good and evil that he became subject to death.⁴² When he became disobedient, God did not turn away, but instead, since man now was "like one of us"⁴³ in knowing good and evil, expelled him from the Garden so he would not be able to eat of the tree of life. Adam then had to till the soil and Eve had to experience pain in childbearing, though it was from their seed that God promised the Savior would come.⁴⁴

I. UNCONDITIONAL LOVE

The Lord is merciful and gracious, slow to anger and abounding in steadfast love.

He will not always chide, nor will he keep his anger for ever. He does not deal with us according to our sins, nor requite us according to our iniquities.

For as the heavens are high above the earth, so great is his steadfast love towards those who fear him;

as far as the east is from the west, so far does he remove our transgressions from us.

As a father pities his children, so the Lord pities those who fear him.

...

But the steadfast love of the Lord is from everlasting to everlasting upon those who fear him, and his righteousness to children's children, to those who keep his covenant and remember to do his commandments.⁴⁵

The story of Hosea illustrates both how unconditional love works in the family and how the Bible analogizes unconditional family love to the love God has for mankind and especially for His people. Unconditional love strikes against the heart of contract law.

⁴⁰ See *Genesis* 2-3.

⁴¹ For a beautiful fictional account of the story, see C.S. LEWIS, *PERELANDRA* (1943). Another parent-child relationship is explained in *Hosea* 11, where God is pictured as a father who teaches Israel to walk and nurtures him.

⁴² See *Genesis* 3:19, 22-24.

⁴³ *Genesis* 3:22.

⁴⁴ See *Genesis* 3:15-17.

⁴⁵ *Psalms* 103:8-13, 17-18 (Revised Standard).

A contract-based world allows a breach of promise so that one party may engage in a better opportunity.⁴⁶ (This is called the concept of efficient breach.)⁴⁷ Contract also implies a need to pay some attention to balances between contracting parties. It is clear from the New Testament that if God kept such a balance, without the redeeming work of Christ, we would always fall short.⁴⁸

In stable, covenant-based families, couples do not keep precise track of who owes what to whom.⁴⁹ Couples who *do not keep* precise track of who owes what to whom have more stable marriages. For example, in the National Survey of Families and Households,⁵⁰ couples were asked in 1987-88 how much time they, and their spouse, spent each week on various household tasks. Both spouses were questioned and their responses were highly consistent. The second wave of the study tracked the same people five years later, in 1992-94. Some of the couples had divorced or separated during those five years, others remained intact. The interesting point is that those couples who answered "don't know" or simply refused to answer the household hours questions had a significantly *lower* rate of divorce than those who could make such estimates. Similarly, those who thought the division of labor in the household and in the labor market was "just about fair" were far less likely to divorce or separate than those who thought their marriages were unfair to themselves or to their spouse. Consider a Virginia divorce case involving a wife who thought a contract-like tit-for-tat exchange was necessary. She testified that after the first several years of marriage she felt that a psychological wall was erected between her and her husband.⁵¹ Each time he did something that wronged her, another brick was added to the wall, so that finally, she could not communicate with him at all.

Similarly, both my co-author, Steve Nock, and I have known couples who kept track of how many arguments they had, how many chores each did, or how often they engaged in sexual intercourse. (One doomed couple whose home I visited in the early Seventies displayed a calendar

⁴⁶ See *Status, Contract and Covenant*, *supra* note 1, at 1586.

⁴⁷ See Ian R. McNeil, *Efficient Breach of Contract: Circles in the Sky*, 68 VA. L. REV. 947 (1982); see also RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 189-90 (5th ed. 1995).

⁴⁸ See *Romans* 3:23; see also *2 Corinthians* 3:4-6 (Revised Standard) ("Such is the confidence that we have through Christ toward God. Not that we are competent of ourselves to claim anything as coming from us; our competence is from God, who has made us competent to be ministers of a new covenant, not in a written code but in the Spirit; for the written code kills, but the Spirit gives life.")

⁴⁹ See Ben-Porath, *supra* note 31, at 4 (noting that "large outstanding balances are tolerated," and "[e]nforcement is mostly internal.")

⁵⁰ National Survey of Families and Households, Center for Demography and Ecology, University of Wisconsin-Madison.

⁵¹ *Sprott v. Sprott*, 355 S.E.2d 881, 882 (Va. 1987).

with heart stickers posted on the days when they had sexual intercourse.) Such keeping track, or expecting loving gestures to be returned, flies in the face of a covenant relationship. We may say such relationships are characterized by duty or responsibility,⁵² rather than by “inherently dynamic emotional states.”⁵³ One article⁵⁴ discusses biological evidence suggesting that two different hormones (or pheromones) are given off during relationships. During the initial stage of the relationship, the hormones create sexual passion and total concern with the other. After several years, these hormones fade and are replaced by a different sort, the kind that characterizes affection rather than passion.⁵⁵ Another way of looking at the phenomenon is to note that contracts frequently involve short-run relationships or even instantaneous exchanges (more like the passion).⁵⁶ Covenants, because they are designed to be permanent, assume that the balances will be righted eventually—that things will be “a wash,”⁵⁷ or that any imbalance does not matter. (This is more like the affectionate relationship.) Their participants are thus more altruistic than are participants in contracts.⁵⁸

Keeping score of who does what, and who owes whom appears to produce less satisfactory unions. But extensive dependencies are central to producing good marriages.⁵⁹ In other words, married people appear to thrive when they depend on one another yet do not keep score. Sociologists and economists have investigated factors that foster *commitment* in marriage. Such research seeks to determine why some individuals are more likely than others to remain in a marriage. Commitment is typically understood as the perceived costs of ending the marriage. If an individual envisions no costs whatsoever in ending his or her marriage, then we may say such a person has no commitment to the union. Some

⁵² See MARY ANN GLENDON, *RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE* 121-30 (1991).

⁵³ REGAN, *supra* note 19, at 67.

⁵⁴ Helen Fisher, *The Four Year Itch: Do Divorce Patterns Reflect our Evolutionary Heritage?*, 96 NAT'L HIST. 22 (1987).

⁵⁵ See *id.* at 26.

⁵⁶ See Anthony T. Kronman, *Contract Law and the State of Nature*, 1 J.L. ECON. & ORG. 5, 9-12 (1985).

⁵⁷ See *Hosea* 6:4 (“What shall I do with you, O Ephraim? What shall I do with you, O Judah? Your love is like a morning cloud, like the dew that goes early away.”); cf. G.K. CHESTERTON, *WHAT'S WRONG WITH THE WORLD* (1910).

⁵⁸ For a discussion of such altruism, see Robert Boyd & Peter J. Richerson, *Culture and Cooperation*, BEYOND SELF INTEREST 41 (Jane Mansbridge ed., 1990).

⁵⁹ This dependency of wife upon husband, according to feminist Martha Fineman, is precisely what ails marriage from a woman's point of view. MARTHA A. FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH-CENTURY TRAGEDIES* 166 (1995); Martha Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2191 (1995).

economic theory argues that dependency is a primary factor in producing commitment.⁶⁰ As couples negotiate the demands of married life, they come to depend on one another more and more. The routine demands of household labor, for instance, require a complex arrangement for shopping, cleaning, caring for children, or keeping the checkbook and many other things. As couples settle into routines, they become increasingly interdependent. There are also very objective bases for dependency. Most wives earn less than their husbands, and therefore, may be presumed to be dependent on their spouse's earnings.⁶¹

Research shows that objective dependencies do foster commitment. When partners depend on one another for income or social status, there is greater commitment to the marriage. However, objective dependencies of that sort are much less important than spousal *obligations*. In an analysis of the National Survey of Families and Households, Nock showed that the strongest predictor of individual commitment to a marriage is the imagined consequences of separation *for the spouse*.⁶² After removing the effects of objective types of dependencies (i.e., income, education, occupational status, children) the belief that separation would negatively affect one's husband or wife was significantly more important than anything else for an individual's commitment to a marriage. The imagined consequences of divorce for one's partner may be taken as a crude measure of an individual's sense of his or her marital obligations or the enduring nature of them.⁶³ Both husbands and wives who believe their partners depend on them are much more committed to their marriages. Such research suggests that marriages founded on extensive dependencies are stronger. It also suggests that married couples who envision mutual, long-term, and enduring obligations to each other have stronger marriages.

In the Bible story, the prophet Hosea apparently was told by God to marry a woman of loose reputation and easy virtue.⁶⁴ She had a series of lovers both before and after their marriage.⁶⁵ Nonetheless, Hosea continued to love her, and though he was angry at her unfaithfulness, he always took her back. He did not desert the promises he made. Hosea's wife is of course the allegorical counterpart to Israel, which time and

⁶⁰ See generally GARY S. BECKER, *A TREATISE ON THE FAMILY* (1991).

⁶¹ See, e.g., Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1 (1996); Amy L. Wax, *Bargaining in the Shadow of the Market: Is there a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 522 (1998).

⁶² *Commitment and Dependency in Marriage*, *supra* note 1, at 509.

⁶³ For an extended discussion of such obligations, see Carl E. Schneider, *Marriage, Morals and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503.

⁶⁴ See Hosea 1:2.

⁶⁵ See Hosea 2.

again was unfaithful to the covenants made by Abraham, Isaac, and Jacob.

II. PERMANENCE

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

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

Thou hast said, "I have made a covenant with my chosen one, I have sworn to David my servant:

"I will establish your descendants for ever, and build your throne for all generations."⁶⁶

The Biblical story of David and Jonathan⁶⁷ is one of many that could be selected to show the permanence of covenant relationships, a concept closely related to the unconditional love discussed above. Jonathan made a covenant with David, because, the Bible reports, he "loved David as his own soul," and he gave David his own robe and sword and bow and girdle. David said that if he had any guilt involving Jonathan's father Saul, Jonathan should slay David himself. Jonathan asked God to be witness that he would disclose faithfully whether Saul would do David harm or not; and later,⁶⁸ Jonathan blessed David and asked him not to cut off his loyalty from his house forever. "When the Lord cuts off every one of the enemies of David from the face of the earth, let not the name of Jonathan be cut off from the house of David."⁶⁹ "And as for the matter of which you and I have spoken, behold, the Lord is between you and me for ever."⁷⁰ According to the Bible, God's covenant is thus an everlasting covenant.

A complication was later caused by the Mosaic Law, which had been given earlier in Jewish history. But, as St. Paul explains:

To give a human example, brethren: no one annuls even a man's will, or adds to it, once it has been ratified. Now the promises were made to Abraham and to his offspring. It does not say, "And to offsprings," referring to many; but, referring to one, "And to your offspring," which is Christ. This is what I mean: the law, which came four hundred and thirty years afterward, does not annul a covenant previously ratified by God, so as to make the promise void.⁷¹

⁶⁶ *Psalm* 89:1-4 (Revised Standard).

⁶⁷ See *1 Samuel* 18.

⁶⁸ See *1 Samuel* 18:1-2, 20:6-13. David had become Saul's son-in-law by killing two hundred Philistines. *1 Samuel* 18:27.

⁶⁹ *1 Samuel* 20:15-16. (Revised Standard).

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

⁷¹ *Galatians* 3:15-17 (Revised Standard).

The Hebrews repeatedly broke God's law, given to Moses in the form of the Ten Commandments, not just in the time of Moses, but also in the succeeding generations. According to St. Paul, this written covenant did not replace the essential one God had made from the beginning, one that was finally fulfilled in Christ.⁷²

In the same way, various human rules and regulations (and even the law of the parties signified by their personal contract) cannot change the essential nature of the parent-child or husband-wife relationship. If a law requires one to support aged parents,⁷³ this does not change one's *moral* need to do so⁷⁴ even beyond the poverty level,⁷⁵ for such services

⁷² See *id.* Consider also the following verses:

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

Jeremiah 31:31-34 (Revised Standard).

The distinction between law and covenant also forms part of the background for the question put to Jesus by the Sadducees reported in Luke 20:27-36. A woman had married a series of men after their brothers died, according to the laws of Moses. If the marriage promises were forever, how could she be faithful to all of them? Consider these verses in *Jeremiah*:

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

Jeremiah 32:38-41 (Revised Standard).

⁷³ See, e.g., VA. CODE ANN. § 20-88 (Michie 1998) (providing for misdemeanor punishment for any person deserting or willfully neglecting or refusing to pay support of an adult child or aged parent who is handicapped or otherwise incapacitated when the child or parent is in necessitous circumstances).

⁷⁴ Compare the following verses from 2 Corinthians:

Such is the confidence that we have through Christ toward God. Not that we are competent of ourselves to claim anything as coming from us; our competence is from God, who made us competent to be ministers of a new covenant, not in a written code but in the Spirit; for the written code kills, but the Spirit gives life.

2 Corinthians 3:4-6 (Revised Standard)

⁷⁵ See *Mitchell-Powers Hardware Co., Inc. v. Eaton*, 198 S.E. 496, 499-500 (Va. 1938) (stating that the obligor "must do more than relieve the pangs of hunger, provide shelter and furnish only enough clothes to cover the nakedness of the parent.").

“are presumably rendered in obedience to natural promptings of love and affection, loyalty, and filial duty, rather than upon an expectation of compensation.”⁷⁶ For example, although we have statutes and cases that condemn physical cruelty by spouses, our marriage vows to love one another holds us to a far higher positive standard.⁷⁷ Laws against child abuse cannot replace our duty as parents to fulfill our children’s trust as well as to educate and properly raise them.⁷⁸ The covenant is thus like the “deeper magic” of which C.S. Lewis writes in *The Lion, The Witch and the Wardrobe*:

“It means,” said Aslan, “That though the Witch knew the Deep Magic [of blood sacrifice for sin], there is a magic deeper still which she did not know. Her knowledge goes back only to the dawn of Time. But if she could have looked a little further Back, into the stillness and the darkness before Time dawned, she would have read there a different incantation. She would have known that when a willing victim who had committed no treachery was killed in a traitor’s stead, the Table would crack and Death itself would start working backwards.”⁷⁹

According to Hebrews 8, Christ acts as our high priest but mediates a better covenant, because God’s response is no longer contingent upon Israel’s (or the believer’s) faithfulness. The law has been placed in people’s minds and written on their hearts: “They shall be my people and I their God—I will remember their sins no more.” As the mediator of the new covenant, Christ is said to promise an eternal inheritance. The first (Mosaic) covenant was ratified only at death and with the scattering of blood, while Christ through the shedding of His blood offers forgiveness of sins. Unlike Aaron or the Old Testament priests, St. Paul posits that Christ did not enter a sanctuary that was a copy of Heaven but into Heaven itself to appear in the presence of God on our behalf.⁸⁰

III. INVOLVEMENT OF GOD AS WITNESS

And Joshua wrote these words in the book of the law of God; and he took a great stone, and set it up there under the oak in the sanctuary of the LORD. And Joshua said to all the people, “Behold, this stone shall be a witness against us; for it has heard all the words of the Lord

⁷⁶ *Jacobs v. Church*, 1995 WL 1055844, *3 (Va. Cir. Ct. Apr. 28, 1995).

⁷⁷ *Compare Counts v. Counts*, 266 S.E.2d 895 (Va. 1980) (doctrine of interspousal immunity creates an exception to Virginia’s criminal assault law), *with Weishaupt v. Commonwealth*, 315 S.E.2d 847 (Va. 1984), *and* VA. CODE ANN. § 18.2-61 (Michie 1998) (doctrine of interspousal immunity is not an exception to rape laws if the spouses are separated at the time of the rape, or if there is serious physical injury).

⁷⁸ *See Finite Horizons*, *supra* note 1, at 296.

⁷⁹ C.S. LEWIS, *THE LION, THE WITCH AND THE WARDROBE* 159-60 (1950).

⁸⁰ *See Hebrews* 9.

which he spoke to us; therefore it shall be a witness against you, lest you deal falsely with your God."⁸¹

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

The commercial contract is typically a spot contract, with expectations of immediate or nearly immediate performance.⁸² Covenants, or especially important contracts like wills⁸³ or deeds,⁸⁴ require other (disinterested) witnesses to be involved since everyone knows that both parties to the promise may not be around at the critical time. Many of the Biblical covenants of this type involved kingship or the Levitic priesthood.

The Jacob story⁸⁵ serves as a good example since again it involves families. Jacob, whose youth and even birth involved some rather shady doing at his brother's expense,⁸⁶ had a stormy relationship with his father-in-law, Laban. Laban forced Jacob to serve twice the customary length of time to obtain his chosen bride, having to earn access to Leah before obtaining Rachel.⁸⁷ The two men also disputed ownership over large numbers of goats, which Jacob through artifice caused to bear his markings rather than Laban's.⁸⁸

When the covenant between the two men is made,⁸⁹ Jacob has his kinsmen help him to set up a pile of stones. The two promise mutual non-aggression, and Laban requires Jacob to swear that he will not mistreat his wives (Laban's daughters) nor their children. Jacob leaves with the two wives, their considerable households, and the large fortune in disputed goats. This act shows the actual leaving of Rachel and Leah

⁸¹ *Joshua* 24:26-27 (Revised Standard). Similar words appear with Jacob, in *Genesis* 32, Moses, in *Exodus* 3 and *Leviticus* 26:44-45, David in *2 Samuel* 5, and King Josiah in *2 Kings* 23.

⁸² See Kronman, *supra* note 56, at 9.

⁸³ See VA. CODE ANN. § 64.1-49 (Michie 1950) (requisites for validity).

⁸⁴ See VA. CODE ANN. §§ 55-48, 55-106 (Michie 1950) (form and acknowledgement of deed).

⁸⁵ See *Genesis* 30-31. For a beautiful fictional parallel, see KATHERINE PATERSON, *JACOB HAVE I LOVED* (1992).

⁸⁶ These events are reported in *Genesis* 25:19-34 and *Genesis* 27.

⁸⁷ See *Genesis* 29:1-30.

⁸⁸ See *Genesis* 30:25-43.

⁸⁹ See *Genesis* 31:43-55.

from their father,⁹⁰ as well as that God is to act as witness to the men's promises.

This heap is a witness, and the pillar is a witness, that I will not pass over this heap to you, and you will not pass over this heap and this pillar to me, for harm. The God of Abraham and the God of Nahor, the God of their father, judge between us.⁹¹

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

For over a century, sociologists have advanced secular explanations for the importance of God's witness. French sociologist, Emile Durkheim, argued that religion influences behavior because individuals experience social norms *as divine*.⁹² In trying to understand the influence of religion on the family, it is tempting to focus on individuals' religious beliefs or values. But, Durkheim argued that another element is also important, perhaps more so.

The idea of a purely private religion is unthinkable, as is the idea of a purely private language. Religion is also a social institution. A person's private faith is not a religion until it is held by others.⁹³ A community of believers is a social reality. It is not necessarily a group of persons—a congregation, for example. Those who share a religious faith are bound together in a fundamentally social relationship. They all conform, to some degree, to the rules, norms, moral values, and beliefs of *fellow believers*. Durkheim argued that the ability of religious beliefs to direct behaviors is inherently social. The social pressure to conform to group norms, he argued, is experienced as a divine power—something not springing from the group, but arising outside it.

The relationships among the faithful come to be experienced as divine as a result of *rituals*. Durkheim noted that every religious tradition is based on scrupulous adherence to conventional rituals.⁹⁴ Religion may be thought of as an institution that divides the world into two spheres, the sacred and the profane. The profane is understandable and ordinary. The sacred is mysterious. Rituals serve to connect the sacred with the

⁹⁰ See, e.g., Genesis 2:24. This "leaving" is what Judith Wallerstein and Sandra Blakeslee assert makes up the first important step in successful marriages. SANDRA BLAKESLEE & JUDITH WALLERSTEIN, GOOD MARRIAGE: HOW AND WHY LOVE LASTS (1995).

⁹¹ Genesis 31:52-53 (Revised Standard).

⁹² See EMILE DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE (1961).

⁹³ See, e.g., Johnson v. Prince William County School Board, 404 S.E.2d 209, 210 (Va. 1991) (bona fides of religious belief for home schooling not met when opposition to school attendance came from a "merely personal moral code").

⁹⁴ See generally Durkheim, *supra* note 92.

profane. By reciting prayers, singing verses, kneeling, bowing, fasting, or feasting according to strict rules, individuals collectively experience the *profane as sacred*. Most individuals will say or sing things out loud in collective prayer or song that they probably would not say in conversation. Something about the ritual makes it possible to say such things. According to Durkheim, something about the ritual transforms the profane into the sacred.⁹⁵ And that something is the presence of other people doing exactly the same actions.

The religiously faithful conform to standards of conduct held out as worthy by those of their faith. Durkheim argued that such conformity springs from religious conviction. Individuals do not experience such conformity as secular or social. The Ten Commandments are not understood or experienced as social norms. But the sanctions for disobeying them are completely social, whether individuals believe that rewards or punishments will follow in this or in another life. In short, the influence of religion according to Durkheim may be thought to reside in personal values, but such values exist in a social environment.⁹⁶ It is only the witness of others that creates the experience of the divine. Religious conformity is a form of social control.

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

IV. CONCLUSIONS AND IMPLICATIONS FOR MODERN RELATIONSHIPS

Marriage, unlike cohabitation, involves a covenant. Marriage is much more permanent than is cohabitation.⁹⁷ Additionally, marriage is more apt to be characterized by unconditional love.⁹⁸ Almost by definition, the marriage ceremony involves at least the witness of the community⁹⁹ and frequently the witness and blessing of God.¹⁰⁰

⁹⁵ See generally *id.*

⁹⁶ *Id.* at 60-65.

⁹⁷ Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, 26 DEMOGRAPHY 615 (1989) (cohabitation relationships are much shorter-lived than marriage, and even marriages begun after the couple cohabited were less stable than those where they had not lived together before).

⁹⁸ See generally *Commitment and Dependency in Marriage*, *supra* note 1.

⁹⁹ See, e.g., W. VA. CODE § 48-1-12b (1998) ("We are gathered here, in the presence of these witnesses, to join together this man and this woman in matrimony"). There can be no secret common law marriage, for the "holding out" to the general public is one of the most important ingredients. See, e.g., *In re Estate of Dallman*, 228 N.W.2d 187, 190 (Iowa 1975); *Ex parte Threet*, 333 S.W.2d 361, 364 (Tex. 1960).

¹⁰⁰ See *Status, Contract and Covenant*, *supra* note 1, at 1599.

Covenant marriage is more likely to be permanent than “traditional marriage” for two reasons. First, it is characterized by more pre- and post-marital counseling.¹⁰¹ Second, because the “transaction costs” of divorce are higher, covenant marriage is still more likely to reflect the kind of covenants discussed earlier.¹⁰²

Parent-child covenants illustrate some of the problems occasioned when law tries to arbitrarily cut-off relationships at a given time.¹⁰³ Because the parent-child relationship is a permanent one, the idea that children suddenly reach independence from parents at age eighteen is unrealistic, and perhaps undermines the earlier relationship.¹⁰⁴ The fact that contemporary adults feel that they ought to be financially and often physically independent even when they become very old¹⁰⁵ also contradicts the idea of covenant.¹⁰⁶

No-fault divorce pretends a “clean break” can occur between spouses of long standing¹⁰⁷ and particularly parents.¹⁰⁸ It also contradicts the characteristics of covenant. This suggests that rules of joint custody,¹⁰⁹ or of custody shared to the extent it was before the parties separated,¹¹⁰ may better promote the substantial and unconditional loving that should take place between parent and child.

Covenant is a concept that takes us beyond contract. Indeed, the idea that marriages (or society, for that matter) could be organized around contracts solely is flawed. In every contract there are actually two contracts: the first is the contract we make with another person, the second is the hidden contract we all make among ourselves to obey the

¹⁰¹ See Spaht, *supra* note 2, at 1568-69.

¹⁰² See Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At-Fault People*, 18 INT'L REV. L. & ECON. 325 (1998).

¹⁰³ See *Family Franchise*, *supra* note 1, at 427.

¹⁰⁴ The responsibility-based relationship is explained in *Adams v. Palmer*:

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

Adams v. Palmer, 51 Me. 480, 485 (1863).

¹⁰⁵ See John H. Langbein, *The Twentieth-Century Revolution in Family Wealth Transmission*, 86 MICH. L. REV. 722 (1988).

¹⁰⁶ See generally *Finite Horizons*, *supra* note 1, at 307.

¹⁰⁷ *Family Franchise*, *supra* note 1, at 426; see also Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1117-21 (1989).

¹⁰⁸ See *Family Franchise*, *supra* note 1, at 427.

¹⁰⁹ See Margaret F. Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393 (1998).

¹¹⁰ See American Law Institute, *Principles of Family Dissolution*, § 2.02(b); John S. Murray, *Improving Parent-Child Relationships Within the Divorced Family*, 19 U. MICH. J.L. REFORM 563, 584-88 (1986).

rules of the first contract.¹¹¹ Behind the idea of contracts, in other words, is the more fundamental idea of trust that contracts will be honored. While contracts presume rational self-interest and seek to promote and protect those, trust is inherently non-rational. Covenant is more like trust than contract. Alternatively, covenant is faith that is not based on rationality.

¹¹¹ Thus, the principled objection to “efficient breach” is that as a society we lose respect for this hidden contract. See generally McNeil, *supra* note 47.