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Introduction

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Abstract

The doctrine of covenant has reemerged in a number of contemporary Jewish, Christian, and Islamic circles as a common trope to map and measure the higher (or spiritual dimensions) of the marital union. The doctrine of covenant has also reemerged separately in a number of recent American states as a convenient means of strengthening marital formation and dissolution requirements. This article is the Introduction to a volume that analyzes the covenant theology and law of marriage in the past and the present. After analyzing the modern covenant marriage movement, the authors demonstrate that Jews, Christians, and Muslims alike view marriage both as a contract and as a covenant.

Keywords: marriage, covenant marriage, contract marriage, pactum, ketubah, kitab, Muslim family law, Jewish family, mutual consent, husband and wife, fidelity, support, betrothals, wedding, Talmud, John Calvin, Geneva, Tametsi, canon law

Covenant Marriage v. Contract Marriage

On August 15, 1997, the State of Louisiana put in place the nation's first modern covenant marriage law.² The law creates a two-tiered system of marriage. Couples

¹ This introduction is excerpted, in part, from an article by the two authors "Marriage as More than a Mere Contract," in *The Ethics of Contract*, ed. Robin Lovin (forthcoming) and Joel A. Nichols, "Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law," *Emory Law Journal* 47 (1998):920.

² See chapters herein by Katherine Shaw Spaht and by Margaret Brinig & Stephen Nock. It is important to note that covenant marriage laws, of various sorts, were commonplace in colonial New England, building in part on the Puritan covenantal theology described in the chapters herein by James T. Johnson and Max L. Stackhouse. See also George Eliot Howard, *A History of Matrimonial Institutions*, 3 vols. (Chicago, 1904), vol. 3; Edmund S. Morgan, *The Puritan Family: Religion and Domestic Relations in Seventeenth-Century New England* (New York, 1966).

may choose a contract marriage, with minimal formalities of formation and attendant rights to no-fault divorce. Or couples may choose a covenant marriage, with more stringent formation and dissolution rules. The licensing costs for either form of marriage are the same. But in order to form a covenant marriage, the parties must receive detailed counseling about marriage from a religious official or professional marriage counselor, and then swear an oath, pledging "full knowledge of the nature, purposes, and responsibilities of marriage" and promising "to love, honor, and care for one another as husband and wife for the rest of our lives." Divorce is allowed such covenanted couples only on grounds of serious fault (adultery, capital felony, malicious desertion, and/or physical or sexual abuse of the spouse or one of the children) or after two years of separation. Separation from bed and board is allowed on any of these grounds, as well as on proof of habitual intemperance, cruel treatment, or outrages of the other spouse. Comparable covenant marriage statutes are now in place in Arizona and Arkansas as well. Twenty-six other states have covenant marriage alternatives to contract marriage under consideration.³

These new covenant marriages laws are designed, in part, to help offset the corrosive effects of America's experiment with a private contractual model of marriage. Historically, in America, marriages were presumptively permanent commitments, and marriage formation and dissolution were serious public events. Marriage formation required the consent of parents and peers, the procurement of a state certificate, the publication of banns, and a public ceremony and celebration after a period of waiting and discernment. Marriage dissolution required public hearings, proof of serious fault by one party, alimony payments to the innocent dependent spouse, and ongoing support payments for minor children.⁴

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

³ See detailed citations in chapter herein by Peter Hay.

⁴ For a comprehensive survey of these earlier American marriage laws, see Charles F. Vernier, *American Family Law*, 5 vols. (Stanford, CA: Stanford University Press, 1931-1938).

each party a clean break to start life anew.⁵

This private contractual model of marriage leaves little conceptual room for the higher dimensions of marriage and little constructive role for other parties to play in the process of its formation and dissolution besides the couple themselves. The strong presumption today is that an individual who has reached the age of consent has free entrance into marital contracts, free exercise of marital relationships, and free exit from marital bonds. The legal advantages that still attach to the status of marriage -- to social welfare benefits, tax breaks, zoning protections, evidentiary privileges, life insurance, inheritance rights, probate priorities, and more -- continue to make marriage more attractive than simple cohabitation, at least for couples with children or with plans to be together for the long term. But the growing reality today is that marriage is "just a piece of paper" to be drawn up and torn up as the parties see fit.⁶

America's experiment with the private contractual model of marriage has failed on many counts and accounts -- with children and women bearing the primary costs.⁷ From 1969 to 1994, the national divorce rate rose to over fifty percent, with nearly two-thirds of divorces involving minor children. In the same period, a quarter of all children were raised in single-parent households. One-third of all children were born to single mothers. Two-thirds of all African-American children were raised without a father. Mother-only homes had less than a third of the median income of homes with a regular male present, and four times the rates of foreclosure and eviction. Children from broken homes proved two to three times more likely to have behavioral and learning problems as teenagers than children from two-parent homes. More than two-thirds of juveniles and young adults convicted of major felonies from 1970 to 1995 came from single- or no-parent homes.⁸

Covenant marriage laws have been one of several legal responses to these mounting social and psychological costs of America's experiment with easy-in/easy-out

⁵ See chapters by Spaht, Brinig & Nock, and Hay herein.

⁶ Katherine Anderson, Don Browning, and Brian Boyer, ed., *Marriage: Just a Piece of Paper?* (Grand Rapids, Mich., 2002).

⁷ David Blankenhorn, *Fatherless America: Confronting our Most Urgent Social Problem* (New York, 1996); Don S. Browning, *Marriage and Modernization* (Grand Rapids, Mich., 2003); Katherine Shaw Spaht, "For the Sake of the Children: Recapturing the Meaning of Marriage," *Notre Dame Law Review* 73 (1998): 1547; Linda J. Waite, *Does Divorce Make People Happy? Findings from a Study of Unhappy Marriages* (New York, 2002); Judith Wallerstein, *Second Chances: Men, Women, and Children a Decade After Divorce*, 15th ann. ed. (Boston, 2004); id., *The Unexpected Legacy of Divorce* (New York, 2000); Barbara Dafoe Whitehead, *The Divorce Culture* (New York, 1966).

⁸ See detailed sources and discussion in Nichols, "Louisiana's Covenant Marriage Law." More recent studies, some with more encouraging recent statistics, include: Mary Ann Mason, Arlene Skolnick, Stephen D. Sugarman, *All our Families: New Policies for a New Century* (New York/Oxford, 1998); Milton C. Regan, Jr., *Alone Together: Law and the Meanings of Marriage* (New York/Oxford, 1999); Steven M. Tipton and John Witte, Jr., eds., *The Family in Interdisciplinary Perspective* (New York, 2005).

marriage. Covenant marriage laws capture the traditional ideal that marriage is more than just a piece of paper, more than just a transient private contract. The foundation of covenant marriage is a pledge of permanent sacrifice -- "to love, care, and honor one another as husband and wife for the rest of our lives." The formation of covenant marriage is a public and deliberative event -- requiring a waiting period, and at least the consent of the couples' parents or guardians and the counseling of therapists or clerics, and by implication the communities whom those third parties represent. The dissolution of covenant marriage comes only upon betrayal of the fundamental goods of this institution -- through adultery, abuse, desertion, or capital felony -- or after a suitable period of careful deliberation.

Covenant marriage laws reflect the historical lesson that rules governing marital formation and marital dissolution must be balanced in their stringency -- and that separation must be maintained as a release valve. Stern rules of marital dissolution require stern rules of marital formation. Loose formation rules demand loose dissolution rules. To fix the modern problem of transient marriages requires reforms at both ends of the marital process, insists Katherine Shaw Spaht, one of the principal drafters of Louisiana's covenant marriage law.⁹ Today, more than twenty states have bills under discussion seeking to tighten or abolish the rules of no-fault divorce, without corresponding attention to the rules of marital formation and separation. Such efforts, standing alone, are misguided. The cause of escalating marital breakdown is not only no-fault divorce, as is so often said, but also no-faith marriage.

Covenant marriage laws allow prospective marital couples to contract out¹⁰ of the state's laws of marriage contract by choosing a covenant marriage. Couples who consider covenant marriage must fully apprise themselves of the costs and benefits of protracting the process of marital formation and waiving their rights to no-fault divorce. But the choice of marital form is theirs. Having this choice encourages inaptly matched couples to discover their incompatibility before marriage, rather than after it. If one engaged party wants a contract marriage and the other a covenant marriage, the disparity in prospective commitment will, for many couples, be too plain to ignore. Couples will delay their wedding until their mutual commitment has deepened, or cancel their wedding if their respective commitments remain disparate. Better to prepare well for a marriage than to rush into it. Better to cancel a wedding than to divorce shortly after it. Such is the theory of the new covenant marriage laws. The early indication, according to Margaret Brinig and Stephen Nock, is that the theory is working, even

⁹ See chapter by Spaht herein.

¹⁰ In his chapter herein, Michael Broyde argues that, in allowing private parties to opt out of the state's contract marriage regime, covenant marriage statutes had important antecedents in the New York Jewish Divorce Law of 1983. That 1983 law, revised in 1992, required New York state courts, when adjudicating divorce cases between two Orthodox Jewish parties, to postpone their civil judgment of divorce until a religious divorce had been granted by appropriate rabbinic authority. Broyde elaborates this thesis in his *Marriage, Divorce, and the Abandoned Wife in Jewish Law* (New York, 2001).

though the number of new covenant marriages remains relatively small.¹¹

These covenant marriage laws seek both to respect the virtues of marriage contracts and the values of enduring marriages. These laws have been attacked as an undue encroachment on sexual liberty and on the rights of women and children; as a "Trojan horse" designed to smuggle biblical principles into American law; as an improper delegation of state responsibilities to religious officials; and as a reversion to the days of staged and spurious charges of marital fault which no-fault laws had sought to overcome. But, given the religiously-neutral language of these laws; their explicit protections of both voluntary entrance and exit from the covenant union; their insistence that religious counselors be restricted in the marriage counseling they can offer on behalf of the state; and the overriding commitment of these laws to both parties' freedom of contract, such constitutional objections seem largely unavailing.¹²

The greater vulnerability of covenant marriages lies not in constitutional challenges but in individual evasions. A spouse can escape a covenant marriage simply by moving to and filing for divorce in any of the 47 American states without covenant marriage options, or in any number of foreign countries. As Peter Hay shows, current conflict of laws rules, both domestic and international, do not favor the enforcement of covenant marriage laws over the contract marriage laws of the forum state where the divorce case is litigated. And the trend in many non-covenant states and many foreign nations in the past decade has been to weaken, rather than strengthen, traditional forms and norms of marriage.¹³ These unfavorable conflicts rules, though not yet strongly tested through litigation, underscore the reality that covenant marriage laws are an important, but only a partial, legal response to the fallout of the modern revolution of marriage and divorce.

Marriage as More Than a Mere Contract

Common Law Teachings. Covenant marriage laws are not only a new form of social engineering, designed to counter the rise of privatized marriage and no-fault divorce. They are also a new forum for the expression of traditional common law teachings that marriage is "more than a mere contract." In the American common law tradition, marriage has long been regarded as a natural if not a spiritual estate, a useful if not an essential association, a pillar if not the foundation of civil society. Marriage has required more than the general rules of private contact -- of offer and acceptance, consideration and rescission, reformation and remedy. It has drawn to itself special

¹¹ See chapters by Spaht and Brinig & Nock herein.

¹² See these and other objections raised and answered in *ibid.*

¹³ See detailed analysis and sources in chapter by Hay herein.

rules and rituals of betrothal and espousal, of registration and consecration, of consent and celebration. It has also provided the basis for a long series of special rights and duties of husband and wife, parent and child that are respected at both public and private law. As the American jurist Joseph Story put it in 1834:

Marriage is treated by all civilized societies as a peculiar and favored contract. It is in its origin a contract of natural law.... It is the parent, and not the child of society; the source of civility and a sort of seminary of the republic. In civil society it becomes a civil contract, regulated and prescribed by law, and endowed with civil consequences. In most civilized countries, acting under a sense of the force of sacred obligations, it has had the sanctions of religion superadded. It then becomes a religious, as well as a natural and civil contract; ... it is a great mistake to suppose that because it is the one, therefore it may not be the other.¹⁴

Chancellor James Kent, one of the great early systematizers of the American common law, wrote about the spiritual and social utility of the marriage contract:

The primary and most important of the domestic relations is that of husband and wife. It has its foundations in nature, and is the only lawful relation by which Providence has permitted the continuance of the human race. In every age it has had a propitious influence on the moral improvement and happiness of mankind. It is one of the chief foundations of social order. We may justly place to the credit of the institution of marriage a great share of the blessings which flow from the refinement of manners, the education of children, the sense of justice, and cultivation of the liberal arts.¹⁵

W.C. Rogers, a leading jurist at the end of the nineteenth century, opened his oft-reprinted treatise on the law of domestic relations with a veritable homily on marriage:

In a sense it is a consummation of the Divine to "multiply and replenish the earth." It is the state of existence ordained by the Creator, who has fashioned man and woman expressly for the society and enjoyment incident

¹⁴ Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in regard to Contracts, Rights, and Remedies* (Boston, 1834), 100 (sec. 108). In his second edition, Story added this note to the quoted passage: "It appears to me something more than a mere contract. It is rather to be deemed an institution of society founded upon the consent and contract of the parties; and in this view it has some peculiarities in its nature, character, operation, and extent of operation, different from what belongs to ordinary contracts."

¹⁵ James Kent, *Commentaries on American Law*, 12th ed. by Oliver Wendell Holmes, Jr., 2 vols. (Boston, 1896), 2:76.

to mutual companionship. This Divine plan is supported and promoted by natural instinct, as it were, on the part of both for the society of each other. It is the highest state of existence, ... the only stable substructure of our social, civil, and religious institutions. Religion, government, morals, progress, enlightened learning, and domestic happiness must all fall into most certain and inevitable decay when the married state ceases to be recognized or respected. Accordingly, we have in this state of man and woman the most essential foundation of religion, social purity, and domestic happiness.¹⁶

Likewise, the United States Supreme Court spoke repeatedly of marriage as "more than a mere contract," "a Godly ordinance," "a sacred obligation."¹⁷ In *Murphy v. Ramsey* (1885), one of a series of Supreme Court cases upholding the constitutionality of anti-polygamy laws, Justice Field declared for the Court:

For, certainly, no legislation can be supposed more wholesome and necessary in the founding of a free, self-governing commonwealth ... than that which seeks to establish it on the basis of the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guarantee of that reverent morality which is the source of all beneficent progress in social and political improvement.¹⁸

The Court elaborated these sentiments in *Maynard v. Hill* (1888), a case upholding a new state law on divorce, and holding that marriage was not simply a "contract" for purposes of interpreting the prohibition in Article I.10 of the United States Constitution: "No State shall ... pass any ... Law impairing the Obligation of Contracts." After rehearsing at length the theological and common law authorities of the day, Justice Field declared for the Court:

[W]hilst marriage is often termed a civil contract ... it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds

¹⁶ W.C. Rogers, *A Treatise on the Law of Domestic Relations* (Chicago, 1891), sec.2 (page 2).

¹⁷ *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888); *Reynolds v. United States*, 98 U.S. 145, 165 (1879); *Murphy v. Ramsey*, 114 U.S. 15, 45 (1885); *Davis v. Beason*, 133 U.S. 333, 341-342 (1890).

¹⁸ *Murphy v. Ramsey*, 114 U.S. at 45.

the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and society, without which there would be neither civilization nor progress.¹⁹

Religious Teachings. These traditional common law teachings that marriage is both a contract and something more was rooted in ancient Christian teachings, which in turn had antecedents and analogues in ancient Jewish and Islamic teachings. Jewish, Christian, and Islamic traditions alike have long taught that marriage is a contract -- called the *ketubah* in Judaism, the *pactum* or *sponsalia* in Christianity, the *kitab* in Islam. But these traditions have also long taught that marriage is more than a mere contract -- more than simply a private bargain to be formed, maintained, and dissolved as the two marital parties see fit. For all three traditions, marriage is an institution that is both private and public, individual and social, temporal and transcendent in quality. Its origin, nature, and purpose lie beyond and beneath the terms of the marriage contract itself.

Some of these parallel teachings on marriage are parts and products of broader parallels among Judaism, Christianity, and Islam. Each of these Abrahamic traditions is a religion of revelation, founded on the eternal command to love one God, oneself, and one's neighbors. Each tradition recognizes a canonical text as its highest authority -- the Torah, the Bible, and the Qur'an. Each designates a class of officials to preserve and propagate its faith, and embraces an expanding body of authoritative interpretations and applications of its canon. Each has a refined legal structure -- the Halacha, the canon law, and the Shari'a -- that has translated its enduring principles of faith into evolving precepts of works. Each has sought to imbue its religious, ethical, and legal norms into the daily lives of individuals and communities. Each tradition has developed its own internal system of legal procedures and structures for the enforcement of these norms, which historically have and still can serve as both prototypes and complements to secular legal systems.

The chapters herein by David Novak, Michael Broyde Michael Lawler, Stanley Harakas, James Johnson, Max Stackhouse, Azizah al-Hibri, and Richard Martin analyze and illustrate these ancient religious teachings on marriage and their continued relevance for the Jewish, Christian, and Islamic traditions today as well as for the secular legal systems of which these communities are a part.

Marriage as Contract. It is important to recognize that, while all three traditions have long taught that marriage is more than a contract, they have also insisted that

¹⁹ Maynard v. Hill, 125 U.S. at 210-211 (1888).

marriage is not less than a contract.

Nearly two millennia ago, Jewish Rabbis created the *ketubah*, the premarital contract in which the husband and the wife spelled out the terms and conditions of their relationship before, during, and after marriage, and the rights and duties of husband, wife, and child in the event of marital dissolution. The Talmudic Rabbis regarded these marriage contracts as essential protections for wives and children who were otherwise subject to the unilateral right of divorce granted to men by the Mosaic law. While the terms of the *ketubah* could be privately contracted, both the couple's families and the rabbinic authorities were often actively involved in their formation and enforcement. Moreover, the Talmud provided elaborate liturgies for their celebration of the signing of the *ketubah* and the wedding that followed.²⁰

More than a millennium and a half ago, Christian theologians adopted the marriage pact or bond.²¹ These contracts forged a new relationship between husband and wife and their respective families. They adopted and adapted a number of the marital and familial rights and duties set out in the household codes of the New Testament and the apostolic church constitutions as well as in Jewish, Greek, Roman, and Patristic writings.²² The early rules governing these marriage contracts, as well as related contracts respecting dowries and other marital property, were later systematized and elaborated by Christian jurists and theologians -- in the eighth and ninth centuries by Eastern Orthodox, in the twelfth and thirteenth centuries by Catholics, in the sixteenth and seventeenth centuries by Protestants.

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

²⁰ See chapters by David Novak and Michael Broyde herein.

²¹ See Philip Reynolds and John Witte, Jr., eds. *Evidence of Marriage in Western Christendom: 500-1500* (forthcoming).

²² Col. 3:18-4:1, Eph. 5:21-6:9, 1 Peter 2:11-3:12, 1 Tim. 2:8-15, 5:1-2, 6:1-2; Titus 2:1-10, 3:1. See sources and discussion in David Balch and Carolyn Osiek, *Marriage in the New Testament* (Louisville, Ky., 1997); Don S. Browning, et al., *From Culture Wars to Common Ground* (Louisville, Ky., 1997).

schools of jurisprudence.²³

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

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

Second, all three traditions insisted that marriage depended in its essence on the mutual consent of the man and the woman. Even if the man and woman were represented by parents or guardians during the contract negotiation, their own consent was essential to the validity of their marriage. Jewish and Muslim jurists came to this insight early in the development of their law of marriage contracts. The Catholic tradition reached this insight canonically only in the twelfth century, after which it was absorbed in Orthodox and later in Protestant teachings. All three traditions continued to tolerate the practice of arranged marriages and child marriages, particularly when those were politically or commercially advantageous. But the theory was that both the young man and the young woman reserved the right to dissent from the arrangement upon reaching the age of consent.

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

Fourth, all three traditions often accompanied marriage promises with elaborate exchanges of property, which sometimes gave rise to their own marital property

²³ See chapter by Azizah al-Hibri herein, and additional sources and discussion in Abdullah A. An-Na'im, ed., *Islamic Family in a Changing World: A Global Resource Book* (London/New York: Zed Books, 2002).

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

Fifth, all three traditions eventually developed a marriage liturgy – although whether and when this liturgy became mandatory for the validity of a marriage differed markedly within and among these traditions. In the Jewish tradition, the Talmud provided detailed liturgies and prayers for both the betrothal and the marriage, building in part on prototypes in the book of Tobit. In the Jewish tradition, weddings were essential community events, presided over by the Rabbi, and involving the entire local community.²⁴ The Christian tradition celebrated wedding liturgies of some sort from the start, but the earliest surviving marriage liturgies are from the eighth century.²⁵ Particularly among the Eastern Orthodox, as Stanley Harakas shows, these liturgies became extraordinary visual and verbal symphonies of prayers, blessings, oaths, and rituals, including the Eucharist. These liturgies grew more slowly in the Christian West, not becoming mandatory among Catholics until 1563, and subject to wide and perennial variation and disputation among Protestants. The Islamic tradition mandated an engagement ceremony, which was a private, religious occasion involving the couple, their families, a cleric, and two or more witnesses. It began with readings from the Qur'an and marital instruction followed by final negotiation of the terms of the marriage contract, and execution and attestation by the parties. The wedding was a separate and joyous celebration, entirely secular in nature and significance, and optional.²⁶

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

²⁴ See chapter by David Novak herein. See also Kenneth Stevenson, *Nuptial Blessing* (London, 1982), 3-8.

²⁵ *Ibid.*, 33-122, with samples in Mark Searle and Kenneth W. Stevenson, *Documents of the Marriage Liturgy* (Collegeville, MN: The Liturgical Press, 1992), 3ff.

²⁶ See chapter by al-Hibri herein.

the engagement or marriage; proof of adultery or other fundamental breach resulted in divorce with the right to remarry. Orthodox and Protestant tribunals provided for either annulment or divorce; Catholics recognized only annulment and separation. The Jewish and Muslim traditions generally treated all such dissolutions through the procedures of divorce or through simple judicial declarations that the unions were contracted in error and thus void.

Marriage as More than Contract. The insistence on a marriage liturgy, with its solemn rituals, prayers, blessings, and oaths, is one important indication that, for Jews, Christians, and Muslims, marriage was more than a simple bilateral contract.²⁷ It was also a fundamental public institution and religious practice. Other media complemented the liturgies in reflecting these higher dimensions of marriage -- the beautiful artwork, iconography, and religious language of the marriage contracts themselves, the elaborate rituals and etiquette of courtship, consent, and communal involvement in establishing the new marital household, the impressive production of poems, household manuals, and books of etiquette detailing the proper norms and habits of love, marriage, and parentage of a faithful religious believer. All these media, and the ample theological writings on them, helped to confirm and celebrate the deeper origin, nature, and purpose of marriage in Judaism, Christianity, and Islam.

First, all three traditions recognized that marriage has its ultimate origin in the creation and commandments of God. The Jewish and Christian traditions shared the teaching of Genesis that, already in Paradise, God had brought the first man and the first woman together, and commanded them to "be fruitful and multiply" (Gen. 1:28). God had created them as social creatures, naturally inclined and attracted to each other. God had given them the physical capacity to join together and to beget children. God had commanded them to love, help, and nurture each other and to inculcate in each other and in their children the love of God, neighbor, and self. "Therefore a man leaves his father and mother and cleaves to his wife, and the two become one flesh," Genesis concludes (2:24). Both the Jewish tradition and the Christian tradition eventually built on this primeval commandment, and its later biblical echoes, many of the basic norms of heterosexual monogamous marriage and sexual ethics.²⁸

The Muslim tradition rooted marriage not only in the teachings of the Qur'an but also in the example of Mohammed.²⁹ The Qur'an speaks of marriage as a "solemn

²⁷ These liturgies are emphasized especially in the chapters by Novak, Harakas, Johnson, and Stackhouse herein.

²⁸ See chapters by Novak, Lawler, and Johnson herein. See illustrative texts from all three traditions in *Eve & Adam: Jewish, Christian, and Muslim Readings on Genesis and Gender*, ed. Kristen E. Kwam et al. (Bloomington/Indianapolis, 1999).

²⁹ Both David Novak and Richard Martin emphasize that Mohammed's role as exemplar of marriage for Muslims was very different from the non-exemplary roles of Moses (who married a foreigner) or Abraham (a perennial polygamist) for Jews, or of Christ and Paul (both bachelors) for Christians.

covenant" (*mithaqun*) (Q. 4.20), indeed a form of worship (*'ibadat*) and religious observance enjoined upon each Muslim as a way of keeping faith with the tradition of Islam. In the Hadith, the Prophet provided that "marriage is my Sunnah, so the one who turns away from my Sunnah, turns away from me."³⁰ Also in the Hadith, the Prophet set out in great detail the principles of proper marriage for a Muslim that were elaborated in later books of Islamic law and etiquette.³¹ A number of these teachings emulated, if not echoed, Jewish and Christian rules -- the requirement of monogamy notably excepted.

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

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

The emphasis on the procreation and nurture of children in the faith and the corresponding prohibition on interreligious marriage were particularly prominent themes in biblical and diaspora Judaism. These rules were not only fundamental safeguards against assimilation into (an often hostile) gentile culture. They were also essential conditions for the Jewish community to continue to flourish and grow despite its aversion to proselytism.³² These same emphases on procreation and against intermarriage also emerged among some later Christian and Islamic communities,

³⁰ Quoted in chapter by Azizah al-Hibri herein at n. 80.

³¹ See chapter by Richard Martin herein

³² See chapters by Novak and Broyde herein, and also chapters by Novak, Broyde, and Jocelyn Hellig in *Sharing the Book: Religious Perspectives on the Rights and Wrongs of Proselytism*, ed. John Witte, Jr. and Richard C. Martin (Maryknoll, NY, 1999), 17-78.

particularly when they were placed in minority contexts. Think of Catholics in nineteenth-century America, and Muslims and Orthodox in twentieth-century America.

The Christian tradition devised more elaborate lists of the inherent goods and goals of marriage, beyond the good of producing the next generation of the faithful. Among the most famous formulations was St. Augustine's fifth-century discourse on the marital goods of *fides, proles, et sacramentum*.³³ Marriage, said Augustine, is an institution of *fides* -- faith, trust, and love between husband and wife, and between parent and child that goes beyond the faith demanded of any other temporal relationship. Marriage is a source of *proles* -- children who carry on the family name and tradition, perpetuate the human species, and fill God's Church with the next generation of saints. And marriage is a form of *sacramentum* -- a symbolic expression of Christ's love for his Church, even a channel of God's grace to sanctify the couple, their children, and the broader community. This trilogy of marital goods became axiomatic in later medieval Catholic theology, and remains at the core of Catholic marriage teaching to this day.

An overlapping formulation, drawn from Roman law and Patristic lore, was captured by the early seventh-century encyclopedist, St. Isidore of Seville. Marriage, Isidore argued, provides husbands and wives with: (1) mutual love and support; (2) the mutual procreation and nurture of children; and (3) the mutual protection from sexual sin and temptation. This formula of marital goods denied the sacramentality of marriage, even while confirming its divine origins. It also placed greater emphasis on the virtues of marital love and the need for protection from sexual sin. This was a popular formulation of marital goods among both Orthodox and Protestant Christians.

The Christian tradition, building on Graeco-Roman sources, also emphasized the broader social goods of marriage – teaching that marriage is good not only for the couple and their children, but also for the broader civic communities of which they are a part. Ancient Greek philosophers and Roman Stoics called marriage “the foundation of the republic,” “the private font of public virtue.” The Church Fathers called marital and familial love “the seedbed of the city,” “the force that welds society together.” Catholics called the family “a domestic church,” “a kind of school of deeper humanity.” Protestants called the household a “little church,” a “little state,” a “little seminary,” a “little commonwealth.” At the core of all these metaphors is a perennial Western ideal that stable marriages and families are essential to the survival, flourishing, and happiness of the greater commonwealths of church, state, and civil society. And a

³³ See detailed sources and citations for this and the next four paragraphs on the “goods of marriage” in John Witte, Jr., “The Goods and Goals of Marriage, in *Marriage, Health, and the Professions*, ed. John Wall, Don. S. Browning, William J. Doherty, and Stephen Post (Grand Rapids, Mich., 2002), 49.

breakdown of marriage and the family will eventually have devastating consequences on these larger social institutions.

Much the same emphasis on the individual and social goods of marriage can be found in the Islamic tradition, as Richard Martin documents. Among the most famous formulations was that developed by the great eleventh-century medieval jurist and theologian, Abu Hamid al-Ghazali, who listed as marital goods: (1) procreation; (2) proper satisfaction of natural sexual desires; (3) love and companionship; (4) efficient ordering of the household; and (5) disciplining oneself.³⁴ The parallels between al-Ghazali's list of marital goods formulated in the eleventh century, and those developed in the next century by Catholic writers like Aquinas and Jewish writers like Maimonides suggest that these traditions may well have cross-fertilized each other.

Marriage as Covenant

"Covenant" is emerging in Western law, theology, and ethics today as a common trope to capture some of these higher dimensions of marriage.³⁵ It is also emerging as a common term to connect the interreligious dialogue among Jews, Christians, and Muslims and the interdisciplinary dialogue among jurists, theologians, and ethicists about marriage. The connections between these layers of dialogue about marriage and covenant are still developing; indeed, one of the aims of this volume is to spell out and encourage some of these connections more explicitly. But it is no coincidence that the covenant marriage movement in American law has been orchestrated, in ample part, by proponents of a covenantal theology and ethics of marriage.

Covenant (*berit* in Hebrew; *diatheke* in Greek; *foedus* in Latin; *mithaqan* in Arabic) is an ancient and religiously-laden term that reaches far beyond the realm of marriage. Michael Lawler's definition of covenant and distillation of recent covenant scholarship is worth quoting at some length:

Scholars agree that the term [covenant] is either derived from, or is closely related to, the Akkadian *biritu*, which means to bind together. *Berit*, or covenant, at root, means to bind together, but it connotes more. The parties bound together

³⁴ See chapter by Martin herein. There are striking parallels in the five goods of marriage listed by seventeenth-century Calvinist Richard Baxter, discussed in the chapter by James Turner Johnson herein.

³⁵ See several examples in chapter by Brinig & Nock herein; William Johnson Everett, *Religion, Federalism, and the Struggle for Public Life* (New York/Oxford, 1997).

are originally free and unbound, and they agree to be bound in a relationship that both limits and guarantees their freedom in accord with the terms of the covenant. It matters not whether the covenant is between equals (*bnai berit*) or between a superior and a subordinate (*ba'alei berit*); both parties are equally bound by the terms of the covenant. The standard term for making a covenant, *likhrot berit*, literally to cut a covenant, derives from an ancient ritual of covenant-making in which an animal was cut in half, the covenanting parties walked between the two halves, and the halves were then bound together. The unitive symbolism of this rite is further underscored by the sacred, sacrificial meal which commonly accompanied the covenant and invoked God as its witness (cf. Exodus 24: 1-12).

[Daniel] Elazar comments that “it is significant that cutting [dividing] and binding are the principal elements in the terminology and early practice of covenant-making since a covenant both divides and binds, that is to say, it clarifies and institutionalizes both the distinction between or separate identities of the partners and their linkage.” Covenants constitute two or more distinct parties in a relationship of mutual dialogue and justice, to which they are *morally* as well as *legally* bound. The covenant partners are to be faithful to the covenant; they are to be *lumen fidelitatis gentium*, a light of faithfulness to the nations. As the notion of covenant was adapted in cultural settings beyond the ancient Near East, *berit* successively gave way to the Greek *diatheke*, the Latin *foedus*, more technical than *testamentum*, the old English *troth*, and the modern English sacred promise, oath, and even contract, though this latter results in the loss of the essential moral overtones of covenant.³⁶

“Covenant” in this rich sense is a common Scriptural term for Jews, Christians, and Muslims alike. It appears 286 times in the Hebrew Bible (as *berit*), 24 more times in the New Testament (as *diatheke* or *foedus*), 26 times in the Qur’an (as *mitaqhan*). “Covenant” has multiple meanings and purposes in these three sacred scriptures. But it is used most importantly and most frequently to describe the special relationship between Yahweh and Israel, God and his elect, Allah and his chosen ones.

³⁶ See chapter by Michael Lawler herein at note 2, quoting in part Daniel J. Elazar, *Covenant and Polity in Ancient Israel* (New Brunswick, NJ, 1995), 65. See also Daniel J. Elazar, *Covenant and Commonwealth: From Christian Separatism to the Protestant Reformation* (New Brunswick, NJ, 1996).

In each of these three scriptures, covenant is also occasionally used to describe marriage. In the Hebrew Bible, Yahweh's special covenantal relationship with Israel is analogized to the special relationship between husband and wife. Israel's disobedience to Yahweh, in turn, particularly its proclivity to worship false gods, is frequently described as a form of playing the harlot. Idolatry, like adultery, can lead to divorce, and Yahweh threatens this many times, even while calling his chosen to reconciliation. This image comes through repeatedly in the writings of the Prophets: Hosea (2:2-23), Isaiah (1:21-22; 54:5-8; 57:3-10; 61:10-11; 62:4-5), Jeremiah (2:2-3; 3:1-5, 6-25; 13:27; 23:10; 31:32), and Ezekiel (16:1-63; 23:1-49).³⁷

The Hebrew Bible also speaks about marriage as a covenant in its own right (Prov. 2:17; Mal. 2:14-16). The Prophet Malachi's formulation is the fullest:

You cover the Lord's altar with tears, with weeping and groaning because he no longer regards the offering and accepts it with favor at your hand. You ask, "Why does he not?" Because the Lord was witness to the covenant between you and the wife of your youth, to whom you have been faithless, though she is your companion and your wife by covenant. Has not the one God made and sustained for us the spirit of life? And what does he desire? Godly offspring. So take heed to yourselves, and let none be faithless to the wife of his youth. "For I hate divorce, says the Lord the God of Israel, and covering one's garments with violence, says the Lord, the God of hosts. So take heed to yourselves and do not be faithless" (Mal. 2:13-16).

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

But if you decide to take one wife in place of another, even if you have given the latter a quintal for dowry, take not the least amount of it back; would you take it by slander and a manifest wrong? And how could you take it when you have gone into one another, and they have taken from you a solemn covenant? (Q. 4:20-21).

Jews, Christians, and Muslims alike have long used these kinds of scriptural verses to speak of marriage, *inter alia*, as a covenant and to encourage the procreation of children and to discourage the practice of divorce in direct application of these

³⁷ See analysis in the chapter by Lawler herein and the detailed study in Gordon P. Hugenberger, *Marriage as Covenant: A Study of Biblical Law and Ethics Governing Marriage Developed From the Perspective of Malachi* (Leiden, 1994).

verses. This comes through in many theological, pastoral, and liturgical texts already in the first millennium of the common era.³⁸ What has not been common in these three traditions until more recently is to link explicitly the divine covenant between God and humanity and the marital covenant of husband and wife – in effect to make God a third party to the marriage covenant, and in turn to make marriage a forum for the expression of the divine-human covenant. What has also not been common until recently is to develop a theology and jurisprudence of covenant marriage, a way of describing the higher dimensions of marriage in concrete covenantal terms, and linking those terms to the concrete contractual terms of marriage that all three traditions have long had in place.

In the Jewish and Muslim traditions, the development of a covenant model of marriage is very recent, indeed. Two of the leading proponents of these ideas are contributors to this volume. In his chapter herein, and in a brilliant book-length study, David Novak lays out a compelling case for a Jewish theology and law of covenant marriage.³⁹ In her chapter herein, and in a bold new book in the making, Azizah al-Hibri makes the same case for covenant marriage in the Islamic tradition. What makes Novak and al-Hibri's efforts so promising is their insistence on grounding their covenantal models of marriage in long-neglected texts of the Bible and Qur'an respectively, and rereading and rethinking their own traditions in light of these original canonical texts. What makes their efforts so edifying for a comparative volume like this, is their openness to seeing analogies, sometimes even antecedents, in the covenantal law and lore of other religious traditions besides their own.

There is a longstanding tradition of covenant marriage in the Christian tradition. The emerging scholarly consensus is that John Calvin, the sixteenth-century Protestant reformer of Geneva, was the first to develop a detailed covenant model of marriage in place of the prevailing Catholic sacramental theology and canon law of marriage.⁴⁰ Much of Calvin's general covenant theology was not new. Calvin expounded the traditional biblical idea of a divine covenant or agreement between God and humanity. He followed conventional Christian teachings in distinguishing two interlocking biblical covenants: (1) the covenant of works whereby the chosen people of Israel, through obedience to God's law, are promised eternal salvation and blessing; and (2) the

³⁸ See examples in the chapters by Novak, Lawler, Harakas, al-Hibri, Martin, and Johnson herein. See also Max L. Stackhouse, *Covenant and Commitments: Faith, Family, and Economic Life* (Louisville, 1997); Paul F. Palmer, "Christian Marriage: Contract or Covenant," *Theological Studies* 33 (1972), 617; William Johnson Everett, *Blessed be the Bond: Christian Perspectives on Marriage and Family* (Lanham, MD, 1990).

³⁹ David Novak, *Covenantal Rights: A Study in Jewish Political Theory* (Princeton, NJ, 2000).

⁴⁰ See chapters by Lawler, Martin, and Stackhouse herein. See elaboration of this thesis in John Witte, Jr., *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition* (Louisville, 1997), chap. 3 and in John Witte, Jr. and Robert M. Kingdon, *Sex, Marriage and Family in John Calvin's Geneva I: Engagement and Marriage* (Grand Rapids, Mich., 2005).

covenant of grace whereby the elect, through faith in Christ's incarnation and atonement, are promised eternal salvation and beatitude. The covenant of works was created in Abraham, confirmed in Moses, and consummated with the promulgation and acceptance of the Torah. The covenant of grace was created in Christ, confirmed in the Gospel, and consummated with the confession and conversion of the Christian. These traditional teachings on the covenant were common among Catholics, Orthodox, and Protestants,

Calvin went beyond the tradition, however, by using the doctrine of covenant to describe not only the vertical relationships between God and humanity, but also the horizontal relationships between husband and wife. Just as God draws the elect believer into a covenant relationship with him, Calvin argued, so God draws husband and wife into a covenant relationship with each other. Just as God expects constant faith and good works in our relationship with Him, so he expects connubial faithfulness and sacrificial works in our relationship with our spouses. "God is the founder of marriage," Calvin wrote. "When a marriage takes place between a man and a woman, God presides and requires a mutual pledge from both. Hence Solomon in Proverbs 2:17 calls marriage the covenant of God, for it is superior to all human contracts. So also Malachi [2:14] declares that God is as it were the stipulator [of marriage] who by his authority joins the man to the woman, and sanctions the alliance."⁴¹

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

⁴¹ Calvin, Comm. Mal. 2:14. See further discussion in chapters by Lawler, Stackhouse, and Martin herein.

This was the first comprehensive covenantal model of marriage in the Christian tradition, and it informed the policies of the Genevan church and state alike.

Calvin may have developed the first covenantal model of marriage, but by no means the last. An analogous covenantal model of marriage emerged from the hand of contemporary Zurich reformer, Heinrich Bullinger, whose work was tremendously influential on both on the Continent and in England. By the later sixteenth century, as James Johnson and Max Stackhouse carefully document, the writings of Calvin and Bullinger, separately and together, catalyzed a veritable industry of Protestant covenant theology, jurisprudence, and ethics. These writings on covenant, which crested in seventeenth- and eighteenth-century England and New England, provided a detailed integrated understanding not only of marriage per se, but also of the place of marriage in church, state, and broader society.⁴² In the last two centuries, covenantal language has also become prominent in Protestant marriage and wedding liturgies. Indeed, today, Stackhouse and Johnson conclude, Protestant liturgies more than Protestant theologies are strongholds for covenant marriage lore.

In the Catholic tradition, Michael Lawler shows, the Council of Trent closed the door firmly on covenant marriage language in 1563. In its decree *Tametsi*, the Council declared canonical the pervasive medieval teaching that marriage is a sacrament. Heretical Protestant teachings on marriage, including the teaching on covenant marriage, could henceforth have no place in the Catholic tradition. Four centuries later, however, the Second Vatican Council reopened this door, using the language of covenant as an organizing idiom to describe the origins, nature, and purpose of marriage. In *Gaudium et spes*, one of the Council's most influential documents, the Vatican Fathers put in thus:

The intimate partnership of married life and love has been established by the Creator and qualified by His laws. It is rooted in the marriage covenant of irrevocable personal consent.... [A] man and a woman, who by the marriage covenant of conjugal love "are no longer two but one flesh" (Mt. 19:6), render mutual help and service to each other through an intimate union of their persons and of their actions. Through this union they experience the meaning of their oneness and attain to it with growing perfection day by day. As a mutual gift of two persons, this intimate union, as well as the good of children, imposes total fidelity on the spouses, and argues for an unbreakable oneness between

⁴² See sources and discussion in David A. Weir, *Early New England: A Covenanted Society* (Grand Rapids, Mich., 2005); Colloquium, "Creativity and Responsibility: Covenant, Contract, and the Resolution of Disputes," *Emory Law Journal* 36 (1987):533.

them. Christ the Lord abundantly blessed this many-faceted love, welling up as it does from the fountain of divine love and structured as it is on the model of His union with the Church. For as God of old made himself present to His people through a covenant of love and fidelity, so now the Savior of men and the Spouse of the Church comes into the lives of married Christians through the sacrament of matrimony.⁴³

In the Orthodox Christian tradition, Stanley Harakas shows, “the term ‘covenant marriage’ is foreign.” Yet the “rich understandings of marriage in the Orthodox tradition also has some resonance with some aspects of covenantal approaches to the marital union” in traditional Protestantism and modern Catholicism.

⁴³ Second Vatican Council, *Gaudium et Spes*, para. 48, in *The Document of Vatican II*, ed. and trans. Walter M. Abbott and Joseph Gallagher (New York, 1966).