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## **The Covenant of Marriage: Its Biblical Roots, Historical Influence, and Modern Uses**

John Witte, Jr.

### **Abstract**

*This Article analyzes the recent covenant marriage movement in America, and its deep roots in biblical teachings. It shows that the Hebrew Prophets, especially Malachi, described the covenant between God and his chosen people of Israel as a model for human marriages, featuring courtship and public celebration of the marriage, mutual love and faithful monogamy, procreation and nurture of children, and limited divorce and an openness to reconciliation. This idea of marriage as a covenant of the whole community is much more prominent in the Bible than the idea of marriage as a sacrament of the church, and it provides a better bridge concept between theology and law, traditional and modern accounts of the institution of marriage. Recent Catholic and Protestant statements alike now use the covenant idea of marriage, which has resonance in Jewish and Islamic contexts as well.*

**Keywords:** Covenant; Covenant Marriage; Covenant in the Bible; Mosaic Law; Old Testament Prophets; Hosea; Ezekiel; Malachi; Monogamy; Procreation; Mutuality; Marital Love; Marital Liturgies; Marital Communication; Divorce; Fidelity; Sacrament of Marriage; Protestantism; Calvinism; Second Vatican Council; Code of 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. The law creates a two-tiered system of marriage. Couples 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 professional marriage counselor or a religious official, 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 same fault 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.<sup>1</sup> Twenty-six other states have considered covenant marriage alternatives to contract marriage.<sup>2</sup>

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 and in much of the West, 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.<sup>3</sup>

Over the past two generations, 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 making a one-time division of marital property to give each party a clean break to start life anew.

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.<sup>4</sup> From 1975-2010, a quarter of all children were raised in single-parent households. One

<sup>1</sup> Louisiana (1997): La. R.S. 9:272 *et seq.* (2003); Arizona: Ariz. R.S. 25-901 *et seq.*; Arkansas: Ark. Code § 9-11-801 *et seq.*

<sup>2</sup> See Peter Hay, "The American 'Covenant Marriage' in the Conflict of Laws," in *Covenant Marriage in Comparative Perspective*, John Witte, Jr. and Eliza Ellison, eds. (Grand Rapids, MI: Wm. B. Eerdmans, 2005), 317-332.

<sup>3</sup> For a comprehensive survey of these earlier American marriage laws, see Charles F. Vernier, *American Family Law*, 5 vols. (Stanford: Stanford University Press, 1931-1938). For the European background, see my *From Sacrament to Contract: Marriage, Religion, and Law in the Western Tradition*, 2d ed. (Louisville, KY: Westminster John Knox Press, 2012).

<sup>4</sup> Don S. Browning, *Marriage and Modernization* (Grand Rapids: William B. Eerdmans, 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*, 15<sup>th</sup> ann. ed. (Boston, 2004); *id.*, *The Unexpected Legacy of Divorce* (New York, 2000); Barbara Dafoe Whitehead, *The Divorce Culture* (New York, 1996).

quarter of all pregnancies were aborted. One third of all children were born to single mothers. One half of all marriages ended in divorce. 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. Teenagers who grew up in broken homes proved two to three times more likely to have behavioral, learning, and socialization problems than teenagers from two-parent homes. More than two-thirds of juveniles and young adults convicted of major felonies after 1970 came from single- or no-parent homes.<sup>5</sup> These numbers have improved somewhat in the past few years, but they are still deeply worrisome.<sup>6</sup>

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 marriage. Covenant marriage laws capture the traditional ideal that marriage is "more than just a piece of paper," more than just a transient and terminal private contract for sexual intimacy.<sup>7</sup> The foundation of covenant marriage is a pledge of presumptive 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 or after a suitable period of separation and 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, covenant marriage proponents have insisted, requires reforms at both ends of the marital process.<sup>8</sup> A number of states have recently responded to the problem of transient marriage simply by tightening their rules of no-fault divorce, but without corresponding attention to the rules of marital formation and separation. Such efforts, standing alone, are misguided. The cause of

<sup>5</sup> 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.

<sup>6</sup> See recent figures in Brad Wilcox, et al., *The State of our Unions, Marriage in America 2010: When Marriage Disappears* (New York: Institute for American Values; Charlottesville, VA: University of Virginia, 2010); Paul R. Amato, et al., *Alone Together: How Marriage in America is Changing* (Cambridge, MA: Harvard University Press, 2007); Steven M. Tipton and John Witte, Jr., eds., *Family Transformed: Religion, Values, and Family Life in America* (Washington, DC: Georgetown University Press, 2005); Mary Ann Mason, Arlene Skolnick, and Stephen D. Sugarman, *All our Families: New Policies for a New Century* (New York/Oxford: Oxford University Press, 1998).

<sup>7</sup> Katherine Anderson, Don Browning, and Brian Boyer, ed., *Marriage: Just a Piece of Paper?* (Grand Rapids: Wm. B. Eerdmans, 2002).

<sup>8</sup> See Katherine Shaw Spaht, "The Modern American Covenant Marriage Movement: Its Origins and Its Future," in *Covenant Marriage*, 239-264. Professor Spaht was the principal architect of the covenant marriage movement in Louisiana.

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 out 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 should, for many couples, be too plain to ignore. Couples should 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.

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 back 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 the freedom of contract of both parties, such constitutional objections seem largely unavailing.<sup>9</sup>

### **Marriage as Covenant in the Hebrew Bible**

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 contract -- of offer and acceptance, consideration and rescission, reformation and remedy. It has drawn to itself special 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 (1779-1845) put it in 1834:

<sup>9</sup> See *ibid.* and Margaret Brinig and Stephen L. Nock, "What Does Covenant Mean for Relationships?" in *Covenant Marriage*, 265-293.

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.<sup>10</sup>

This traditional legal teaching that marriage is more than a mere private contract is rooted in, in part, ancient biblical teachings. Particularly, the idea that marriage is a covenant has deep biblical moorings, which I would like to spend a bit of time excavating. The Hebrew Bible relates that God entered into a special new covenant relationship with his chosen people of Israel, building on earlier covenant promises to Noah and Abraham.<sup>11</sup> In this new covenant, God promised the people of Israel divine favor and blessing in return for their obedience to the Mosaic law. But God also threatened divine condemnation and punishment if the people disobeyed the law and went after other gods. The biblical term "covenant" (*b'rith* in Hebrew; *diatheke* in Greek; *foedus* in Latin) is more than simply a contract or agreement. In a covenant, both sides yield a portion of their natural freedom to the other, and agree to limit and direct their actions thereafter in accordance with the terms of their covenant. Both sides agree on the dire consequences to them and their descendants of non-compliance with the terms of their covenant. In the ancient world, peace treaties and alliances between tribes and peoples were sometimes formed by covenants of this sort. Their formation often featured elaborate ceremonies and sacrifices, communal oath swearings, and the erection or dedication of a physical marker signifying the covenant and sometimes recording its terms. As the Jewish authority on covenant theology, Daniel Elazar, puts it: "A covenant is a morally informed agreement or pact based upon voluntary consent, established by mutual oaths or promises, involving or witnessed by some transcendent authority, between peoples or parties having independent status, equal in connection with the purposes of the pact, that provides for joint action or obligation to achieve

<sup>10</sup> Joseph Story, *Commentaries on the Conflict of Laws, Foreign and Domestic, in regard to Contracts, Rights, and Remedies* (Boston: Little, Brown, 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."

<sup>11</sup> Genesis 9:8-19; 15:1-6, 18; 17:2; 22:16-18. All biblical quotations herein are from the Revised Standard Version unless otherwise noted.

defined ends (limited or comprehensive) under conditions of mutual respect, which protect the individual integrities of all the parties to it.”<sup>12</sup>

This was the special covenant relationship that God had entered into with his chosen people of Israel. Moses’ charge to the people of Israel in Deuteronomy, as part of an elaborate public recitation and ceremony, was one of several statements of this mutual covenant between God and Israel:

This very day, the Lord your God is commanding you to observe these statutes and ordinances: so observe them diligently with all your heart and with all your soul. Today you have obtained the Lord’s agreement: to be your God; and for you to walk in his ways, to keep his statutes, his commandments, and his ordinances and to obey him. Today the Lord has obtained your agreement: to be his treasured people, as he promised you, and to keep his commandments; for him to set you high above all nations that he has made, in praise and in fame and in honor; for you to be a people holy to the Lord your God, as he promised.<sup>13</sup>

Though the Mosaic law itself did not draw this analogy, the Hebrew Prophets Hosea, Jeremiah, Ezekiel, Isaiah, and Malachi all analogized this covenant relationship between God and Israel to the marital relationship between a husband and wife. Just as God chose to give up his divine freedom to bind himself to his chosen people of Israel, the Prophets argued, so a man chooses to give up his natural freedom to bind himself to his wife, to become “one flesh” with her. Just as Israel chose Yahweh out of all the other gods of the ancient pantheon to be its God and to make sacrifices only to this God, so a woman chooses her husband from all the other men in the universe to be her only husband, and to sacrifice and dedicate herself to him alone. Just as God and Israel swore to bind themselves together by a special covenant, with each side promising to be faithful and obedient to the other, so a husband and wife swear to a special marital covenant, with each side promising to be faithful and obedient to the other in accordance with the terms of their agreement and with the laws of the Torah. Just as breach of the divine covenant between God and his chosen people will hurt the parties and have devastating consequences upon later generations, so will breach or betrayal of a marital covenant between husband and wife hurt the innocent spouse and have devastating consequences for each of them and for the children of that union.<sup>14</sup>

<sup>12</sup> See Daniel J. Elazar, *Covenant and Polity in Biblical Israel: Biblical Foundations and Jewish Expressions* (London: Transaction Publishers, 1998), 163; Delbert R. Hillers, *Covenant: The History of a Biblical Idea* (Baltimore, MD: Johns Hopkins University Press, 1969), 25-39

<sup>13</sup> Deuteronomy 26:16-19 (NRSV); see further Deuteronomy 29:13; Exodus 6:7; Leviticus 26:12.

<sup>14</sup> Hosea 2:2-23; Isaiah 1:21-22; 54:5-8; 57:3-10; 61:10-11; 62:4-5; Jeremiah 2:2-3; 3:1-25; 13:27; 23:10; 31:32; Ezekiel 16:1-63; 23:1-49; Malachi 1-2. See further Gordon P. Hugenberger, *Marriage as Covenant: A Study of Biblical Law and Ethics Governing Marriage Developed From the Perspective of Malachi* (Leiden, 1994); Michael G. Lawler, “Marriage as Covenant in the Catholic Tradition,” in *Covenant Marriage*, 70-92; Sharon Moughtin-Mumby, *Sexual and Marital Metaphors in Hosea, Jeremiah, Isaiah, and Ezekiel* (Oxford: Oxford University Press, 2008).

The Prophet Hosea, who wrote in the mid-eighth century b.c.e., was the first to use this covenant marriage metaphor.<sup>15</sup> Hosea preached against Israel's worship of the cult of Baal. Baal was a Canaanite fertility god, whom his worshippers regarded as the lord of the earth. Baal's sexual intercourse with the goddess Anat was regarded as the source of all things on earth. This creative act of divine intercourse was celebrated by temple prostitutes, both male and female. They were joined by the faithful worshippers of Baal in ritual acts of sexual intercourse in the temple, sometimes massive orgies of collective worship. The Mosaic law had already sought to stamp out this cult of Baal.<sup>16</sup> The later prophets repeatedly denounced the Jews for succumbing to its temptations. Jewish women who served as temple prostitutes of Baal were regarded as treated as harlots and were to be shunned.

One such temple harlot was a woman named Gomer. Yet God told the Prophet Hosea to take her as his wife. After Hosea and Gomer had married and produced children, however, Gomer eventually committed adultery by returning to "play the harlot" in the temple of Baal.<sup>17</sup> Yet Hosea, acting under divine instruction, forgave her and called her back into marital covenant with him and to faithful care of their three children. Hosea used this personal experience of marriage, adultery, and reconciliation with Gomer as the foundation and exemplification of his prophecy about Israel's relationship with God. Before the giving of the Mosaic law, Israel was involved with false gods, yet God had called her to be his chosen ones. God entered into a special covenant relationship with them, calling them to abide by the Mosaic law. Israel, however, played the harlot by going after false gods, committing idolatry. Yet God maintained his steadfast covenant faithfulness and love for Israel. "Yahweh's love for unfaithful Israel," Michael Lawler writes, "is a love that is the opposite of hatred (9:15), a helping love (11:1), a healing love (14:5), a love that wins back an unfaithful wife (3:4-5), a covenantal love that is 'loyalty, service, and obedience'."<sup>18</sup> Hosea used the loaded Hebrew term "*chesed*" for this special kind of covenantal love. It means "love, goodness, and inward feeling of tenderness and mercy," as several other passages in the Hebrew Bible illustrate.<sup>19</sup> He also used the Hebrew term, "*emunah*," which means faithfulness, devotion, unflinching and enduring support.<sup>20</sup>

The Prophet Jeremiah, writing at the turn of the sixth century b.c.e., also used this marital covenant metaphor to condemn the idolatry of the Jews in consorting with false gods and foreign peoples.<sup>21</sup> But now Israel had compounded its sins of idolatry with the sins of false sacrifice and child murder. Rather than offering to God the burnt sacrifices of animals prescribed in the Torah, the Israelites of Jeremiah's day were

<sup>15</sup> Michael G. Lawler, *Secular Marriage, Christian Sacrament* (New York: Twenty-Third Publications, 1995), 8-9.

<sup>16</sup> Deuteronomy 23:17.

<sup>17</sup> Hosea 2:5.

<sup>18</sup> Edward Schillebeeckx, *Marriage: Human Reality and Saving Mystery* (New York: Sheed and Ward, 1965), 37-44.

<sup>19</sup> *Ibid.*, 63 (citing Isaiah 69:7, Joel 2:13; Micah 7:18; Psalm 5:7, 36:5, 48:9, Jeremiah 3:12).

<sup>20</sup> *Ibid.* (citing Deuteronomy 7:9, Isaiah 49:7, Jeremiah 42:5, Hosea 9:12).

<sup>21</sup> Jeremiah 2:18.

sacrificing their first children to Baal as a thanksgiving offering.<sup>22</sup> Through Jeremiah's prophecy, God now rejected his chosen people of Israel and presented them with a bill of divorce, as a husband is permitted to do under the Mosaic law.<sup>23</sup> But, when a remnant of the people proved faithful, God ultimately retreated from this threat of divorce, pledged his eternal love and covenant faithfulness to Israel and to her children who remain faithful: "I have loved you with an everlasting love; therefore, I have continued my faithfulness to you."<sup>24</sup>

The Prophet Ezekiel gave the covenant marriage metaphor more elaborate expression still, now imputing graphic emotions to God, the metaphorical lover, then husband, and then victim of his wife's adultery. Ezekiel wrote in the early sixth century b.c.e. at the time when Jerusalem had fallen to Nebuchadnezzar and the Israelites were in exile in Babylon. He describes the metaphorical marriage of God and Israel in graphic terms. God is now depicted wistfully recounting the birth of Israel, her puberty, their happy courtship, betrothal, wedding, and happy cohabitation, only to be devastated by Israel's infidelity and her need for severe punishment.

I passed by you again, and looked on you; you were at the age for love. I spread the edge of my cloak over you, and covered your nakedness: I pledged myself to you and entered into a covenant with you, says the Lord God, and you became mine. Then I bathed you with water and washed off the blood from you, and anointed you with oil. I clothed you with embroidered cloth, and with sandals of fine leather; I bound you in fine linen and covered you with rich fabric. I adorned you with ornaments: I put bracelets on your arms, a chain on your neck, a ring in your nose, earrings in your ears, and a beautiful crown upon your head. You were adorned with gold and silver, while your clothing was of fine linen, rich fabric, and embroidered cloth. You had choice flour and honey and oil for food. You grew exceedingly beautiful, fit to be a queen. Your fame spread among the nations on account of your beauty, for it was perfect because of my splendor that I bestowed on you, says the Lord God. But you trusted in your beauty, and played the whore because of your fame, and lavished your whorings on any passer-by.<sup>25</sup>

And on and on this narrative goes with the same raw emotion imputed to God. Ezekiel devotes many chapters to documenting Israel's betrayal of the law of God and her union with false gods and foreign peoples. His running metaphor eventually shifts to a divorce court, where God, the aggrieved husband, presents evidence against his

<sup>22</sup> Jeremiah 2:34.

<sup>23</sup> Jeremiah 3:7-8; cf. Deuteronomy 24:1-4.

<sup>24</sup> Jeremiah 31:3; cf. Ezekiel 16:63, Is. 54:7-8.

<sup>25</sup> Ezekiel 16:8-15 (NRSV).

wife Israel whose “uncleanness” has led to her necessary repudiation and exile. But eventually, God forgives his wayward bride and promises her “a new covenant of peace,” whose terms he lays out in great detail in later chapters of Ezekiel. He promises that, despite her unfaithfulness and exile, Israel “will soon come home,” and “the Lord will be there,” waiting as a faithful and forgiving husband.<sup>26</sup> Exactly the same metaphorical pattern of courtship, marriage, betrayal, divorce proceedings, and eventual reconciliation between God and Israel can be found in the writings of the Prophet Isaiah.

All four of these prophets – Hosea, Jeremiah, Ezekiel, and Isaiah – used this marriage metaphor for anthropomorphic reasons. By casting in graphic human and emotional terms that everyone could understand what it must feel like to God to be betrayed by his beloved chosen people, the prophets hoped to shake the wayward people from sin and bring them back to covenant faithfulness.

Malachi, the last of the Prophets to use this covenant image in his mid-fifth century b.c.e. text, repeated this story of marital formation, betrayal, and reconciliation, but then he drew direct lessons from this image for human marriages as well. In the opening verses of his prophecy, Malachi started out the same way as the earlier prophets had done, depicting God’s angry lamentation about Israel’s infidelity. This time, it was their many ritual impurities and fraudulent sacrifices that ran contrary to the “covenant of life and peace.” God lashes out angrily at this latest act of infidelity by his bride: “I will rebuke your offspring and spread dung upon your faces, the dung of your offerings, and I will put you out of my presence.”<sup>27</sup>

But then Malachi flipped this covenant marital metaphor on its head, using it to offer moral instructions about human marriages. He now called each human marriage a special covenant relationship in its own right, indeed an echo and expression of God’s loving covenant with Israel. He now called humans to be faithful to their covenant marriage with each other, just as God had been faithful in his covenant relationship with his chosen people. And he now called breach of one’s own marital covenant with a spouse a breach of the broader covenant with God, which God will punish – in this case, by refusing their sacrifices, even if these sacrifices follow the ritual laws.

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

<sup>26</sup> Ezekiel 36:8, 48:35.

<sup>27</sup> Malachi 2:4-5.

Lord, the God of hosts. So take heed to yourselves and do not be faithless.”<sup>28</sup>

The King James or Authorized Version of this same passage highlights other aspects in its translation:

And this have ye done again, covering the altar of the LORD with tears, with weeping, and with crying out, insomuch that he regardeth not the offering any more, or receiveth [it] with good will at your hand. Yet ye say, Wherefore? Because the LORD hath been witness between thee and the wife of thy youth, against whom thou hast dealt treacherously: yet [is] she thy companion, and the wife of thy covenant. And did not he make one? Yet had he the residue of the spirit. And wherefore one? That he might seek a godly seed. Therefore take heed to your spirit, and let none deal treacherously against the wife of his youth. For the LORD, the God of Israel, saith that he hateth putting away: for [one] covereth violence with his garment, saith the LORD of hosts: therefore take heed to your spirit, that ye deal not treacherously.

There is a lot packed into this passage, and it has long been an exegetical battleground among interpreters.<sup>29</sup> Most important for our purposes is how this running covenant metaphor of Malachi and the earlier Prophets holds major lessons for human marriages -- integrating and elevating some of the other Hebrew Bible teachings on marriage, and anticipating the important teachings of the New Testament.

First, the covenant metaphor confirms the created form of marriage, as a monogamous union between one man and one woman. Even God, who had the perfect right to pick as many brides as he wished, chose only one bride, his beloved Israel, with whom to produce Godly descendents. The Malachi 2 passage, just quoted, ties this norm directly to the primordial creation story of Genesis 1-2. At creation, God could have created two or more wives for Adam, but he chose “to breath his spirit” into just one wife even though he had ample spiritual “residue” to give life to many other wives. God could have created three or four types of humans to be the image of God. But he created two types: “male and female he created them.”<sup>30</sup> In the law, God could have commanded his people to worship two or more gods, but he commanded them to worship one God. Marriage, as an order of creation and a symbol of God’s special relationship with his elect, involves two parties and two parties only.

Second, the covenant metaphor confirms that God participates in each marriage. The passage in Malachi again underscores this, echoing the Genesis story of creation.

<sup>28</sup> Malachi 2:13-16.

<sup>29</sup> Paul F. Palmer, “Christian Marriage: Contract or Covenant,” *Theological Studies* 33 (1972), 617-65; Hugenberger, *Marriage as a Covenant*.

<sup>30</sup> Genesis 1:27.

Just as God gave the first man Adam and the first woman Eve “the spirit of life” and brought them together, so God gives each man and each woman a spirit of love and witnesses and solemnizes their union. God is not only the creator of the institution of marriage, Malachi makes clear. God is also the “witness” to each marriage; his presence and testimony legitimates the formation of each new marital covenant that follows prescribed forms and norms. God is also the guarantor of the marriage, on whom the couple can call to ensure that the terms of the marital agreement are fulfilled. And God is the exemplar of a faithful covenant marriage as he shows in his metaphorical covenant marriage with the bride of Israel. To enter into a marriage, the Prophets teach, is to enter into a new relationship not only with one’s spouse but also with God. God may be present in that marital relationship in various ways, the later Christian tradition would teach – through parents, peers, or pastors who represent divine authority and priesthood, through neighbors, congregants, and community members who represent divine hospitality and support, or through children, grandchildren, or kinfolk who represent God’s gifts and blessings. But the main point is that marriage is a special creation of God, supported by a whole network of relationships in which and by which God is present.

Third, the covenant metaphor confirms the created procreative function of marriage. Even God, who had the power to create as many faithful followers as he wished for as many generations as he wanted, chose instead to produce “Godly seed” through his chosen bride Israel operating under the normative terms of the covenant. This, too, echoes the creation story, where God delegates the power of creating the next generation of humans to Adam and Eve, calling them to be “fruitful and multiply” and fill the earth. Covenant marriage underscores this created procreative purpose of marriage. But it also makes clear, as Malachi highlights, that faithful married couples are called to produce not just any children but “Godly offspring,” the next generation of God’s covenant faithful who love God and live by the laws of God’s covenant. The marital covenant makes procreation an extraordinary responsibility. It is a sharing with God in the creation and nurture of a new image bearer and a new covenant follower of God on earth, a responsibility that stays with parents for as long as they and their children live.

Fourth, the covenant metaphor confirms the divine laws governing marriage formation – as set out in both the Mosaic law and in the natural law revealed before Moses. Even God, who had the perfect right to take whatever bride by whatever means he wanted, obeys his own laws for proper courtship and marriage. He chooses his spouse carefully and takes his time in courting and getting to know her. He seeks her consent and that of her father, Abraham. He provides her with engagement and wedding gifts. He rehearses for her the terms of the marital covenant before their wedding day so that they both understand what they are getting into. And the couple then celebrates their covenant union in an elaborate public ceremony and public exchange of vows before the whole community with an authorized official, Moses, presiding. The metaphorical story of God’s covenant marriage with Israel, as told by the Prophets, cleverly underscores the very Mosaic laws of marriage that the covenanted people of Israel were required to follow in forming their own marriages.

Fifth, the covenant metaphor elevates these Mosaic laws of marriage, both by adding new provisions and by exemplifying how to live by the spirit of the law. God goes beyond the letter of the Mosaic law of marital formation in forming his relationship with Israel, thereby setting a moral example for his people. For example, Mosaic law, following the customs of ancient times, took very little account of the woman's consent, allowing a man to sell his daughter to the highest dowry bidder, and providing that even a rapist could marry his victim so long as her father accepted the bride price for her.<sup>31</sup> God, by contrast, takes time to get to know Israel and to seek her consent to the marital covenant, while also seeking the consent of her metaphorical father, the ancient patriarch, Abraham. Mosaic law, again following ancient customs, treated marital gifts effectively as a "bride price" paid directly by the man to his fiancée's father, not unlike transactions used to sell slaves or cattle.<sup>32</sup> God, by contrast, bestows his gifts directly upon his chosen fiancée and bride, making them a sign and token of his love for her. Mosaic law made little provision for the public celebration of a marriage or public recitation of reciprocal marital vows.<sup>33</sup> God, by contrast, connects the formation of marriage to the elaborate public ceremonies that attended the formation of other covenants; a covenant marriage is a public celebration in which the whole community must be involved.<sup>34</sup> Mosaic law gave the man the exclusive right to divorce a woman who was "unclean."<sup>35</sup> God, by contrast, chooses to forgive his "unclean" spouse, and to continue in loving covenant union with her, notwithstanding her idolatrous adultery. God does get sad, hurt, and angry, and even files for divorce. But he ultimately waives his divorce rights under the covenant and reconciles with his wife despite her "uncleanness" and betrayal. Mosaic law required a man who was divorced and remarried to support the children of his first wife as much as those of his second.<sup>36</sup> God, by contrast, chooses to remain married to his first wife, if for no other reason than to be there to support their "children and children's children" more effectively. The covenant of marriage confirms and conforms to the natural and Mosaic laws for marriage, but it also integrates and elevates them, calling the faithful to live by the letter and spirit of these laws.

Sixth, the covenant metaphor makes clear that each individual marital covenant between husband and wife is part and product of a much larger covenantal relationship between God and humanity. Both the husband and the wife must be faithful to this covenant, Malachi makes clear. This is a new egalitarian ethic. The earlier Prophets, echoing the Genesis account of humanity's fall into sin through the failings of Eve, had

<sup>31</sup> Exodus 22:16-17; Deuteronomy 22:28-29.

<sup>32</sup> See the scattered passages within and beyond the Torah in Joseph Blenkinsopp, "The Family in Old Testament Israel," in Leo G. Perdue, et al., *Families in Ancient Israel* (Louisville, KY: Westminster John Knox Press, 1996), 48, 60ff.

<sup>33</sup> See the detailed evidence and arguments for and against marital ceremonies and oaths in ancient Israel discussed in Hugenberger, *Marriage as Covenant*, 168-215.

<sup>34</sup> See Daniel J. Elazar, *Covenant & Commonwealth: From Christian Separation Through the Protestant Reformation* (New Brunswick, N.J.: Transaction Publishers, 1996) and his earlier writings cited and distilled therein.

<sup>35</sup> Deuteronomy 24:1-4.

<sup>36</sup> Deuteronomy 21:15-17.

always focused on Israel, the wayward wife, the adulteress, who had gone after other gods, and who had produced illegitimate children, who could not be supported and who would “die out.”<sup>37</sup> That image of the fallen woman comes through as late as Proverbs 2:17, a book produced a century before the Book of Malachi: “You will be saved from the loose woman, from the adventuress with her smooth words, who forsakes the companion of her youth, and forgets the covenant of her God.”

Malachi turns the tables and focuses on the husband, too, calling him to be faithful to his wife, just as God is faithful to Israel. For a husband to wander after another woman – whether a lover, prostitute, or concubine -- is now not just an act of adultery, but an act of blasphemy, an insult to the divine example of covenant marriage that God, the metaphorical husband, offers to each human husband living under God’s covenant. Husbands are now to follow God’s example of offering “covenant love” (*chesed*) to their wives, remaining faithful to them even in the face of “violence,” trouble, or betrayal. Husbands are also to follow God’s example in living both by the letter and the spirit of the traditional law of divorce. There is still a place for divorce in cases of deep rupture of the relationship. “God hates divorce,” Malachi says, but God does not prohibit it. Instead, God calls husbands not to divorce lightly on grounds of mere “uncleanness” (as Deuteronomy 24 put it), nor to divorce harshly “covering their garments with violence” (as Malachi 2 put it). To breach one’s marital covenant lightly or violently, Malachi teaches, is tantamount to breaching one’s covenant with God. For those who do so, God “no longer regards or accepts” their offerings or worship – a sure sign of divine condemnation. In Malachi’s formulation, marriage has now become a part of one’s religious duty, a part of living in covenant community, a part of one’s expression of true love (*chesed*) of God, neighbor, and self. Catholic theologian, Edward Schillebeeckx, puts this well:

The concept of *chesed* was particularly important in the context of marriage as *b’rith* – a covenant between man and woman.... [I]t indicated the power binding two beings to each other, and thus a communal bond (corresponding to the Latin *religio* and *pietas*). *Chesed* was in this special way the bond of unity and affection itself, a bond of “covenant” which as it were acquired a legal stability. *Chesed* and *b’rith*, community of love and community of covenant, were almost synonymous in practice.... *Chesed* was the principle making the covenant into a bond of affection, a legally established community. Marriage was the human reality in which *chesed*, love, and *b’rith*, covenant, acquired their privileged meaning.<sup>38</sup>

<sup>37</sup> Hosea 2:4-5; Sirach 23:24-26; Wisdom 3:16-17, 4:16, with discussion in John Witte, Jr., *The Sins of the Fathers: The Law and Theology of Illegitimacy Reconsidered* (Cambridge: Cambridge University Press, 2009), 11-16.

<sup>38</sup> Schillebeeckx, *Marriage*, 64.

## New Testament Echoes and Elaborations

These same Hebrew Bible lessons about the creation, commandments, and covenant of marriage recur in the New Testament.<sup>39</sup> Both Jesus and Paul repeat and condone the created structure of marriage as a “one flesh union” between a man and a woman, designed for their mutual affection and support and mutual procreation of children.<sup>40</sup> Jesus himself participates in the wedding at Cana, performing his first miracle there, and thereby incarnating and dramatizing God’s own participation in the formation of a human marriage covenant.<sup>41</sup> Jesus further uses the image of a wedding feast repeatedly to illustrate the coming of the Kingdom of God and the union of God and his elect.<sup>42</sup> Both Jesus and Paul confirm the procreative purpose of marriage, the natural and spiritual good of producing “Godly offspring” who exemplify the true faith and piety that become the Christian life. Both Jesus and Paul further underscore the importance of each parent’s and broader community’s responsibility to protect, nurture, educate, and catechize the children -- the flipside to the obligation of children to “honor [their] father and mother.” Jesus describes children as models of piety, fidelity, and purity, and he reserves a special place in hell for those who harm or mislead children.<sup>43</sup> And both Jesus and later New Testament writers condone the letter and spirit of a wholesome sexual ethic that believers must adopt to avoid fornication, adultery, concubinage, incest, sodomy, polygamy, and other forms of uncleanness and debauchery.<sup>44</sup>

The New Testament further illustrates the equitable application of the existing Mosaic law that God had already shown in negotiating and maintaining his covenant relationship with Israel. Joseph, for example, had the right to have Mary, his fiancée, stoned for committing pre-marital adultery that led to her pregnancy. Instead, he endeavored to break the engagement quietly without dishonoring her, before God intervenes and encourages him to marry her.<sup>45</sup> The Pharisees wanted to stone the adulteress who had been caught in the act. Instead, Jesus challenges her accusers: “he who is without sin, cast the first stone,” but then orders the accused woman to sin no more.<sup>46</sup> Jesus and St. Paul may have “hated” divorce, too, but they allow it in cases of fundamental betrayal of the body (through adultery) or of the soul (through a spouse’s desertion from the faith).<sup>47</sup>

<sup>39</sup> Matthew 22:1-14, 25:1-13; 2 Corinthians 11:2; see also Mark 2:19-20; John 3:29; Revelation 19:6-8, 21:9-10.

<sup>40</sup> Matthew 19:5; Mark 10:7-8, 1 Corinthians 6:16; Ephesians 5:31.

<sup>41</sup> John 2:1-12.

<sup>42</sup> Matthew 22:1-14, 25:1-13

<sup>43</sup> See sundry biblical verses and interpretations in Marcia Bunge, ed., *The Child in the Bible* (Grand Rapids, MI: Wm. B. Eerdmans, 2009); and Patrick M. Brennan, ed., *The Vocation of the Child* (Grand Rapids, MI: Wm B. Eerdmans, 2008).

<sup>44</sup> Romans 1:24-27; 1 Corinthians 5:1; 6:9, 15-20; Ephesians 5:3-4; Colossians 3:5-6; 1 Timothy 2:9-10; 3:2; 1 Thessalonians 4:3-8.

<sup>45</sup> Deuteronomy 22:13-21, 24:1-4; Matthew 1:18-19. See also Hosea 2:19-20, 3:2.

<sup>46</sup> John 8:7.

<sup>47</sup> Matthew 19:3-9; 1 Corinthians 7:15.

The two most famous New Testament passages on marriage, 1 Corinthians 7 and Ephesians 5, also echo and amplify the covenantal lessons of marriage set out in the Hebrew Bible. In Corinthians 7 (and elsewhere), Paul follows Jesus in saying and showing that marriage is not for everyone; some may well be called to a single, celibate life in imitation of the life that Jesus and Paul led.<sup>48</sup> But Paul condoned marriage for those tempted by sexual sin, saying it was “better to marry than to burn.”<sup>49</sup> And within marriage, he instructed the husband and wife alike to have equal regard for the rights and needs of the other, including the other’s sexual needs.

[B]ecause of the temptation to immorality, each man should have his own wife, and each woman her own husband. The husband should give to the wife her conjugal rights, and likewise the wife to her husband. For the wife does not rule over her own body, but the husband does; likewise the husband does not rule over his own body, but the wife does. Do not refuse one another except perhaps by agreement for a season, that you may devote yourselves to prayer; but then come together again, lest Satan tempt you with lack of self-control. I say this by way of concession, not of command.<sup>50</sup>

This important passage echoes the Hebrew Bible in commending sex to marital couples, but also goes beyond it in pressing this ethic in egalitarian terms. The Mosaic law, for example, had given new husbands an exemption from military service to “be free at home one year to be happy with the wife whom he has married.”<sup>51</sup> “[R]ejoice in the wife of your youth,” the ancient Proverb had said. “May her breasts satisfy you at all times; may you be intoxicated always with her love”<sup>52</sup> – a sensual admonition underscored by whole chapters of sensuality gathered in the Song of Songs. But all these passages in the Hebrew Bible were focused on the husband, and some other passages were downright insulting in their preoccupation with female anatomy. Malachi had already turned the tables on husbands, and pressed for a more egalitarian understanding of the marital covenant. Paul widens this egalitarian trajectory in 1 Corinthians 7. He underscores the mutual rights of both the wife and the husband to sexual bonding, the mutual sacrifice expected for the body of the other, and the mutual need for husband and wife to agree together to abstain from sex, and then only for a season, lest the unused marital bed tempt either of them to test the neighbor’s bed.

This egalitarian language of mutuality and equality was even more pronounced in Ephesians 5:21-33, a passage written either by Paul or by one of his disciples in the later first century c.e. The full passage bears quotation:

Be subject to one another out of reverence for Christ. Wives, be subject to your husbands as you are to the Lord. For the

<sup>48</sup> 1 Corinthians 7:1, 7, 25-35. 39-40; 1 Timothy 3:2, 12; Titus 1:6. 1 Timothy 5:9-16

<sup>49</sup> 1 Corinthians 7:9 (KJV).

<sup>50</sup> 1 Corinthians 7:2-7.

<sup>51</sup> Deuteronomy 24:5.

<sup>52</sup> Proverbs 5:18-19.

husband is the head of the wife just as Christ is the head of the church, the body of which he is the Saviour. Just as the church is subject to Christ, so also wives ought to be, in everything, to their husbands.

Husbands, love your wives, just as Christ loved the church and gave himself up for her, in order to make her holy by cleansing her with the washing of water by the word, so as to present the church to himself in splendor, without a spot or wrinkle or anything of the kind—yes, so that she may be holy and without blemish. In the same way, husbands should love their wives as they do their own bodies. He who loves his wife loves himself. For no one ever hates his own body, but he nourishes and tenderly cares for it, just as Christ does for the church, because we are members of his body. “For this reason a man will leave his father and mother and be joined to his wife, and the two will become one flesh.” This is a great mystery and I am applying it to Christ and the church. Each of you, however, should love his wife as himself, and a wife should respect her husband.<sup>53</sup>

This passage echoes many of the same teachings of the marital covenant. Marriage, the author of Ephesians 5 emphasizes, is a divinely sanctioned union in which God participates and which God exemplifies in his loving sacrificial union with his chosen people in the church. Marriage is a monogamous one-flesh union between one man and one woman grounded in the creation order (and created in part, as Ephesians 6 goes on to say, for the procreation and nurture of children). Marriage is a union based on mutual consent and respect for the other but even more on a “tender” and “sacrificial love” for one’s spouse as if that spouse were one’s own body, a love modeled on Christ’s sacrificial love for the church in which he is embodied on earth. Marriage is fundamentally a communal relationship, being part of a broader body of Christ on earth and an echo and reflection of God’s mysterious union with his church. These are all familiar themes of the marital covenant that had been described more than a half millennium before by the Hebrew prophets.

### **From Sacrament to Covenant?**

Ephesians 5:32 has long been used as the biblical source for the idea that marriage is a sacrament on the order of baptism and the Eucharist. In his famous fifth-century translation of the Bible from the Greek Septuagint into the Latin Vulgate, Church Father St. Jerome for the first time translated the Greek word for “mystery” (*mysterion*) into the Latin word for “sacrament” (*sacramentum*). This rendered Ephesians 5:32 as: “This is a great sacrament [*mysterion; sacramentum*], and I am applying it to Christ and

<sup>53</sup> Ephesians 5:21-33 (NRSV).

the church.” In the twelfth century, the leading French theologian, Peter Lombard, famously spoke of marriage as one of the seven sacraments of the church, and various theologians and local church councils echoed this view. This view also shaped the medieval canon law, which treated sacramental marriage as an indissoluble union that could be formed only between baptized Christians in good standing who were governed by the church. The Council of Trent in 1563 made these sacramental teachings part of Catholic dogma, and they remain at the heart of Catholic theology and canon law to this day.<sup>54</sup>

While I respect the Catholic tradition’s law and theology of sacramental marriage, I am more drawn to the biblical image of marriage as a “covenant.” First, “covenant” is the preferred biblical language for marriage. The term “*sacramentum*” appears but once in the Bible in connection with marriage, and then only as a dubious translation of the Greek term “*mysterion*” which is better rendered as “mystery.” By contrast, the word “covenant” (*b’rith* in Hebrew, *diatheke* in Greek; *foedus* in Latin) is a far more common biblical term – appearing 312 times total in Scripture, 46 times in reference to marriage. It’s worth noting that fifth-century Church Father, St. Augustine, in his formulations of the “sacrament of marriage” on which so much of the tradition depends, used the terms “sacrament,” “covenant,” and “sacred bond” of marriage as synonyms.<sup>55</sup> And he did not invest any of these terms with the kind of theological and jurisprudential force that later medievalists would do.

Second, the covenant metaphor is a better conceptual bridge builder in discussing marriage historically and today. It not only bridges Hebrew Bible and New Testament formulations, but also bridges theological and legal, religious and secular discourses on marriage. It allows us to draw easier connections between rational natural law and various theological discussions of marriage. It allows us to look for analogous understandings of the higher dimensions of marriage not only in Jewish and Christian traditions, but also in various Muslim, Confucian, Buddhist, Hindu, and other traditions of reflection.<sup>56</sup> And it allows us to connect theological and jurisprudential discussions of marriage more easily today, in a manner consistent with the American constitutional prohibition on establishments of religion.

Third, the covenant metaphor better recognizes the critical mutuality and consensuality of marriage. With sacraments like baptism and the eucharist, it is God’s pouring his grace upon undeserving persons – even innocent recipients in the case of

<sup>54</sup> See the relevant passages analyzed in Theodore Mackin, S.J., *Marriage in the Catholic Church: The Marital Sacrament* (New York: Paulist Press, 1989). See also Philip L. Reynolds, *Marriage and the Schoolmen: The Emergence of the Sacramental Theology of Marriage during the Central Middle Ages* (Cambridge: Cambridge University Press, forthcoming).

<sup>55</sup> Augustine, *On the Good of Marriage*, in *St. Augustine: Treatises on Marriage and Other Subjects*, trans. Charles T. Wilcox, ed. Roy J. Deferrari (Washington, DC: Catholic University of America Press, 1969), 9-54, at 6, 7, 15, 17, 32; id., *On Adulterous Marriages*, in *St. Augustine, Treatises on Marriage*, 61-134, at I.12, II.9-11.

<sup>56</sup> See Don S. Browning, M. Christian Green, and John Witte, Jr., eds., *Sex, Marriage and Family in World Religions* (New York: Columbia University Press, 2006); Don S. Browning and Marcia Bunge, eds., *Children and Childhood in World Religions* (Rutgers, NJ: Rutgers University Press, 2009).

infant baptism. To be sure, the recipient does go voluntarily to receive the sacrament, and is (eventually) expected to offer thanksgiving, praise, and sacrifice in return. But the real sacramental work is all one way – from God to humanity, from Christ to the church – and, indeed, some Christian traditions would say that this sacramental grace is “irresistible.” Covenants, by contrast, are mutual bonds between the two parties whose validity depends in its essence on the mutual consent of both spouses and whose starting assumption is equality between the parties, at least equality of bargain about whether to marry. Each party is called to deliberate and accept a set of rights and duties that are endemic to the status of being married. But each party is able to resist the invitation to the covenant, to walk away in the case of breach, and to forgo the institution altogether if the other party proves to be unacceptable or incompatible.

Fourth, the covenant metaphor better shows that marriage is enduring but not necessarily indissoluble. Sacraments are permanent marks of grace that cannot be erased no matter how the parties behave. And they are made available to all parties, no matter how sinful they may be or become. Not so marriage covenants. Marriage covenants have built into them conditions of mutual performance; they recognize the possibility of breach; and they address the consequences of dissolution. Fundamental breaches of a marriage covenant can result in divorce. Yes, God “hates divorce,” as Malachi said, but God allows for divorce, as Moses, Christ, and Paul all provided. I believe that marriage is a fundamentally good and essential institution, but it is not an idol to be worshiped come what may. I believe in the sanctity and durability of marriage, but recognize that a marriage can be irretrievably broken by a tragic event like adultery, desertion, felonious wife or child abuse or other capital felony. In such cases, it is sometimes best for spouses to part ways and to start anew. Covenants contemplate this in a way that sacraments do not and cannot.

Fifth, the covenant metaphor captures better the reality that marriage is a multi-dimensional institution that interacts with and depends upon a variety of other social institutions and sectors of society to flourish. It has a natural organic foundation rooted in the creation and natural order. It involves ongoing obligations to spouses and children. It features the social involvement of the entire community in its formation, maintenance and dissolution. It has profound economic dimensions of gift and exchange, labor and sacrifice. It involves the communicative rituals of formation and ongoing communication between the parties. It has distinct spiritual goods and goals that are unique to this institution. And around these dimensions are gathered the institutions and professions of law, theology, medicine, market, health care, education, and more. Sacraments are not so inherently multidimensional, but focused on the spiritual dimension of marriage and the ecclesiastical jurisdiction of the church.

While historically these differences over the meaning of marriage as a sacrament deeply divided Catholic and Protestant churches, and shaped the historical battles between church and state over marital jurisdiction, it’s worth noting that more recent statements of the Catholic magisterium regularly speak of the “covenant of marriage” as well. In *Gaudium et Spes* (1965), for example, the Second Vatican Council (1962-1965) proclaimed as follows:

The intimate partnership of married life and love has been established by the Creator and qualified by His laws. It is

rooted in the conjugal 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 the children, imposes total fidelity on the spouses and argues for an unbreakable oneness between 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.<sup>57</sup>

Marital love, *Gaudium et Spes* continued, involves “the good of the whole person ... [which] ennobles ... those special ingredients and signs of the friendship distinctive of marriage.” Marital love impels spouses to make “a free and mutual gift of themselves, a gift proving itself by gentle affection and by deed.” It is expressed in sexual intercourse, which is “good,” “noble,” and “worthy” regardless of any procreative promise, intent, or outcome. It is structured through the “equal personal dignity of wife and husband, a dignity acknowledged by mutual and total love.” It brings to the couple “the needed cultural, psychological, and social renewal” that they need daily to survive, flourish, and indeed to “perfect” themselves.<sup>58</sup>

In an appendix to *Gaudium et Spes*, the Council elaborated the teaching that marriage is “a covenant of love” formed voluntarily between the man and the woman before God:

Marital consent of its essence intends the unity of this covenant, its indissolubility and the love that is devoted to the service of life. The stronger and purer the marital love, the more strongly and perseveringly will the spouses accept and realize marriage’s specific traits and its essential goods.... No one is aware of how seriously necessary it is that love be fully present in the act of consent, and increase throughout the entire married life. For love will fulfill and cause to be fulfilled what the consent has said and has promised.<sup>59</sup>

<sup>57</sup> *The Documents of Vatican II*, trans. and ed. Walter M. Abbott & Joseph Gallagher (New York: Guild Press, 1966), 199, at 249-251.

<sup>58</sup> *Ibid.*, 251-53.

<sup>59</sup> Quoted in Theodore Mackin, *Marriage in the Catholic Church: What Is Marriage?* (New York: Paulist Press, 1982), 261.

A number of subsequent church documents, particularly those issued during the lengthy pontificate of Pope John Paul II, echoed and elaborated this language of the marital covenant, highlighting many of the structural features set out by the Hebrew Prophets.<sup>60</sup> The 1968 *Catechism* of the Catholic Church, for example, called on both husbands and wives to live in “authentic dignity of persons, be joined to one another in equal affection, harmony of mind, and the work of mutual sanctification” and “by the sacrifices and joys of their vocation and through faithful love” testify to “the mystery of love which the Lord revealed to the world.” It also called on a plurality of institutions to serve and “aid” (*subsidium*) marriage and the family so constituted, just as the family as a vital social unit serves and aids society and its members. The church, and its theologians, ethicists, and other masters of “the sacred sciences” should aid marital couples through their pastoral care, their special worship and liturgies, and their catechesis of children and counseling of couples. The state should “give due attention to the needs of the family regarding housing, the education of children, working conditions, social security and taxes,” and, through immigration reforms, ensure “migrants their right to live together as a family.” The sciences – “medical, biological, social, and psychological” – should “pool their efforts” to advance “the welfare of marriage and the family”, particularly in procreation and child care.<sup>61</sup> This idea of “subsidiarity,” that marriage requires the aid, the “*subsidium*,” of multiple institutions for its guidance and effective functioning is an important insight into the reality that marriage is a multidimensional and multi-institutional association. And it reflects the modern Catholic Church’s new view that democratic states that respect the religious freedom of all citizens have authority to maintain state family laws that are binding on Catholic and non-Catholic faithful alike.

Equally important to the modern Catholic integrative understanding of marriage was the 1983 Code of Canon Law, which included a comprehensive legal treatment of sex, marriage, and family life. In ten chapters comprising 110 canons, the Code worked through marital preparation and the wedding liturgy, marital consent and impediments to marriage, the treatment of mixed and secret marriages, the meaning and consequences of separation and annulment, and various remedies for defectively formed marriages.<sup>62</sup> Several other canons took up legal procedures and tribunals treating marriage questions. The point of this new canon law system was not so much to create a church law of marriage that rivaled the state’s law. Instead, this Catholic canon law was now designed to supplement the law of the state, to substitute for it in nation-states whose governments were in turmoil or transition, and to provide concrete moral, pastoral, and practical guidance for the married lives of the Catholic faithful that sometimes required

<sup>60</sup> See esp. John Paul II, *Familiaris Consortio* (1981), in *Vatican Council II: Volume 2, More Postconciliar Documents*, ed. Austin Flannery, new rev. ed. (Dublin: New Dominican Publication, 1998), 815-98; John Paul, *Charter of Family Rights*, in *ibid.*, 908-16. See further Richard M. Hogan and John M. Levoir, eds., *Covenant of Love: Pope John Paul II on Sexuality, Marriage and Family in the Modern World* (Garden City, NY: Doubleday, 1985).

<sup>61</sup> *The Catechism of Modern Man* (Boston: Daughters of St. Paul, 1968), 572-76.

<sup>62</sup> See *Code of Canon Law* (Washington, DC: Canon Law Society of America, 1983), Canons 1055-1165. See also Canons 1425, 1432, 1490, 1671-1715.

conduct that went above, beyond, and against the permissiveness of modern state law. State law now set a morality of duty for sex, marriage, and family life of all citizens; the canon law set a morality of aspiration for Catholics.<sup>63</sup>

Significantly, the 1983 Code again used covenant language: “The matrimonial covenant, by which a man and a woman establish between themselves a partnership of the whole of life, is by its nature ordered toward the good the spouses and the procreation and education of offspring; this covenant between baptized persons has been raised by Christ the Lord to the dignity of a sacrament” which, by its nature is “perpetual and exclusive.”<sup>64</sup> And significantly, the Code spurned traditional doctrines of male headship within the home, which the 1917 Code had pressed in reaction to the early women’s rights movement, but at the cost of some of the more egalitarian reforms of Trent and subsequent synods. “[E]ach of the spouses has equal obligations and rights to those things which pertain to the partnership of conjugal life,” the 1983 Code provided, expanding the classic notion of the conjugal debt. Moreover, fathers and mothers together “have the most serious duty and the primary right to do all in their power to see to the physical, social, cultural, moral, and religious upbringing of their children.”<sup>65</sup> These egalitarian lessons of spousal and parental relations have been further driven home in an impressive series of recent Catholic handbooks, pamphlets, how-to guides, illustrated sermons, story books, websites, and learned but accessible volumes on marriage preparation, household management, spousal relations, Christian parentage, child rearing, elder care, and intergenerational responsibility.<sup>66</sup>

## Summary and Conclusions

The biblical teaching of marriage as a covenant highlights a number of key elements of marital lore and law that have had enduring provenance in the West. Together, they form something of a biblical phenomenology of marriage. The key elements of the marital covenant in the Bible include:

<sup>63</sup> The terminology is from Lon L. Fuller, *The Morality of the Law*, rev. ed. (New Haven, CT: Yale University Press, 1964).

<sup>64</sup> *Code of Canon Law*, Canons 1055, 1134. See also *Code of Canons of the Eastern Churches: New English Translation* (Washington, DC: Canon Law Society of America, 1998), Canon 776: “The matrimonial covenant, established by the Creator and ordered by His laws, by which a man and a woman by an irrevocable personal consent establish between themselves partnership of the whole of life, is by its nature ordered toward to the good of the spouses and the generation and education of children. From the institution of Christ, a valid between baptized persons is by that very fact a sacrament, by which the spouses, in the image of an indefectible union of Christ with his Church, are united by God and, as it were consecrated and strengthened by sacramental grace.”

<sup>65</sup> *Code of Canon Law*, Canons 1055, 1134-1136. .

<sup>66</sup> See excellent examples in See Lisa Sowle Cahill, *Sex, Gender and Christian Ethics* (Cambridge: Cambridge University Press, 1991); id., *Family: A Christian Social Perspective* (Minneapolis: Fortress Press, 2000); John F. Kippley, *Sex and the Marriage Covenant: A Basis for Morality* (Cincinnati, OH: CCL, 1991); Julie Hanlon Rubio, *A Christian Theology of Marriage and Family* (New York: Paulist Press, 2003).

*First, consent:* the voluntary participation by both parties (and often their respective families) in the formation of a new marital union;

*Second, courtship:* the need to take time to negotiate the pending merger of lives, properties, and families;

*Third, monogamy:* the expected commitment to exclusive troth with only one spouse;

*Fourth, publicity:* the broader family's and community's involvement in marital formation, maintenance, and dissolution;

*Fifth, ritual:* the dramatic enactment of marriage at a properly officiated wedding with a unique marital liturgy in which the couple, their families, and the broader community participate;

*Sixth, celebration:* the jubilant feasts that attach to a new marriage and to a child's birth;

*Seventh, gifts:* the reciprocal material exchanges not only between the couple's families, but also the gifts by the broader community to help establish the new household;

*Eighth, equality:* the expected ethic of equal regard and respect for one's fiancé(e) and spouse;

*Ninth, mutuality:* the loving sacrifices each party is expected to make for the legitimate needs of one's spouse, even if the spouse cannot reciprocate by reason of sickness, injury, or incapacity;

*Tenth, communication;* the mutual sharing by husband and wife of sex and intimacy, domestic labor and economics;

*Eleventh, procreation:* the joint investment of both mother and father in the nurture, protection, and education of their children, often aided by broader kin networks;

*Twelfth, fidelity:* the unique loyalty that is expected to one's spouse, children, parents, and kin;

*Thirteenth, permanence* and the awareness that a now healthy and independent spouse has to be helped later in the lifecycle when health, strength, and stamina wane;

*Fourteenth, accountability:* the need to answer for one's faults to authorities who represent the broader community's interests in the health, safety, and stability of the ongoing marital household;

*Fifteenth reconciliation:* the aspiration to forgive, if possible, the faults of one's spouse, especially for the sake of their children;

*Sixteenth dissolubility:* the recognition that marriage covenants have built into them conditions of mutual performance, whose chronic breach can result in divorce; and

*Seventeenth, immutability:* the notion that even after divorce and death, the status of marriage remains, and obligates the spouse and parent to give *ongoing support* for their (ex-)spouse, children, and other dependents.

Together, these biblical elements of the marriage covenant were designed to confirm, elevate, and integrate the natural inclinations and rational reflections on marriage that other ancient peoples had already offered on this vital institution. Together these elements were designed to make marriage a more effective, reliable, loving, egalitarian, and attractive institution for the couple and their children. And together, these covenantal elements were designed to provide the religious community and broader society with a stable household whose flourishing was deemed to be of critical importance to the health of the broader community.

Christians over the centuries have incorporated these covenantal ideals and elements of marriage into the personal ethics of believers and into the spiritual lives of the church community. The many biblical passages on marriage and the marital covenant have provided endless inspiration for sermons, catechisms, confessional and pastoral handbooks, and many other forms of moral instruction for marriage that remain in place in Christian communities to this day. Moreover, Christians translated these covenantal ideals into internal religious norms for church discipline and external civil norms for the state and broader society. Particularly the Calvinist or Reformed tradition since the sixteenth century, inspired by the pioneering work of John Calvin, Heinrich Bullinger, Martin Bucer, and the scores of Anglo-Puritan divines whom they inspired, has used the idea of marriage as a covenant to build a complex new state family law for the West in place of the medieval canon law of marriage predicated on the idea of marriage as a sacrament.<sup>67</sup>

And these views have helped to shape the West's legal understandings that marriage is more than a mere contract. Marriage is also one of the great mediators of individuality and community, revelation and reason, tradition and modernity. Marriage, the Western legal tradition has long taught, is at once a harbor of the self and a harbinger of the community, a symbol of divine love and a structure of reasoned consent, an enduring ancient mystery and a constantly modern invention. Marriage is rooted in primeval commands and prophetic examples. It is reflected in religious, ceremonial, social, economic, political, and cultural norms and forms. Marriage is at once private and public, contractual and spiritual, voluntary and natural, psychological and civilizational in its ultimate origin, nature, and function.

The recent covenant marriage laws that we began with go further than simple contract marriage laws in reflecting and protecting some of these higher dimensions of marriage. In this, the new covenant marriage laws serve a particularly valuable teaching function in America today -- instructing the community on the higher regard that the state has for marriage, instructing the couple of the higher rigor that marriage has for them, instructing religious communities on the higher calling they have to uphold the spiritual dimension of marriage. And they do all this consistent with the First Amendment by focusing on the enduring phenomenology rather than the biblical pedigree of the covenant of marriage.

<sup>67</sup> See sources and discussion in John Witte, Jr. and Robert M. Kingdon, *Sex, Marriage and Family Life in John Calvin's Geneva*, 2 vols. (Grand Rapids, MI: Wm. B. Eerdmans, 2005, 2013).

But the modern covenant marriage movement today has two Achilles heels, which has rendered it not only a limping response to our modern crisis of marriage, but ultimately a movement that cannot yet get up and move. The one Achilles heel is the law. Outside of the three states of Louisiana, Arkansas, and Arizona that have covenant marriage options, states will not recognize covenant marriage, only contract marriage. An estranged spouse can thus escape a covenant marriage simply by moving to and filing for divorce in any of the 47 American states. Current conflict of laws rules do not favor the enforcement of covenant marriage laws over the contract marriage laws of the forum state where the divorce case is litigated. These unfavorable conflict of laws rules, though not yet strongly tested in court, underscore the reality that covenant marriage laws remain an innovative, but necessarily incomplete legal response to the fallout of the modern sexual and divorce revolution.<sup>68</sup>

The second Achilles heel is the modern church. Too many modern churches have lost their traditional role as moral exemplars of covenant marriage and covenant living. Too many churches have lost their capacity to engage the hard legal, political, and social issues of our day with doctrinal rigor, moral clarity, and canonical authenticity. Too often of late, Christians and other religious believers have marched to the culture wars without ammunition – substituting nostalgia for engagement, acerbity for prophecy, platitudes for principled argument, bumper sticker issues for holistic reformations.

In centuries past, Catholic, Protestant, and Orthodox churches alike produced massive codes of religious law and discipline that covered many areas life, not least sex, marriage, and family domestic life. They instituted sophisticated tribunals for the equitable enforcement of these religious laws. They produced exquisite works of theology and jurisprudence that worked out the precepts of proper domestic living in great detail. Some of that sophisticated legal work still goes on among some religious communities today. A growing cadre of Christian jurists, theologians, and ethicists are reengaging the hard questions. But the legal structure and institutional sophistication of modern American churches are a pale shadow of what went on before. And their marital norms and habits are increasingly devolving into simple variations on the cultural and legal status quo. American religious communities must think more seriously about restoring and reforming their own bodies of religious law on marriage, divorce, and sexuality on the strength of biblical teaching of covenant, instead of simply acquiescing in state laws and culture.<sup>69</sup> American states, in turn, must think more seriously about granting greater deference to the marital laws and customs of legitimate religious and cultural groups that cannot accept a marriage law of the common denominator or denomination. Through these twin mechanisms – of reforming state laws and

<sup>68</sup> See Hay, "The American 'Covenant Marriage'."

<sup>69</sup> See interesting Christian, Jewish, and Muslim prototypes described in Joel A. Nichols, ed., *Marriage and Divorce in a Multicultural Context: Multi-Tiered Marriage and the Boundaries of Civil Law and Religion* (Cambridge, 2012); Symposium, "Sharia, Family, and Democracy: Religious Norms and Family Law in Pluralistic Democratic States," *Emory International Law Review* 25 (2012): 779-1059; Rex Ahdar and Nicholas Aroney, eds., *Sharia in the West* (Oxford, 2010).

respecting church laws -- American society might well slowly move its marriage law back "from contract to covenant."<sup>70</sup>

<sup>70</sup> The title of Margaret F. Brinig, *From Contract to Covenant: Beyond the Law and Economics of the Family* (Cambridge, Mass.: Harvard University Press, 2000); see also id., *Family, Law, and Community: Supporting the Covenant* (Chicago: University of Chicago Press, 2010).