Covenant Marriage Seven Years Later: Its as Yet Unfulfilled Promise

Katherine Shaw Spaht
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I. INTRODUCTION

Almost seven years have passed since the first covenant marriage legislation was enacted in Louisiana, followed by the enactment of similar legislation in Arizona in 1998 and Arkansas in 2001. During the intervening years between its enactment in Louisiana and the present, covenant marriage legislation has been introduced in approximately thirty other states but the bills containing the legislation have failed to pass. Remarkably, the failure of covenant marriage bills to pass has occurred even though the legislation simply offers a couple an alternative to the prevailing legal regime of "no-fault divorce" marriage.

During the same time period, Steve Nock, a sociologist at the University of Virginia, and his research colleagues have studied the proposition, "Can Louisiana’s Covenant Marriage Law Solve..."
America's Divorce Problem?" The wealth of information mined from that on-going study offers a glimpse of the effect of cultural changes on the understanding of marriage, as well as the self-selection effects of this experiment and the sanctification of marriage created by the choice of a more committed form of marriage. By virtue of the same study, results from a Gallup poll conducted in 1998 also revealed the attitudes of a random sample of citizens towards covenant marriage legislation in Louisiana, Arizona, and Minnesota. Thereafter, the research team received another grant to consider the implementation of a change in policy through the use of state civil servants; in the case of covenant marriage, the state civil servants would consist of the staff of the local Clerk of Court's office. But the bulk of information gathered by the research team concerns the couples themselves—300 covenant couples, 300 standard couples.

With the decision of the United States Supreme Court in Lawrence v. Texas followed by the Massachusetts case of Goodridge v. Department of Public Health, the air and the vigor has been "sucked out" of the nascent national discussion of marriage. Rather than the broader polity discussing the far more pervasive problems of harm done by divorce, the rescue of at-risk marriages by marriage education, and the promotion of "healthy" marriages by the federal government, national attention is currently focused almost entirely on same-sex sexual expression. Same-sex couples marrying in Massachusetts and a proposed amendment to the United States Constitution defining marriage as a union of one man and one woman have literally consumed all of the media attention.

4. Selection effects often occur when participation in a program is voluntary, producing "the likelihood that those who choose to participate [in a covenant marriage] are different from those who do not in ways that predispose them to better outcomes regardless of program participation." Alan J. Hawkins, Evaluating Covenant Marriage in Louisiana: Early Lessons I, Speech and Presentation at Smart Marriages Conference, Denver, Colorado (2000) (manuscript on file with author). The covenant couples, not surprisingly, were more religious and more conservative; were less likely to have cohabited before marriage; were less likely to have experienced pre-marital conflict; talked more before marriage about important issues that can cause marital problems; received more approval of their spouse from their parents; and were less likely to have been previously married or to have a child. Id.


6. Id. at 713–17.


9. The proposed Federal Marriage Amendment reads as follows: Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any state, shall
II. SAME-SEX MARRIAGE AND "MARRIAGE-LITE": CONTROVERSIAL RESULTS OF EUROPEAN EXPERIMENTS

Of course the issue of same-sex "marriage," or even the access of same-sex couples to civil unions, is a critical one, with the discussion and results having far reaching consequences for marriage. It may well determine how quickly the United States may resemble "post-marriage" Scandinavia, which has recognized the equivalent of same-sex "marriage" for ten years. What has happened in Scandinavia? "Same-sex marriage has locked in and reinforced an existing Scandinavian trend toward the separation of marriage and parenthood." According to Stanley Kurtz of the Hoover Institution:

Marriage is slowly dying in Scandinavia. A majority of children in Sweden and Norway are born out of wedlock. Sixty percent of first-born children in Denmark have unmarried parents. Not coincidentally, these countries have had something close to full gay marriage for a decade or more. Kurtz examined an unpublished study of the registered same-sex partnerships in Denmark, conducted by Darren Spedale, often cited in the writings of gay-rights advocates William Eskridge, Jr. (law

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be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman.


10. Even the Louisiana Legislature, during the 2004 Regular Session, proposed a state constitutional amendment that is comprehensive in addressing same-sex "marriages," as well as civil unions, be they contracted out of state or attempted in state. 2004 La. Acts No. 926. The amendment, passed by the citizens of the state of Louisiana on September 18, 2004, reads as follows:

Defense of Marriage

Marriage in the state of Louisiana shall consist only of the union of one man and one woman. No official or court of the state of Louisiana shall construe this constitution or any state law to require that marriage or the legal incidents thereof be conferred upon any member of a union other than the union of one man and one woman. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized. No official or court of the state of Louisiana shall recognize any marriage contracted in any other jurisdiction which is not the union of one man and one woman.

La. Const. art. XII, § 15.


12. Kurtz, supra note 11.
professor) and Andrew Sullivan (journalist). Kurtz takes issue with the "half-page statistical analysis of heterosexual marriage . . . [because it] doesn't begin to get at the truth about the decline of marriage in Scandinavia during the nineties."\(^\text{13}\) Kurtz argues that the important rates to evaluate are not lower divorce rates and higher marriage rates in Scandinavia in the nineties, but the out-of-wedlock birth rates and family dissolution rates (non-married cohabitants).\(^\text{14}\)

His evaluation has provoked a rejoinder, not surprisingly, in a "discussion paper" prepared by M.V. Lee Badgett for the Institute for Gay and Lesbian Strategic Studies at the University of Massachusetts Amherst and the Council on Contemporary Families, which promotes alternative family forms.\(^\text{15}\) The paper examines some of the same data as both Spedale and Kurtz, comparing it to data from equivalent countries not legally recognizing same-sex unions and essentially accusing Kurtz of the "consistent misuse and misinterpretation of data."\(^\text{16}\) Yet, Kurtz relied heavily for his interpretation of the data on Kathleen Kiernan, "the acknowledged authority on the spread of cohabitation and out-of-wedlock births across Europe . . .."\(^\text{17}\) She divides Europe into three zones, describing the Nordic countries as leading in cohabitation, out-of-wedlock births, and, of course, gay "marriage."\(^\text{18}\) The rejoinder has provoked its own response in which Kurtz replies: "The bottom line is neither Badgett nor anyone else has been able to get around the fact that marriage in both Scandinavia and the Netherlands is in deep decline."\(^\text{19}\)

Not yet provocative of a response, a Policy Brief published by the Institute of Marriage and Public Policy (iMAPPP), prepared by director Maggie Gallagher and Joshua K. Baker, entitled *Same-Sex Unions and Divorce Risk: Data from Sweden*, simply addresses the raw data compiled in a recently released report:

13. *Id.*
14. *Id.*
16. *Id.* at 2.
18. *Id.* at 29.
A recent study offers the first systematic review of same-sex unions and divorce rates based on accurate national register data in Sweden from the 1990's.

The study found that gay male couples were 1.5 times as likely (or 50 percent more likely) to divorce as married opposite-sex couples [1,526 same-sex partnerships were contracted between 1995 and 2002, compared with 280,000 Swedish opposite-sex marriages over the same period and unlike most other places, 62 percent of the same-sex couples were male], while lesbian couples were 2.67 times as likely (167 percent more likely) to divorce as opposite-sex married couples over a similar period of time. Even after controlling for demographic characteristics associated with increased risk of divorce, male same-sex couples were 1.35 times as likely (35 percent more likely) to divorce, and lesbian couples were three times as likely (200 percent more likely) to divorce as opposite-sex married couples.20

The story is essentially the same in the Netherlands, one of only two European countries to recognize same-sex marriage.21 The following report concentrates on the number of gay couples opting for this historic opportunity to “marry” and what effect the campaign for same-sex “marriage” had on the broader public’s attitude toward marriage.

Since April 2001, each quarter has brought a further decline in the number of gay marriages, falling from 2,500 in 2001 to less than 1,500 last year. As of April 2004, only 5,916 of Holland’s roughly 55,000 gay couples had tied the knot. The floodgates had been forced open by gay-marriage activists, but through them came just a trickle of mainly lesbian couples (lesbians make up only 20 percent of the homosexual community in the Netherlands, but they now make up more than half of all married homosexual couples.)

It seems that so far 90 percent of Dutch homosexual couples have declined the historic opportunity to get married. . . . Gay organizations’ own figures, which put the size of the gay community in Holland at around 1.5 million (almost 10


21. Belgium and the Netherlands are the only European countries to recognize same-sex marriage.
percent of the total Dutch population of 16 million), seems a wild exaggeration. But if accurate, these figures would give the impression that with only a little bit more than one-third of 1 percent of Dutch gays and lesbians actually married, interest in marriage among homosexuals is virtually nonexistent.

A government-sponsored study on sexuality in the Netherlands among people ages 18 and older came up with a more realistic figure of 350,000 gays and lesbians. Even on this cautious estimate, however, married gays and lesbians comprise no more than 3.3 percent of the total number of adult homosexuals.

... 

[By] lobbying so intensively for a change in the law, the gay-marriage campaign did contribute to a change in people's attitude toward marriage. And there is little doubt that it has been a change for the worse.

Since the start of the Dutch gay-marriage debate—in which gay-marriage activists successfully made the case for separating civil marriage from the legal rights and duties involved with the raising of children—the percentage of Dutch babies born out of wedlock has skyrocketed. As Stanley Kurtz has also pointed out . . . , in the 15 years since the beginning of the long march toward gay marriage, the illegitimacy rate in the Netherlands has risen from 11 percent (1989) to over 31 percent (2003).

... 

[M]aybe it's just a coincidence that the birth of the gay-marriage movement in the Netherlands coincided with the start of the decline of the institution of marriage. Maybe—but it would be an awfully big coincidence.22

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The data has so distressed five Dutch scholars that they have issued a statement raising an alarm over the deterioration of marriage in the Netherlands:

The first thing that should happen is that politicians, academics and opinion leaders should recognize that we are faced with a serious problem. . . “Then, we need a national debate about the question of how we can restore marriage to its original, special, protected status.” What should certainly never have happened, was the decision to legalize gay marriage. “In my view that has been an important contributing factor to the decline in the reputation of marriage. It should never have happened . . . We should have had the guts to tell a relatively small group in our society: leave marriage alone.”

If there is to be a return of the “reputation” of marriage as these Dutch scholars urge, can we first engage the public in this debate? Should there be a myriad of optional selections, like a relationship smorgasbord, that includes present-day marriage? One could argue that such a legislative scheme exists today in the United States: there are “civil unions” in Vermont, same-sex “marriages” in Massachusetts, marriage in every state, and covenant marriages in Louisiana, Arkansas, and Arizona. In Hawaii there are reciprocal beneficiaries, and the American law Institute has proposed domestic partnerships. In other countries there are solidarity pacts. Should

23. Abby de Jong, Interview with Dutch Scholars: When It Comes to Relationships We’re Clueless, Reformatoisch Dagblad, July 8, 2004, available in English at http://www.heritage.org/Research/Family/netherlandsinterview.cfm. “It’s [marriage] more than just loving someone. But when it comes to relationships, people today just seem clueless. Most of them just don’t understand that all this private stuff is really just an expression of the fear of permanent commitment to others.” Id. A statement of the same Dutch scholars is attached as Appendix B.
24. One author proposes three alternative Marriage Models from which each marrying couple must choose: the Gender Equity Model, the Relational Model, and the Customized Model. Barbara Stark, Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law, 89 Cal. L. Rev. 1479 (2001).
27. See supra notes 2–3 and accompanying text.
30. C. civ. arts. 515-1 to 515-7 (France). See also In Europe, Lovers Now
the "restoration" of marriage envision it as a series of "joint ventures" with different limited purposes?\textsuperscript{31} For example, should the vision of marriage include a "starter marriage," defined as short in duration (one to five years) without children, the purpose of which is "practice"?\textsuperscript{32} Would this marriage be followed by a child rearing marriage that lasts longer, contracted for the purpose of having and rearing children, followed by a companionate marriage for retirement years, those so-called "golden" years? After all, we are told that Americans have accepted serial marriages\textsuperscript{33} and divorce is normative.

For most of those with children of marriageable age, none of the previously suggested possibilities of restoring either marriage or its reputation are appealing. Restoration of marriage as envisioned by some parents of marriageable-age children bears little resemblance to marriage today. Such parents do not desire a return to marriage that results in the powerlessness of wives, but they do want a restoration of marriage that signifies it is a serious commitment. They envision marriage as permanent, or at least intended to be, with barriers to an easy exit. This vision of marriage, the purpose of which is to welcome children to whom both mother and father are committed, has a long and much richer history—the history of the world's oldest social institution. Marriage, especially marriage as a covenant,\textsuperscript{34} evokes religious tradition and the legally binding agreement of the parties evidenced by the adherence to necessary formalities. It is that vision of marriage that a large subset of parents desire for their children. Louisiana offers to the children of these parents just such a vision of marriage as a choice, and it does so through its covenant marriage legislation.

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\textbf{III. WHAT IS COVENANT MARRIAGE?}
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A Louisiana covenant marriage differs in three principal respects from other legally recognized "standard" marriages: 1) mandatory

\textsuperscript{Propose: Marry Me, a Little, N.Y. Times, Feb. 22, 2004, at A3.}


\textsuperscript{32. See Pamela Paul, The Starter Marriage and the Future of Matrimony (2002).}

\textsuperscript{33. See J. Thomas Oldham, ALI Principles of Family Dissolution: Some Comments, 1997 U. Ill. L. Rev. 801, 827 ("America appears to have accepted a pattern of serial marriage.").}

\textsuperscript{34. Margaret F. Brinig & Steven L. Nock, What Does Covenant Mean for Relationships?, 18 Notre Dame J.L. Ethics & Pub. Pol'y 137 (2004).}
pre-marital counseling; 2) the legal obligation to take all reasonable steps to preserve the couple’s marriage if marital difficulties arise; and 3) restricted grounds for divorce consisting of fault on the part of the other spouse or two years living separate and apart. Each of the three components addresses John Witte’s observation in *From Sacrament to Contract* that restricting exit rules of marriage by reforming divorce law requires complementary legal restrictions on entry into marriage. Covenant marriage restricts entry into and exit from marriage for those who choose it and attempts to strengthen the marriage itself by imposing a legal obligation upon the covenant spouses which they agree to in advance of their marriage—taking reasonable steps to preserve their marriage if difficulties arise.

The mandatory pre-marital counseling under the covenant marriage statute must contain counsel about the seriousness of marriage, the intent of the couple that it be lifelong, and the agreement that the couple will take all reasonable steps to preserve the marriage. Any minister, priest, rabbi, or the secular alternative of a professional marriage counselor is permitted to provide the counseling and sign an attestation form. Of course, many religious counselors require considerably more, especially if they have signed a Community Marriage Covenant (CMC) or Agreement. The CMC, signed by community clergy, ordinarily requires a minimum of counseling sessions with the minister (four, for example), a pre-marital inventory such as PREPARE or FOCCUS, and the guarantee of a mentoring couple assigned to the engaged couple. In those cities that now have Community Marriage Agreements, the clergy signatories provide counseling that is far more extensive than the covenant marriage legislation requires.

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The first, simplest, and most direct question was whether the divorce rate decline was greater after the CMP was signed than the existing decline before the signing. The researchers examined divorce rates for five years before clergy signed Community Marriage Policies and up to seven years after signing—in 114 communities in 122 counties....

In more familiar terms, counties with a Community Marriage Policy® had an 8.6% decline in their divorce rates over four years, while the comparison counties registered a 5.6% decline. If those rates are projected for seven years, CMP communities enjoy a 17.5% decline in the divorce rate vs. 9.4% in comparison counties. Thus, Community Marriage
At the end of the mandatory pre-marital counseling, the prospective spouses sign a document called a Declaration of Intent that contains the content of their covenant, which includes the agreement to seek counseling if difficulties arise as well as their agreement to be bound by the Louisiana law of covenant marriage (choice of law clause). Both spouses sign the agreement and then execute an affidavit, signed by a notary, attesting to having had counseling as the law requires and having read the Covenant Marriage Act, the pamphlet prepared by the Attorney General that explains the differences between a covenant marriage and a standard marriage, including comparative grounds for divorce. The Declaration of Intent is in essence a special contract authorized by the state (Louisiana, Arizona, or Arkansas) that contains legal obligations similar to those in ordinary contracts. Most importantly, it is the agreement of the covenant spouses in advance to take reasonable steps to preserve their marriage which constitutes a legal obligation, the second distinguishing component of a covenant marriage. This obligation to take reasonable steps to preserve the marriage begins at the moment the marital difficulties arise and "should continue" until rendition of the judgment of divorce, the one exception being "when the other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses."

Lastly, a spouse in a covenant marriage may obtain a divorce only if she can prove adultery, conviction of a felony, abandonment for one year, or physical or sexual abuse of her or a child of the parties. Otherwise, the spouses must live separate and apart for two years. A comparison of the grounds for divorce in a Louisiana "standard" marriage reveals that a covenant marriage commits the spouses in

Policies counties have a decline in the divorce rate that is nearly double that of control communities. The levels of impact would likely be greater if more communities had higher levels of participation and implementation—that is, if more churches and synagogues signed on and more mentor couples trained. The Institute estimates that 31,000 divorces are being avoided in 114 cities/counties with a Community Marriage Policy. Since clergy and community leaders have now created 183 Community Marriage Policies, that number could be perhaps 40,000 to 50,000 marriages being saved.

Id.

43. Id. 9:307(D) (as added by 2004 La. Acts No. 490).
44. Id. 9:307(A).
45. Id. 9:307(A)(6).
advance to a relinquishment of the easy exit rules in favor of more stringent, morally based exit rules. In a “standard” marriage a spouse may seek a divorce for adultery, conviction of a felony, or living separate and apart for six months either before or after a suit for divorce is filed. There is an enormous difference between living separate and apart for six months versus living that way for two years. Furthermore, if one considers Paul Amato’s research, the vast majority of divorces (his research suggests two-thirds) occur for the “soft” reasons, such as lack of communication and unfulfilled personal needs, rather than adultery or physical violence.

In other research Amato has conducted, the attitudes of the spouses upon entry into marriage ultimately determines the quality of their marriages; if spouses enter marriage with the belief that divorce is the solution to any problems that arise, their marriages are of significantly lower quality and thus often end in divorce. By contrast, if the spouses believe that divorce is not an option, the quality of their marriages tend to be more satisfying and fulfilling. As a consequence fewer couples in the latter category divorce. Covenant couples enter into marriage only after mandatory pre-marital counseling. They sign a “Declaration of Intent” that emphasizes the expectation that their marriage will be lifelong. The solemnity of the preparation and the significance of signing the “Declaration of Intent” place covenant spouses within the latter category described by Professor Amato.

IV. OBSTACLES TO ITS IMPLEMENTATION: CLERGY AND CIVIL SERVANTS

In Louisiana, despite a Gallup poll of Louisiana citizens conducted in 1998 that revealed strong support for covenant

47. Id. art. 103(3).
48. Id. art. 103(1).
49. Id. art. 102.
51. Paul R. Amato & Stacy J. Rogers, Do Attitudes Toward Divorce Affect Marital Quality?, 20 J. of Family Issues 69 (1999). Amato and Rogers write: Although most Americans continue to value marriage, the belief that an unrewarding marriage should be jettisoned may lead some people to invest less time and energy in their marriages and make fewer attempts to resolve marital disagreements. In other words, a weak commitment to the general norm of life-long marriage may ultimately undermine people’s commitments to particular relationships.

Id. at 70.
marriage—especially the pre-divorce counseling, public servants charged with implementation of the covenant marriage legislation and religious clergy throughout the state have failed in different ways to embrace the marital option. Of the 527 respondents to the survey in Louisiana conducted in May 1998,

eighty-one percent of respondents believed that pre-marital counseling was very or somewhat important compared to nineteen percent who believed that it was not very or not at all important; 92.3% of respondents believed that the couple agreeing in advance to seek counseling if marital difficulties arise during the marriage was very or somewhat important, whereas 7.7% believed that it was not very or not at all important.

Not unexpectedly, the most controversial of the components of covenant marriage—restricted divorce—proved to be the least popular: "Overall, [only] two thirds (65.7%) agreed that longer waiting periods for a divorce are a good idea." The attitudes of one-third of the respondents about waiting periods reflect lack of knowledge about the benefits of longer "cooling off" periods before divorce, reflected in the recent empirical study of the National Survey of Families and Households by Maggie Gallagher and Linda Waite. They report that "more than 86% of unhappily married couples in the late 1980s who did not divorce reported having a happy marriage five years later (about 15% divorced)."

Despite Louisianans' favorable view of the covenant marriage legislation, the staff of the Clerks' offices throughout the state who issue marriage licenses have obstructed, rather than facilitated, the implementation of the legislation. Although the legislation as enacted was not specific, the legislature assumed that the Attorney General's pamphlet describing the differences between covenant and "standard" marriages would be delivered by the Clerk's staff to applicants for marriage licenses. During a "confederate" study of the implementation of covenant marriage legislation, Steven Nock and his research team found that clerks offered the information in only thirty-five percent of the parishes, and another forty-seven percent only offered the written information when asked to produce it.

52. Spaht, supra note 5, at 713–17.
53. Id. at 714.
54. Id. at 713.
55. Id. at 714.
56. Id.
57. Id. at 715 (emphasis added).
58. Id. at 723–26.
59. Laura Sanchez, et. al., The Implementation of Covenant Marriage in
fact the team reported that most clerks expressed negativity about covenant marriage:

In 53% of the parishes, clerks made pessimistic or derogatory comments. For example, when a confederate asked a clerk about covenant marriage, after being presented a marriage license with the option already checked “no,” a clerk in the background called out, “she won’t want one.” In another parish, a clerk told our confederate to “just put no” on the line. The clerks presupposed that the confederate would not want a covenant marriage because it is “a whole lot of paperwork” and that if she had really wanted one, she would have “known ahead of time.” In fact, the overwhelming sentiment was that applicants would have to know about the option before applying for the license. In almost all parishes, the office’s tasks were defined as helping knowledgeable couples fulfill the requirements, but not as serving as a source of education to the public about the availability of the option.61

If staff members were asked about the option, staff in only twelve percent of the parishes gave accurate information, while in fifty-three percent of the parishes, the explanations contained inaccurate or misleading information, and in the remaining thirty-five percent, “clerks gave patently wrong information.” Now, by virtue of 2001 legislation, staff in the Clerks’ offices are required explicitly to deliver the Attorney General’s pamphlet, called the Covenant Marriage Act, to all applicants for marriage licenses.63

After conclusion of the “confederate study” conducted by Nock’s research team, the staff of selected clerks’ offices were asked to give their opinions on covenant marriage in personal interviews. Most “equated Covenant marriage with a religious movement, and felt only couples who learned about it from their church leaders would or could get one.” The researchers also reported that

[u]ltimately, the clerks felt that the Covenant marriage option was “just a line we have to have on the form in case someone

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Louisiana, 9 Va. J. Soc. Pol’y & L. 192, 206 (2001). The study was conducted in seventeen of the sixty-four Louisiana parishes chosen “by probability proportionate to size, based on the number of marriages they registered in 1998.” Id. at 203.
60. In most offices, “the clerk simply took the verifying information from the applicant . . . and completed the marriage license form, checking the covenant option as ‘no’ without inquiry or comment.” Id. at 204.
61. Id. at 207.
62. Id. at 206.
64. Sanchez, supra note 59, at 207.
wants one.” As one said, “I think that there was someone in the legislature that had nothing else to do. . . . I don’t think it’s catching on. I think this is an idea that will just run its course and disappear.”

Two staff members of the surveyed clerks’ offices expressed the view that engaged couples reject covenant marriage because of the increased difficulty in getting a divorce: “‘The couples tell us that when they are ready to divorce, they don’t want the law telling them they can’t.’ . . . ‘Because they don’t want to be stuck. They say that they don’t want to have to go through the hassle.’”

If it is a religious movement, why is it that so few Christians are electing the choice of a covenant marriage? Where are their pastors, ministers, and priests? The Louisiana bishops of the Episcopal and Methodist churches explicitly rejected “covenant marriage” because it would restore “more difficult” divorce law and minimize “standard” marriages performed in a church setting. The Catholic Church until 1999 refused to permit its priests to participate in the counseling required by the statute because the counselor was required to inform the couple of the grounds for divorce in a covenant marriage. That objection was remedied by amendment to the counseling statute and publicly recognized by the bishops’ committee as curing their objections. Nonetheless, there is no evidence that the Catholic Church is officially informing its engaged couples during pre-Canaa sessions that covenant marriage is an option in the state of Louisiana, much less that it is more consistent with the Catholic view of marriage (sacramental). Southern Baptists, the second largest denomination in Louisiana after Catholics, make decisions on such matters church by church although the organized Association has featured the option in at least one of its national gatherings. Thus, we have a “religious movement” alluded to by the Clerks’ staff without followers. Christian couples are not choosing covenant marriage in significant numbers. Only two to three percent of the newly married couples in Louisiana in any given year are covenant couples.

The ultimate success of covenant marriage and the protection that it offers children depends upon the action of pastors, ministers, and priests. It is the clergy who are usually among the first to be informed of an engagement and pending nuptials, and they have a moral responsibility to inform couples marrying in their church that

65. Id.
66. Id. at 219.
68. Covenant marriage legislation permits the “conversion” of a “standard” marriage to a “covenant” marriage. See id. 9:275.
Louisiana offers two types of marriage. Even staff in the Clerks’ offices recognize who bears the ultimate responsibility, noting that most couples interested in covenant marriage learn about it from their religious leaders and come to the clerk’s office prepared to ask for one. If, as estimated, over eighty-five percent of couples who marry in Louisiana marry in a house of worship, future empirical research should focus on the attitudes of the clergy toward covenant marriage.

The state of Louisiana is not entirely blameless, of course. The social science research team opined that “‘the state, if truly dedicated to reducing divorce or at least encouraging Covenant marriage, would benefit from a mass public education campaign.’” without which, “‘the likely growth of Covenant marriage is doubtful.’” The research team further recommended that the education effort “‘could include television- and radio-aired public service announcements, brochures and advertisements to bridal registry magazines, news announcements to clergy and justices of the peace.’” In a newly created Marriage Handbook financed by the State of Louisiana using TANF (Temporary Assistance to Needy Families) monies, there is a section devoted to the law of Louisiana which explains and emphasizes the choice between a “standard” and “covenant” marriage, including the differing legal consequences, as well as explicating the legal consequences of marriage itself. There are still no mass media public education efforts, however.

If nothing else, the adoption of covenant marriage by Louisiana in 1997 precipitated a broader national discussion of marriage—its purposes, its “health,” its decline, its maintenance, and its endurance. Since 1997 and the beginning of this earnest national conversation, marriage education and divorce reform, a myriad of more sophisticated and compelling empirical studies, and the national government’s marriage promotion efforts have resulted. A disparate group of leaders from public think tanks, academia, the therapeutic professions (psychology and social work and other similar disciplines), and faith-based organizations birthed the National Marriage Movement, a loose and broadly constructed coalition or network whose principal goal is to see more children grow up in the home of their biological (adoptive) parents in a low-conflict, healthy marriage. For the seven years following the passage of covenant marriage legislation, there was steady, incremental progress in arresting the damaging “revolutions” of the 1960s and 1970s and a

69. Sanchez, supra note 59, at 212.
70. Spaht, supra note 5, at 726 (quoting prepublication draft of Sanchez, supra note 59).
71. Id. at 726 n.84 (quoting prepublication draft of Sanchez, supra note 59).
reversal of destructive social experiments designed by adults for their own pleasure. These adult experiments fail to calculate the costs for children.\textsuperscript{73}

V. NOCK'S RESEARCH: WHAT DISTINGUISHES COVENANT COUPLES FROM OTHER MARRIED COUPLES?\textsuperscript{74}

Women "are the 'leaders' in selecting covenant marriage, particularly women with a vested interest in childbearing who apparently feel the need for the protection of stronger divorce laws."\textsuperscript{75} Men lead in selecting "standard" marriage.\textsuperscript{76} Covenant couples have a forceful conviction about the importance of the choice they are making that "standard" married couples do not, believing that they are making a powerful statement about marriage as an institution.\textsuperscript{77} Surprisingly to some researchers, "covenant married husbands and wives are more educated and hold more traditional attitudes."\textsuperscript{78} Couples in a covenant marriage are "far more likely to choose communication strategies that do not revolve around attacking or belittling their partner. They are less likely to respond to conflict with sarcasm or hostility, two communication strategies that [John] Gottman (1994) indicates are particularly strongly associated with poor marriage outcomes."\textsuperscript{79}

\textsuperscript{73} Despite the fact that most social scientists agree that there is insufficient research on same-sex parenting to reach a firm conclusion about differences in outcomes "the most appropriate comparison group [is] children of heterosexual divorced parents [most children raised by same-sex parents were conceived in the context of a heterosexual relationship which failed]." Mary Parke, Are Married Parents Really Better for Children? What Research Says About the Effects of Family Structure on Child Well-Being 5 (CLASP Policy Brief, Couples and Marriage Series, Brief No. 3, 2003).

Of the studies already undertaken, a respected family scholar, Steven Nock of the University of Virginia, testified as follows: "Through this analysis I draw my conclusions that 1) all of the articles I reviewed contained at least one fatal flaw of design or execution; and 2) not a single one of those studies was conducted according to general accepted standards of scientific research." Affidavit of Steven Nock at ¶ 3, Halpern v. Attorney General of Canada, [2000] No. 684/00 (Ont. Sup. Ct. of Justice). See also Dennis Prager, Children's Needs Not a Factor in the Homosexual Agenda, Wash. Times (Nat'l Weekly Ed.), May 10-16, 2004, at 33.

\textsuperscript{74} For a comprehensive discussion and comparison, see Brinig & Nock, supra note 34.

\textsuperscript{75} Spaht, supra note 72, at 52.

\textsuperscript{76} Id. at 53.

\textsuperscript{77} See id. at 53.


\textsuperscript{79} Id. at 31.
Two years after marrying, covenant couples "described their overall marital quality as better than did their Standard counterparts." Covenant couples were more committed to their marriage two years after the ceremony than at the time of their marriage; whereas, their standard counterparts had changed little in their level of commitment.80

With the growing centrality of marriage for covenant couples, they experienced "higher levels of commitment . . . , higher levels of agreement between partners..., fewer worries about having children . . . , and greater sharing of housework." It is not too early . . . to conclude that covenant marriages are better marriages. . . . Steven Nock, the director of the study, expresses the view that "internally the [covenant] marriages are vastly better, and covenant couples agree about who does what, the fairness of things, etc. much more than standard couples."81

These covenant couples are participants in a "new" form of marriage "that reserves the traditional, conventional, and religious aspects of the traditional institution, but also resolves the various inequities often associated with gender in modern marriages."82 In his opinion, "a central theme that discriminates between the two types of unions . . . [is] institutionalization of the marriage."83 Institutionalization of the marriage simply reflects the couple's view that "the marriage warrants consideration apart from the individualistic concerns of either partner. In regard to some matters, covenant couples appear to defer to the interests of their marriage even when the individual concerns of the partners may appear to

80. Spaht, supra note 72, at 54 (quoting a draft of Nock, Sanchez, & Wright, infra note 82). "What is interesting is that these couples feel more strongly about the concept three years into marriage, and that the difference in how they feel is significantly greater than the difference in how the standard marriage couples feel about the same statement." Brinig & Nock, supra note 34, at 175. See also Margaret F. Brinig & Steven L. Nock, "I Only Want Trust": Norms, Trust, and Autonomy, 32 J. Socio-Econ. 471 (2003).

81. Spaht, supra note 72, at (quoting a draft of Nock, Sanchez, & Wright, infra note 82; E-mail from Steven L. Nock to Katherine S. Spaht (Sept. 16, 2002, 6:32 a.m.)) (emphasis added).


83. Nock, Sanchez, & Wright, supra note 82, at 6 (emphasis added). See also Brinig & Nock, supra note 34.
conflict. And this orientation to married life . . . helps resolve the customary problems faced by newly married couples in regard to fairness and equity."®

Couples in a covenant marriage view marriage institutionally which "elevates the normative (expected) model of marriage to prominence in the relationship."® What accounts for this institutional view? "[T]he centrality accorded religion by the couple" and "beliefs about the life of marriage independently of the individual."® "Two individuals do not easily make a strong marriage. Rather, it takes the presence of a set of guiding principles around which these two individuals orient their behaviors and thinking."®

"All in all this is a very nice story and one that is attracting a lot of interest."®

VI. COMPLETING THE VISION OF MARRIAGE WITHIN COVENANT MARRIAGE

During the 2004 regular session, the Louisiana Legislature enacted new provisions that enhance the covenant marriage legislation by more explicitly addressing the content of the covenant marriage relationship. The provisions concern the rights and responsibilities of married persons. All married persons in Louisiana owe to each other fidelity, support, and assistance.® Yet, this is the only legal regulation of the marital relationship during its existence. Covenant marriage legislation, in particular the grounds for separation and divorce, speak inferentially to the appropriate conduct for spouses during marriage: each spouse is to "yield to the other in sexual matters as long as the request [is] reasonable [positive aspect of fidelity and its breach constitutes cruel treatment entitling a covenant spouse to a separation] and to conduct himself so as not to bring dishonor and shame to the family formed by the marriage, which could occur by adulterous affairs, outrageous or felonious behavior, and constant intemperance."® Furthermore, in a covenant marriage neither spouse should leave the other (abandonment) and by doing so deny to the other support and assistance. Nor should either physically or sexually abuse the other or a child of the parties.®

® Nock, Sanchez, & Wright, supra note 82, at 6 (emphasis added).
® Id. at 11.
® Id. at 7.
® Id. at 9.
® E-mail from Steven L. Nock to Katherine S. Spaht (Sept. 16, 2002, 6:32 a.m.) (on file with the author).
Law can and should do more. Law can teach and exhort. It is possible for a statute drafter to “craft a statute which states general principles about the content of marriage, some with legal consequences intended to constrain or punish and others intended to be simply hortatory or examples of the expressive function of the law.” The new legislation restores a vision of marriage that has been lost—a vision of marriage and the public’s interest in it, as expressed with its collective voice through the law. Each of the provisions has a foreign source; these provisions appear in civil codes in countries around the world.

La. R.S. 9:293. Spouses in a covenant marriage are subject to all of the laws governing married couples generally and to the special rules governing covenant marriage.

La. R.S. 9:294. Spouses owe each other love and respect and they commit to a community of living. Each spouse should attend to the satisfaction of the other’s needs.

La. R.S. 9:295. Spouses are bound to live together, unless there is a good cause otherwise. The spouses determine the family residence by mutual consent, according to their requirements and those of the family.

92. Two newspaper reports of this legislation demonstrate deep misunderstanding by some members of the press, which is unfortunately generally reflective of the American citizenry at large. The news report of the hearing on House Bill No. 252 in House Committee on Civil Law and Procedure was titled: “Bill ‘exhorts’ covenant harmony.” Marsha Shuler, Bill “Exhorts” Covenant Harmony, The Advocate, Apr. 6, 2004, at 4A. The subsequent editorial in The Advocate on Saturday, April 10, 2004, was titled, “The Legislature’s marital counsel,” and sarcastically urged the Legislature to reject the bill since it legislated “household chores” and was inane. See The Legislature’s Marital Counsel, The Advocate, Apr. 10, 2004, at 6B.


95. Family Code of the Philippines art. 68; Code civil [C. civ.] art. 392 (Quebec); Código Civil [C.C.] art. 67 (Spain); Código Civil art. 1672 (Portugal); Código Civil art. 131 (Chile); Codigo Civil [C.C.] art. 1566(V) (Brazil); Code civil [C. civ.] art. 215 (France); § 1353(1) Bürgerliches Gesetzbuch [BGB] (Germany); Código Civ. art. 139 (Venezuela); Burgerlijk Wetboek [BW] art. 1:81 (The Netherlands).

96. C. civ. arts. 392, 395 (Quebec); BW art. 83(1) (The Netherlands); Family Code of the Philippines art. 68; Código Civ. art. 199 (Argentina); Código Civ. art. 137 (Venezuela); Código Civ. para el Distrito Federal [C.C.D.F.] art. 163 (Mexico); Código Civ. art. 133 (Chile); Codice civile [C.c.] art. 143 (Italy); Código
La. R.S. 9:296. The management of the household shall be the right and the duty of both spouses.\textsuperscript{97}

La. R.S. 9:297. Spouses by mutual consent after collaboration shall make decisions relating to family life in the best interest of the family.\textsuperscript{98}

La. R.S. 9:298. The spouses are bound to maintain, to teach, and to educate their children born of the marriage in accordance with their capacities, natural inclinations, and aspirations, and shall prepare them for their future.\textsuperscript{99}

Submitted in the form of a letter as part of the official record of the hearing on this new legislation, researcher Steve Nock of the University of Virginia supported each legal provision proposed with findings from his study of covenant couples, showing that covenant couples' marital behavior conforms to the legal provisions adopted.\textsuperscript{100}

VII. THE THREAT OF LAWRENCE V. TEXAS AND THE ABILITY OF COVENANT MARRIAGE TO WITHSTAND THE THREAT

And then along comes Lawrence v. Texas.\textsuperscript{101} Although the Lawrence case involved a criminal statute punishing sodomy, it has implications for the entire body of law called family law. Justice Anthony Kennedy attempts to reassure the reader by stating that the decision is narrow in scope and holds no broad implications for state statutes regulating sexual conduct. First, he observes that the statute in Lawrence was criminal, not civil, and it punished sexual acts between consenting adults in the privacy of their bedroom.
Regardless of the nature of these acts, they fall within the "liberty" interest of the Fourteenth Amendment:

The Fourteenth Amendment protects the person from unwarranted government intrusions into a dwelling or other private places . . . . Freedom extends [however] beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial [geographical] and more transcendent dimensions.\(^{102}\)

Justice Kennedy continued to distinguish Lawrence and argued its narrowness by emphasizing that the case did not concern minors or public conduct and did not "involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."\(^{103}\) Rather the Texas sodomy statute punished the participants as criminals:

"This . . . should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."\(^{104}\)

The most disturbing portion of the opinion authored by Justice Kennedy is that portion that develops and describes the "liberty" interest of the individual protected from governmental regulation. "Liberty" after Lawrence no longer means a fundamental right, "deeply rooted in the history and traditions of our country."\(^{105}\) The new, unanchored "liberty" interest "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."\(^{106}\) The transcendent dimension includes personal

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102. Id. at 562, 123 S. Ct. at 2475 (emphasis added).
103. Id. at 578, 123 S. Ct. at 2484. This is true even if the legal recognition would be "validating."
104. Id. at 567, 123 S. Ct. at 2478 (emphasis added).
106. Lawrence, 539 U.S. at 562, 123 S. Ct. at 2475. For an interesting criticism of an individual's "rights" to privacy versus a right that focuses on "relationships," see Nehal A. Patel, The State's Perpetual Protection of Adultery: Examining Koestler v. Pollard and Wisconsin's Faded Adultery Torts, 2003 Wis. L. Rev. 1013. He reviews pro-marriage and feminist critics of the lack of an adequate legal
decisions relating to marriage, procreation, contraception, family relationships, child rearing and education—decisions “involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . .”107 According to Justice Kennedy, no state, acting for its citizens, can “mandate our own moral code.”108 Justice Sandra Day O'Connor, often the “swing” vote and another appointee of a Republican president, attempted in a concurring opinion an impossible distinction between acceptable laws that “preserve the traditions of society” and unacceptable laws that “express moral disapproval.”109 Yet, of all the incredible statements contained in that opinion, the winner is the one which expresses an autonomy of self that virtually knows no boundaries; hence, none that can be imposed by state regulation.

At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.110

Within the context of the married family and state law that regulates the intimate decisions made there, such autonomy creates anarchy. Whose “right to autonomy” trumps? What about the relationship of husband and wife or the common good of the family, as a unit? It was the opening salvo in what was to become a more intense and accelerating “culture war” just as Justice Scalia predicted in his dissenting opinion.111

Notwithstanding what the Lawrence opinion says about the individual’s right to “liberty,” any “liberty” interest under the Fourteenth Amendment can be waived by the individual who possesses the right, as long as the waiver is knowing and voluntary.112
Although the "waiver" in a covenant marriage is not a one-time event like a search, there is a parallel in the federal jurisprudence involving enlistment in the military; the enlistee voluntarily and knowingly subjects himself to a distinct system of order and justice which modify the "liberty" interests he possesses under the Constitution.\textsuperscript{113} In the case of the military, there are significant governmental interests, such as national defense and security, not present in the case of marriage. But, the governmental interest of assuring "healthy, low-conflict" marriages of superior quality in which children are born and reared by their two biological or adoptive parents seems no less compelling to the future of this country than national defense.

In light of the "waiver" cases, consider that in a covenant marriage the spouses must have pre-marital counseling during which the couple receives information about the differences between a covenant and a standard marriage. That information is in the form of the pamphlet produced by the Attorney General’s office, which will include a description of the special rights and obligations of covenant spouses during their marriage added by the 2004 legislation.\textsuperscript{114} The couple then executes an affidavit (in the presence of a notary) attesting to having received the counseling (accompanied by an attestation by the counselor) and to having read the Attorney General’s pamphlet.\textsuperscript{115} The affidavit required by the legislation to be executed by the covenant spouses after signing the Declaration of Intent "serves as proof of a knowing and voluntary waiver of each covenant spouse’s ‘right to be free from governmental regulation of their adult, consensual, intimate relationship’ and of each spouse’s willingness to submit to legal regulation of their relationship."\textsuperscript{116}

The covenant marriage legislation provides a solution to a potential problem that threatens the institution of marriage and any future attempts to strengthen it legally. Originally, marriage suffered from the problem of impermanence, threatened by unilateral "no-fault" divorce; now, it is threatened by the problem of the usurpation of democracy by the United States Supreme Court.\textsuperscript{117}


\textsuperscript{115} Id. 9:273.1(B). Spaht, supra note 94.

\textsuperscript{116} Spaht, supra note 94.

VIII. CONCLUSION

Often I have argued that covenant marriage "offers to those people of the dissident culture, either those who belong to a religious community or those who adhere to traditional morality, a safe haven from the post-modern, dominant culture."118 Lawrence and the current culture war focused on same-sex "marriage" merely accelerate the necessity of "constructing 'safe havens' for 'all who desire protection from a corrosive culture advanced by an elite, governing caste.'"119

Within [the] safe haven [of covenant marriage], spouses who desire to restore the institution of marriage may offer themselves collectively as witnesses to others about sacrificial love and its central role in binding male and female to each other and their offspring.120

Covenant spouses already view marriage as a transcendent reality, distinctly different from the transcendent reality spoken of by Justice Kennedy in the Lawrence decision. Covenant marriage "represents a paradigm that is the opposite of post-modern marriage."121 Covenant spouses defer to marriage, an abstraction representing a third party to the marriage itself, rather than view marriage as a loose union of two radically autonomous selves acting always in each person's own self-interest—some form of joint venture without sufficient remedy for its breach. Which vision serves the rest of society better? Which vision serves our most vulnerable citizens, children, better?

If the answer to both questions is yes, then why isn't government confidently defending the covenant marriage vision, much less not promoting it? And, why aren't more religious citizens choosing it?
May 4, 2004

Katherine S. Spaht
Jules F. and Frances L. Landry Professor
Louisiana State University
Paul M. Hebert Law Center
East Campus Drive
Batón Rouge, LA 70803-1000

Dear Katherine,

I am pleased to see the provisions of House Bill No. 252 and would like to offer some comments about how they reflect many of the findings from our ongoing research with both covenant and standard couples in Louisiana. You have my permission to introduce the following comments in the record as testimony before the Senate Committee on Judiciary A.

I am currently a Professor of Sociology at the University of Virginia where I have taught since 1978. I teach both undergraduate and graduate courses in Research Methods, Statistics, The Family, and Family Policy. I am co-founder of the Center for Children, Families, and the Law at the University of Virginia, a multi-disciplinary center to foster collaborative research and teaching on issues involving children and families.

My research focuses primarily on households and families. I am concerned with the causes and consequences of changes in family organization and structure. Thus, I have investigated marriage, divorce, and cohabitation by focusing on the factors that lead individuals into these statuses and the consequences of entering them. I am the author of six books and over 70 articles and chapters.

I am also Director of the Marriage Matters Project which is a five-year research effort supported by the National Science Foundation and the Smith Richardson Foundation. This research investigates the legal innovation known as Covenant Marriage in Louisiana. It is a quantitative effort involving approximately 1,200 individuals (600 in each type of marriage) interviewed repeatedly over the course of five years. This project began in 1999 and is now approaching completion. We selected a scientific sample of approximately 600
newly married couples from parish records. Half were in covenant marriages. Each partner in each couple was interviewed three times over the past five years. This research has allowed us to examine the differences and similarities among covenant and standard couples. We have been able to identify factors associated with the decisions about which type of marriage to have. We have also been able to track the trajectories of individuals and couples over time, as jobs come and go, children arrive or depart, and marriages end or reconcile. It is this study from which I draw the following general points.

Here I summarize basic findings from our work over the past five years. Throughout, I distinguish between couples in covenant marriages and those in standard (non-covenant) marriages. The primary sources and documentation are found in the footnote.

§ 294. Covenant spouses' love, respect, and community. Spouses owe each other love and respect and they commit to a community of living. Each spouse should attend to the satisfaction of the other's needs.

Our work has documented the significantly higher levels of affection, sharing, commitment, agreement and love among covenant couples. This greater quality of the marriage is bolstered by greater involvement with family and friends. Indeed, covenant couples are more likely to seek and receive help and counsel from both family members and friends. Both covenant wives and husbands have reported, repeatedly, that there is greater mutual respect and trust than is found among comparable standard marriages. Finally, covenant couples rely on more productive (less damaging) strategies for resolving conflicts that arise in their marriages.

§ 295. Covenant spouses' obligation to live together. Spouses are bound to live together, unless there is good cause otherwise. The spouses determine the family residence by mutual consent, according to their requirements and those of the family.

On a long list of potential sources or problems in a marriage, covenant partners regularly report higher levels of agreement on most mundane issues of life. These include matters of type of work (employment), balancing competing demands of work and family, and raising children. In short, there is a higher degree of mutual agreement (consent) among covenant than standard couples.
§ 296. Right and duty of covenant spouses to manage household. The management of the household shall be the right and duty of both spouses.

One of our most compelling findings relates to the greater degree of equity (fairness) found among covenant husbands and wives. In many matters, especially those relating to the allocation of household tasks, covenant partners describe their arrangement as fair and equitable. We distinguish between strict equality (each partner does the same thing) and equity (each partner does what is deemed fair) in all of our work. The division of tasks in any household is a complex, negotiated matter. In covenant marriages, we believe, a guiding principle (the centrality of the marriage, per se) provides a rationale for the fair division of tasks. This means that covenant couples endorse somewhat more traditional views about the proper responsibilities of husbands and wives. But unlike standard couples, such gendered distinctions are valued and do not become sources of conflict and tension. In some of our work, we have described the ways that covenant couples manage to resolve these prosaic problems as "intimate equity" by which we meant the joint commitment to a model of stable marriage that produces the sense of fairness and justice.

§ 297. Decision making in interest of family. Spouses by mutual consent after collaboration shall make decisions relating to family life in the best interest of the family.

As already noted, our work has documented the greater extent of agreement and discussion among covenant couples in many matters of family decision-making. The relative (compared with standard couples) absence of conflict over decisions, and the greater reliance on effective conflict-resolution strategies when disagreements arise are both part of the reason we find such higher agreement among covenant couples.

§ 298. Obligations to children of the marriage. The spouses are bound to maintain, to teach, and to educate their children born of the marriage in accordance with their capacities, natural inclinations, and aspirations, and shall prepare them for their future.

Our work was not designed to investigate the welfare of children. At the same time, we are concerned to investigate the role children play in the lives of couples. Covenant couples are much less likely to have children from prior relationships (earlier marriages or relationships.) As a result, there are relatively fewer stepchildren in covenant
marriages. This results in lower levels of conflict and problems that are known to arise in blending (step) families. More generally, covenant couples are more likely to discuss and agree about most matters of family life. This includes, of course, how to rear their children.

I wanted to share these simple findings because they appear to have bearing on the provisions of House Bill 252. I also want to thank you for your help in our research. If I can give you any additional information from our project, please do not hesitate to contact me.

Sincerely yours,

/s/ Steven L. Nock
Steven L. Nock, Ph.D.
Professor of Sociology and Psychology
APPENDIX B


Dutch Scholars on SSM (English Translation)

At a time when parliaments around the world are debating the issue of same-sex marriage, as Dutch scholars we would like to draw attention to the state of marriage in The Netherlands. The undersigned represent various academic disciplines in which marriage is an object of study. Through this letter, we would like to express our concerns over recent trends in marriage and family life in our country.

Until the late 1980's, marriage was a flourishing institution in The Netherlands. The number of marriages was high, the number of divorces was relatively low compared to other Western countries, the number of illegitimate births also low. It seems, however, that legal and social experiments in the 1990's have had an adverse effect on the reputation of man's most important institution.

Over the past fifteen years, the number of marriages has declined substantially, both in absolute and in relative terms. In 1990, 95,000 marriages were solemnized (6.4 marriages per 1,000 inhabitants). This same period also witnessed a spectacular rise in the number of illegitimate births—in 1989 one in ten children were born out of wedlock (11%), by 2003 that number had risen to almost one in three (31%). The number of never married people grew by more than 850,000, from 6.46 million in 1990 to 7.32 million in 2003. It seems the Dutch increasingly regard marriage as no longer relevant to their own lives or that of their offspring. We fear that this will have serious consequences, especially for the children. There is a broad base of social and legal research which shows that marriage is the best structure for the successful raising of children. A child that grows up out of wedlock has a greater chance of experiencing problems in its psychological development, health, school performance, even the quality of future relationships.

The question is, of course, what are the root causes of this decay of marriage in our country. In light of the intense debate elsewhere about the pros and cons of legalizing gay marriage it must be observed that there is as yet no definitive scientific evidence to suggest the long campaign for the legalization of same-sex marriage contributed to these harmful trends. However, there are good reasons to believe the decline in Dutch marriage may be connected to the successful public campaign for the opening of marriage to same-sex
couples in The Netherlands. After all, supporters of same-sex marriage argued forcefully in favor of the (legal and social) separation of marriage from parenting. In parliament, advocates and opponents alike agreed that same-sex marriage would pave the way to greater acceptance of alternative forms of cohabitation.

In our judgment, it is difficult to imagine that a lengthy, highly visible, and ultimately successful campaign to persuade Dutch citizens that marriage is not connected to parenthood and that marriage and cohabitation are equally valid “lifestyle choices” has not had serious social consequences. There are undoubtedly other factors which have contributed to the decline of the institution of marriage in our country. Further scientific research is needed to establish the relative importance of all these factors. At the same time, we wish to note that enough evidence of marital decline already exists to raise serious concerns about the wisdom of the efforts to deconstruct marriage in its traditional form.

Of more immediate importance than the debate about causality is the question what we in our country can do in order to reverse this harmful development. We call upon politicians, academics and opinion leaders to acknowledge the fact that marriage in The Netherlands is now an endangered institution and that the many children born out of wedlock are likely to suffer the consequences of that development. A national debate about how we might strengthen marriage is now clearly in order.

Signed,
Prof. M. van Mourik, Professor in Contract Law, Nijmegen University; Prof. A. Nuytinck, Professor in Family Law, Erasmus University-Rotterdam; Prof. R. Kuiper, Professor in Philosophy, Erasmus University-Rotterdam; J. Van Loon, Ph.D, Lecturer in Social Theory, Nottingham Trent University; H. Wels, Ph.D, Lecturer in Social and Political Science, Free University-Amsterdam.