

WHAT'S LOVE GOT TO DO WITH IT? A PROPOSAL FOR ELEVATING THE STATUS OF MARRIAGE BY NARROWING ITS DEFINITION, WHILE UNIVERSALLY EXTENDING THE RIGHTS AND BENEFITS ENJOYED BY MARRIED COUPLES

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I. INTRODUCTION

Much has been written in recent years regarding marriage and its place in modern society. Articles have been published advocating the expansion of marriage to include same-sex couples,¹ the abolition of government-regulated marriage,² and condemning the “withering away” of marriage and all it represents.³ Authors have proposed replacing the legal status of marriage with a new status bearing different nomenclature, such as “domestic limited partnership,” and have suggested creating different rules, rights and obligations

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1. See, e.g., Tobin A. Sparling, *All in the Family: Recognizing the Unifying Potential of Same-Sex Marriage*, 10 LAW & SEXUALITY 187 (2001); John G. Culhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119 (1999).

2. See, e.g., Daniel A. Crane, *A “Judeo-Christian” Argument for Privatizing Marriage*, 27 CARDOZO L. REV. 1221 (2006); Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2006). But see Nancy J. Knauer, *A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 CARDOZO L. REV. 1261 (2006) (expressing concern that deregulation of marriage would simply give rise to other issues regarding legal recognition of same-sex relationships); Carol Sanger, *A Case for Civil Marriage*, 27 CARDOZO L. REV. 1311 (2006) (expressing concern that contract law, by itself, is not capable of sufficiently regulating marriage); Dr. Charles J. Reid, Jr., *And the State Makes Three: Should the State Retain a Role in Recognizing Marriage?*, 27 CARDOZO L. REV. 1277 (2006) (arguing that, for a variety of reasons, the state is in the best position to regulate marriage).

3. See Lynn D. Wardle, *The “Withering Away” of Marriage: Some Lessons from the Bolshevik Family Law Reforms in Russia, 1917–1926*, 2 GEO. J.L. & PUB. POL’Y 469 (2004).

than those currently pertaining to the status of marriage.⁴ Others have proposed the creation of a new status for same-sex couples, which roughly parallels the rules, rights and obligations currently applicable to married couples, and would exist alongside the current legal status of marriage.⁵ The legislatures of several states have taken varying positions on these issues. While some states have created a separate “civil union” status, others have expanded the traditional definition of marriage or explored the idea of “covenant marriage.” For example, the Vermont legislature created the status of “civil union” that confers the same benefits enjoyed by married couples on same-sex couples who choose it.⁶ Additionally, the Massachusetts and California legislatures have been directed by the highest courts in those states to redefine marriage to include same-sex couples.⁷ Conversely, many state legislatures have taken the opposite view, defining marriage restrictively as a union between one man and one woman.⁸ In three states, the legislature created a separate form of marriage—termed “covenant marriage”—a purely elective status available only to different-sex couples and creating stringent requirements for both entry and exit.⁹

Against this backdrop, the marriage debate rages on; each side equally convinced of the merits of its arguments and making them vigorously with legal, ethical, moral and religious overtones. Apparently, it is not possible for states to reach a consensus regarding a universal definition of a legally recognized relationship that would replace the current status of marriage. At the same time, each side appears woefully unhappy with the status quo. One side desires an expansive definition of marriage whereas the other desires a more restrictive definition, like those currently governing most jurisdictions. Some in the more restrictive camp also desire mandatory requirements for entering and exiting the marriage relationship.

Some very compelling (and some not so compelling) arguments have been advanced on each side of the debate. It is painfully obvious that whether the

4. See, e.g., Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349 (2007) (proposing a domestic partnership model based on business partnership law as a substitute for civil marriage).

5. See, e.g., Greg Johnson, *Civil Union, a Reappraisal*, 30 VT. L. REV. 891, 891 (2006) (suggesting that couples could be given the right to choose their form of legally recognized relationship from several options, including domestic partnership and civil union).

6. See William C. Duncan, *Whither Marriage in the Law*, 15 REGENT U.L. REV. 119, 123–24 (2003).

7. See Charles P. Kindregan, Jr., *Religion, Polygamy, and Non-Traditional Families: Disparate Views on the Evolution of Marriage in History and in the Debate Over Same-Sex Unions*, 41 SUFFOLK U. L. REV. 19, 20 (2007) (stating that *Goodridge* was the first decision by the highest court of any state to constitutionally recognize the right of same-sex couples to marry); *In re Marriage Cases*, 183 P.3d 384, 402 (Cal. 2008) (concluding that the California statutory provisions that limit marriage to opposite-sex couples violate the California Constitution); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (ruling that barring same-sex couples from the protections, benefits and obligations of civil marriage violates the Massachusetts Constitution).

8. See Duncan, *supra* note 6, at 120 (describing the process by which constitutional amendments in Alaska and Hawaii were enacted to restrict the definition of marriage to opposite-sex couples).

9. Covenant marriage laws have so far been enacted in Louisiana, Arizona and Arkansas. *Id.* at 121–22.

status of marriage is modified or remains the same, a substantial number of people will be unhappy and feel that their personal morals, ethics and beliefs have been violently offended. If a consensus of any kind is to be reached, it must satisfy the most compelling arguments made by each side. How is that possible when the positions of the two camps are so polarized? The solution must provide for more than one legally recognized relationship that couples may enter, each offering the same rights and benefits but with different requirements.

This article proposes an approach that defines two legally recognized relationships. First, opposite-sex couples desiring a traditional marriage could choose the option that generally adopts portions of the covenant marriage law enacted thus far by three states. Second, all couples, whether same-sex or opposite-sex, could choose the option most similar to today's current marriage relationship.

Part II of this article discusses the general history of the marriage concept. Marriage has historically taken different forms and has had varying degrees of importance over time and with respect to different groups. Part III addresses some of the criticisms levied against the current state of marriage, and the responses to such criticisms. Part III.A discusses the view that marriage has become much too liberalized and inclusive therefore losing much of its original meaning and importance. This liberalization has been described as a "withering away" of marriage, much to the peril of society. As explained in Part III.B, one response to that view has been the enactment of covenant marriage laws. Part IV advocates an expansive view of marriage that would include same-sex couples and further explains some of the arguments advanced on both sides of that debate. Part IV also discusses the proposals offered to resolve that debate. Part V explains in more detail the need for a multi-faceted approach, and fleshes out the proposal described above.

II. THE HISTORY AND ORIGINS OF MARRIAGE

In telling the creation story, the Bible describes how woman was made from the rib of man and states that "[f]or this reason a man will leave his father and mother and be united to his wife, and they will become one flesh."¹⁰ This statement implies that such unity, or marriage, shall be between one woman and one man.¹¹ Yet history reveals that marriage has taken many different forms and has assumed varying degrees of importance in different cultures.¹² There are many biblical examples of marriages not following the one man to one woman implication of Genesis. One famous example is King Solomon, who had 700 wives.¹³

10. *Genesis* 2:24. All citations to the Bible are to the New International Version.

11. *See Matthew* 19:4–5 (quoting Jesus Christ, in referencing the creation story, that "man and wife" meant a male and a female).

12. *See Wardle, supra* note 3, at 469 (citing JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION, AND LAW IN WESTERN TRADITION 2–3, 194 (1997) (discussing five models of marriage in Western Christian tradition); MARY ANN GLENDON, STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE 7–14 (1977) (discussing alternative forms of marriage regulation and different meanings of marriage)).

13. *See 1 Kings* 11:3.

Commentators differ regarding the historical importance of marriage in early Christianity. According to Professors Jennifer Drobac and Antony Page, “[b]efore the late eighteenth century, marriage typically only served one or more of three goals: (1) to consolidate wealth and resources, (2) to forge political alliances, and (3) to consummate peace treaties.”¹⁴ As for Christianity’s role, the authors assert that “[m]arriage was not originally a Christian religious institution. During its first thousand years, the Catholic Church did not consider marriage a sacrament and weddings were not celebrated in churches.”¹⁵ Professor Daniel Crane provides substantial historical support for the proposition that the Catholic Church’s modern view of marriage as a Christian sacrament—like baptism and the Eucharist—began to emerge early in church history and was theologically formalized at least by the Middle Ages.¹⁶ Professor Crane also discusses various early, prominent, Protestant authorities on marriage who state “it is possible to locate a distinctive Protestant tradition that is both ambivalent toward the sacramental understanding of marriage yet insistent that marriage remains a spiritual institution.”¹⁷

Professors Drobac and Page point out that American law, consistent with the First Amendment to the U.S. Constitution, has never recognized marriage as a sacrament or other religious construct. The law recognizes marriage only as a civil contract.¹⁸ Although marriage remains an extraordinarily important religious concept, religious leaders who perform marriages are authorized to do so by local law and are charged with verifying the satisfaction of civil marriage license requirements.¹⁹ In that regard, governmental regulation of marriage is entirely secular. Nevertheless, the concept of marriage adopted and approved for regulation is “based on religious tradition and the English common law: . . . lifelong, monogamous, Christian marriage.”²⁰

In its early form adopted from the English common law, marriage in America “was a strongly hierarchical relationship. Under the system of coverture, a married woman’s legal and economic identity merged into her husband’s.”²¹ In other words, the husband was in total, legal control of the marital relationship and any property produced during the marriage. As the Texas Supreme Court succinctly stated, “[a]t common law, the husband and wife were one, and the husband was that one.”²² This model remained in place, virtually untouched for about two centuries; indeed, it persevered despite

14. Drobac & Page, *supra* note 4, at 357 (citing EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE’S RIGHT TO MARRY 7, 104 (2004)).

15. Drobac & Page, *supra* note 4, at 357.

16. Crane, *supra* note 2, at 1229–33.

17. *Id.* at 1237.

18. Drobac & Page, *supra* note 4, at 357 (citing LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS AND THE LAW 7 (2004)).

19. Drobac & Page, *supra* note 4, at 357–58.

20. Ann Laquer Estin, *Marriage and Belonging*, 100 MICH. L. REV. 1690, 1691 (reviewing NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION (2000)).

21. *Id.* at 1692.

22. *Few v. Charter Oak Fire Ins. Co.*, 463 S.W.2d 424, 426 (Tex. 1971).

“[w]omen receiv[ing] the right to vote in 1920 and gain[ing] greater citizenship and nationality rights in the decades that followed.”²³

Sweeping changes began to occur in the latter half of the twentieth century. In her book, *Public Vows: A History of Marriage and the Nation*, Nancy Cott identified the decade of the Second World War as an important turning point regarding the traditional model of marriage.²⁴ “During the 1940’s, the Supreme Court abandoned its hostility toward migratory divorce, and the American Bar Association recommended moving to a no-fault principle in divorce.”²⁵ As a result, fault was eliminated as a prerequisite for divorce.²⁶ Eventually the concept of the husband being in total control of the marital relationship and the marital property began to give way to a model of equal rights for both spouses. For example, Texas, a community property state, amended its constitution in 1972 to ensure equal rights between the sexes²⁷ and subsequently enacted laws equalizing the marital property rights of both spouses.²⁸ In the common law property states, the concept of coverture gave way to a system that essentially gave the spouses equitable rights of distribution upon dissolution of the marriage.²⁹

III. WHAT HAS GONE WRONG WITH MARRIAGE? DIFFERENT PERSPECTIVES

A. Is Marriage “Withering Away”?

There is no question that the elimination of fault as a prerequisite for divorce has fundamentally changed the concept of marriage. Rather, the difference of opinion lies in whether marriage has changed for better or worse. As states began enacting no-fault divorce laws, the prevalence of divorce increased dramatically. Professor Allen Parkman cites to statistics reflecting that the annual national divorce rate was approximately ten per 1,000 women fifteen years and older for most of the 1950’s and into the 1960’s, but rose steadily after 1964 until 1979, when it peaked at 22.8.³⁰ After 1979, the divorce rate plateaued and in 1996, the last year for which we have reliable national data, the divorce rate was 19.5.³¹ It has recently been estimated that nearly half of all marriages in America will end in divorce.³²

Professor Parkman asserts that significant keys “to a successful marriage are sacrifices on behalf of the relationship, the expectation of reciprocity by the other family members, and a commitment by both spouses to their

23. Estin, *supra* note 20, at 1697.

24. *Id.* at 1697.

25. *Id.*

26. Drobac & Page, *supra* note 4, at 361.

27. TEX. CONST. art. I, § 3a.

28. *See, e.g.*, TEX. CONST. art. XVI, § 15.

29. Cameron v. Cameron, 641 S.W.2d 210, 220 (1982).

30. Allen M. Parkman, *The Contractual Alternative To Marriage*, 32 N. KY. L. REV. 125, 125 (2005) (citing U.S. NATIONAL CENTER FOR HEALTH STATISTICS, 43 MONTHLY VITAL STATISTICS REPORT 9, tbl. 1 (1995)).

31. *Id.*

32. Wardle, *supra* note 3, at 498.

relationship.”³³ He argues that no-fault divorce laws “create perverse incentives that discourage people from taking the steps necessary to make their marriages a success”³⁴ by inadequately compensating spouses for sacrifices made during marriage. Instead, spouses are encouraged to make decisions during marriage that benefit themselves at the expense of the family.³⁵ Professors Eric Rasmusen and Jeffrey Stake elaborate on this notion:

[T]he legal reforms radically changed the incentives married persons confronted. With no assurance that a marriage would continue and no security for either party in the judicially determined terms of divorce, the parties to a marriage remained nearly as financially insecure after marriage as they had been when single. Spreading of financial losses within the marital unit could no longer be relied upon when one spouse had the option to bail out of a household in difficulty. Devoting time and energy to producing assets useful to the marriage became riskier. A career became a safer bet for either party. People across the country responded to those new incentives, spending more time at the office and less at home.³⁶

Professors Drobac and Page list four principle goals that married couples hope to achieve: to “(1) demonstrate love and commitment, both to each other and in the eyes of the community; (2) secure the parentage and welfare of their children; (3) create an efficient and unified domestic economic enterprise; and (4) obtain legal rights and benefits based on their marital status.”³⁷ They assert that the free availability of unilateral no-fault divorce thwarts all four of these goals: (1) spouses are motivated to protect themselves financially by spending more time at work at the price of demonstrating less love and commitment to each other and to their marriage; (2) children suffer as a result of divorce due to adverse financial consequences, and experience more behavioral, emotional, health and academic problems than do children whose parents have not divorced; (3) an efficient and unified domestic economic enterprise is difficult to create when spouses cannot be confident that the marriage will survive no matter how much time and energy they devote to it; and (4) the legal rights and benefits of marriage can obviously not be obtained if the marriage ends in divorce.³⁸

Professor Katherine Shaw Spaht argues that no-fault divorce is only one of many avenues in which the law has retreated from the regulation of marriage. This retreat has resulted in allowing the spouses not only to decide when to divorce but also “to enter the relationship of marriage without the information that used to be required, to define the content of their marriage and to determine its day-to-day regulation.”³⁹ Professor Spaht further asserts that the practical

33. Parkman, *supra* note 30, at 126.

34. *Id.* at 127.

35. *Id.*

36. Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 459 (1998).

37. Drobac & Page, *supra* note 4, at 352–53 (citing *Turner v. Safley*, 482 U.S. 78, 95–96 (1987)).

38. *Id.* at 362–64.

39. Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243, 243–44 (2003).

result of the law's retreat from marriage regulation is that "people in Western countries have concluded that marriage is a private relationship which the law has no right to regulate and whose consequences affect only the parties to the marriage, not the general public, not even their own children."⁴⁰ Accordingly, "abandonment by law of the regulation of marriage played a significant role in changing society's understanding of marriage and its public character."⁴¹ She concludes that

[w]hat our law . . . teaches about marriage needs revision desperately—a revision that reinvigorates, strengthens, and protects the most fundamental of human institutions. The need for reinvigoration in law of the traditional understanding of marriage is pressing; it may be the only way Americans can resist other ideas inimical to and destructive of the institution of marriage.⁴²

Other commentators have adopted a contrary position, heralding the establishment of no-fault divorce as a much needed progressive reformation of family law. For example, Professor Cynthia VanSickle observes that prior to the advent of no-fault divorce unhappy couples desiring a divorce were often forced to fabricate fault.⁴³ This often resulted in collusion between the parties wherein one spouse agreed to take full responsibility for the breakdown of the marriage to facilitate obtaining a divorce.⁴⁴ Professor VanSickle asserts that

[t]he change from fault to no-fault forced women to become better educated, more marketable, and consequently, more financially independent. To revert to a traditional, fault-based divorce system would encourage women to resume traditional gender roles, which emphasize the financial dependence of women on their spouses. Further, it also stands to reason that any financial hardship or dependence incurred by a woman in marriage and divorce would also be felt by the children of the marriage.⁴⁵

Professor VanSickle concludes that "eliminating the no-fault provision from divorce actions is indeed a throwback to the pre-Civil Rights movement that serves to stratify gender roles and return them to the status quo of the pre-World War II United States."⁴⁶

As the national divorce rate rose due to either the factors described above or for other reasons altogether, men and women were increasingly deciding to delay or reject marriage.⁴⁷ From 1950 to 2002, the median age of first marriages rose significantly, from 22.8 years for men and 20.3 years for women, to 26.9 for men and 25.3 for women.⁴⁸ A number of couples delaying marriage choose to

40. *Id.* at 244.

41. *Id.* at 247.

42. *Id.* at 306.

43. Cynthia M. VanSickle, *A Return to the Anti-Feminist Past of Divorce Law: The Implications of the Covenant or Marriage Laws as Applied to Women*, 6 J. L. SOCIETY 154, 158 (2005).

44. *Id.*

45. *Id.* at 159.

46. *Id.* at 178.

47. Parkman, *supra* note 30, at 125.

48. *Id.* at 125 (citing U.S. CENSUS BUREAU ANNUAL DEMOGRAPHIC SUPPLEMENT TO THE MARCH 2002 CURRENT POPULATION SURVEY, CURRENT POPULATION REPORTS, Series P20-547, available at <http://www.census.gov/population/socdemo/hh-fam/tabMS-2.xls>).

cohabitate. According to the 2000 Census, “the number of unmarried couples living together increased by more than 70% between 1990 and 2000.”⁴⁹ Professor Lynn Wardle reported at the time of his article that about 5% of all American households are comprised of nonmarital cohabitants, up from 3% a decade previously, and that “[a]pproximately half of all persons who marry have cohabited prior to marriage.”⁵⁰ In addition, the success rate of cohabitating unmarried couples is much worse than that of marriages; approximately 90% of cohabitating unmarried couples end their relationship within the first five years.⁵¹

Collectively, the higher median age of first marriages for both men and women and the elevated divorce rate for those who do marry contributes significantly to the increasing percentage of unmarried heads of household. In 2004, almost 50% of heads of households were not married, up from almost 45% in 1990.⁵² The percentage is higher yet in African American families; in 2000, it was estimated that only 48% of such families were headed by married couples.⁵³ Those factors also contribute significantly to the increasing number of children born to unmarried mothers. Professors Drobac and Page observe that, “[i]n 2002, a record 34% of births were by unwed women. More than twice as many unmarried African American women gave birth than married African American women did. The percentage of births to unmarried mothers for all races has almost doubled since 1980, when the rate was 18.4%.”⁵⁴ Indeed, Professor Spaht also argues that “[n]o longer does the general public intuit that the married couple is the instrumentality charged with civilization’s most burdensome, time-consuming but indispensable task, the acculturation of children.”⁵⁵

Professor Lynn Wardle devoted an entire article to the “withering away” of marriage. He described the official state effort in Russia during the two decades following the Bolshevik Revolution in 1917, which radically transformed and de-privileged the institution of marriage, and compared it to developments in contemporary American law.⁵⁶ The Russian attempt to promote the “withering away” of marriage was based on socialist ideology holding the state economically responsible for all its members and thus eliminating the need for marriage or family.⁵⁷ Professor Wardle provided the following summary of the Bolshevik experiment:

Within two months of the October 1917 Revolution, the government drastically liberalized divorce, allowing divorce without grounds, either by mutual consent or upon unilateral request. The same decree mandated civil registration of marriage and abolished legal recognition of future religious marriages. In 1918 those reforms were codified in a new Family Law Code that mingled some

49. Wardle, *supra* note 3, at 498.

50. *Id.*

51. Drobac & Page, *supra* note 4, at 352 n.9.

52. *Id.* at 352 nn.4–5.

53. *Id.* at 352 n.7.

54. *Id.* at 365 (footnotes omitted).

55. Spaht, *supra* note 39, at 244.

56. See generally Wardle, *supra* note 3.

57. *Id.* at 447.

progressive provisions (such as joint property ownership and division) with other more radical provisions. The 1918 Code also legally abolished illegitimacy and adoption. In 1920, another national decree legalized state-funded abortion-on-demand. Finally, in 1926, a new Family Law Code was adopted that further liberalized divorce by entirely eliminating judicial review for mutual divorces, and allowing unilateral divorce through simple process—essentially postcard divorce. And since form was deemed irrelevant, if not a capitalist tool, and informal liaisons were considered as legitimate as marriage, the 1926 Code also extended full marital status and benefits to *de facto* couples.⁵⁸

The Bolshevik experiment, forcing the “withering” of marriage and family, failed miserably.⁵⁹ Professor Wardle quoted an authority on Soviet social history, as follows:

“Soviet social reconstruction was paid for in the coin of individual suffering and broken families.” For some subgroups of Russian society, especially some “peasants, family life often simply ceased to exist.” After the Revolution, “moral decline and psychological excesses developed which ‘further deepened the disorganization of the family . . . and [created] economic hardships,’ and in marital family relations” reduced the family to a condition lower than had “existed in Tsarist Russia.”⁶⁰

Because divorce became so easy to accomplish, the divorce rate rose rapidly. In most cases, women continued to be responsible for supporting the children, yet received little, if any child support or alimony.⁶¹ Men began changing wives regularly, with some men marrying more than twenty women.⁶² Abandonment, coerced divorce, blackmail and extortion became more prevalent.⁶³ Abortions became more commonplace, and the number of abandoned street children increased significantly.⁶⁴ “Children were the most tragic and numerous victims of the new family order.”⁶⁵

In an insightful comparison of the Bolshevik experiment with developments in American family law and society, Professor Wardle concludes that “[t]he same social practices . . . embraced by Russian revolutionary society [in] 1917 seem to have been accepted and normalized in American society at the turn of the millennium,”⁶⁶ and “[t]he same legal policy elements that combined to create the radical Bolshevik family law reforms seem to have emerged in the family policies of the American nation and/or the family law regulations of the American states.”⁶⁷ The similarities between the Bolshevik experiment and American family law reform are unmistakable: divorce in America, as in the Bolshevik regime, has become extremely liberalized by the adoption of

58. *Id.* at 473 (footnotes omitted).

59. *Id.*

60. *Id.* at 490–91 (quoting H. KENT GEIGER, *THE FAMILY IN SOVIET RUSSIA* (1968)).

61. *Id.* at 491.

62. *Id.* at 492.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 497.

67. *Id.*

unilateral no-fault divorce laws;⁶⁸ bearing children outside of marriage has become commonly accepted and is no longer subject to legal or social stigma;⁶⁹ and the United States Supreme Court has legalized abortion.⁷⁰

Professor Wardle asserts that “[i]n some ways, American family policy-makers have gone far beyond the Russian Bolsheviks with regard to elevating extra-marital sexual relations and giving marital status to nonmarital cohabitants.”⁷¹ In *Lawrence v. Texas*,⁷² the Supreme Court recognized “the right of adults to enter personal sexual relationships as part of an unwritten fundamental ‘right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life.’”⁷³ In 2000, the American Law Institute recommended family law reforms that provided for the recognition of nonmarital domestic partnerships for all couples, whether same-sex or different-sex, and extended the same economic benefits accorded to married couples when they divorce.⁷⁴ Professor Wardle argues that these reforms “manifest that the mainstream of elite leaders of the bench and bar consider nonmarital relationships to be functionally equivalent to marriage in all significant respects relevant to any public policy in family law.”⁷⁵ In addition, legislation has been adopted in several states legalizing in various ways relationships of same-sex couples, and extending marriage or marriage-like status to them.⁷⁶ Professor Wardle asserts that, as a result, “[t]here is a strong, growing legal and social trend in the United States to extend marital status and benefits to nonmarital relations that is similar to if not more extreme than the policies adopted by the Russian Bolsheviks in the decade after the 1917 Revolution.”⁷⁷

B. A Response: Covenant Marriage

To combat the perceived deterioration of the traditional concept of marriage as a union of one man and one woman intended to be indissoluble until death, some state legislatures considered establishing an alternate form of marriage that couples could choose rather than the default form already in existence. Legislation was unsuccessfully introduced in several states to enact “covenant marriage” laws.⁷⁸ These laws embraced the concept of so-called

68. *Id.*

69. *Id.* at 500.

70. *Id.* at 501.

71. *Id.* at 502.

72. 539 U.S. 558, 559 (2003).

73. *Id.* (footnotes omitted).

74. Wardle, *supra* note 3, at 504.

75. *Id.*

76. *Id.* at 504–05.

77. *Id.* at 505. In addition to the legal reforms described above, Professor Wardle identifies several ideological elements that have contributed to the “withering away” of marriage. For example, he cites extensively to feminist and gay legal scholars who advocate abolishing marriage as a legal institution, and replacing it with legal concepts that govern other types of interactions and relationships between individuals, such as contract and property law. He states that “[f]eminist scholars have long criticized marriage as a repressive and oppressive institution.” *Id.* at 508.

78. See Joel A. Nichols, *Louisiana’s Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929, 943–44 (1998) (stating that covenant

“supervows”—legally cognizable premarital contracts in which couples make marital commitments beyond those required by law.⁷⁹ Adoption of a covenant marriage law established the novel concept of a two-tiered marriage system in the adopting state.

In Louisiana, state representative Tony Perkins was interested in legislation that would strengthen families and joined forces with Professor Katherine Shaw Spaht, of Louisiana State University, to draft a covenant marriage law to be introduced in the Louisiana legislature.⁸⁰ The law’s stated purpose was to act as “an antidote to the high rates of divorce and as a proactive measure to bolster the institution of marriage.”⁸¹ The law was eventually enacted and became fully effective in 1997.⁸² Subsequently, Arizona in 1998 and Arkansas in 2001 enacted covenant marriage laws that are substantially similar to Louisiana’s.⁸³ All require that a couple desiring to marry make a choice between the new covenant marriage statute and the standard form of marriage governed by statutes in existence when the new covenant marriage law was enacted.

1. *What is Covenant Marriage?*

The covenant marriage statutes differ from the standard marriage statutes in several key ways. First, the covenant marriage statutes contain much more stringent entrance requirements. In Louisiana, a couple desiring to enter a covenant marriage must execute a declaration of intent to contract a covenant marriage. The declaration states the couple’s commitment to: (1) live together as husband and wife for the remainder of their lives; (2) disclose to each other everything that could adversely affect their marriage; (3) receive premarital counseling regarding the nature, purpose and responsibility of marriage; and (4) take all reasonable efforts to preserve the marriage, including marital counseling as may be necessary.⁸⁴ The declaration of intent must include an affidavit by the couple “attesting that they have received premarital counseling from a priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect, or a professional marriage counselor.”⁸⁵ The counseling must include “a discussion of the seriousness of covenant marriage, communication that a covenant marriage is a commitment for life, and a discussion of the obligation to seek marital counseling in times of marital difficulties.”⁸⁶ The

marriage bills were unsuccessfully introduced in Florida, Georgia, Mississippi, Indiana, Illinois and Washington).

79. *Id.* at 944.

80. *Id.*

81. *Id.*

82. *Id.* at 946. For an interesting discussion of the manner in which the covenant marriage bill was introduced in the Louisiana legislature and ultimately became law, see Gary H. Nichols, *Covenant Marriage: Should Tennessee Join the Noble Experiment?*, 29 U. MEM. L. REV. 397, 442–44 (1999) (explaining how Representative Perkins introduced the legislation in a manner which made opposing the bill the same as being against the idea of family).

83. Chauncey E. Brummer, *The Shackles of Covenant Marriage: Who Holds the Keys to Wedlock?*, 25 U. ARK. LITTLE ROCK L. REV. 261, 276, 278 (2003).

84. LA. REV. STAT. ANN. § 9:273(A)(1) (2000).

85. *Id.* § 9:273(A)(2)(a).

86. *Id.*

affidavit must also confirm that the couple has “received and read the informational pamphlet developed and promulgated by the office of the attorney general entitled ‘Covenant Marriage Act’ which provides a full explanation of the terms and conditions of a covenant marriage.”⁸⁷ The declaration of intent must also include an attestation, signed by the counselor, “confirming that the parties were counseled as to the nature and purpose of the marriage.”⁸⁸

Second, the covenant marriage statutes make obtaining a divorce more difficult than in the standard marriage statutes. In Louisiana, individuals bound by covenant marriage can obtain a divorce by proving that: (1) the other spouse has committed adultery; (2) the other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor; (3) the other spouse has abandoned the matrimonial domicile for one year and refuses to return; (4) the other spouse has physically or sexually abused the spouse seeking the divorce or a child of either spouse; or (5) the spouses have been living apart continuously without reconciliation for two years.⁸⁹ A spouse in a covenant marriage may choose to obtain a judgment of separation from bed and board (a legal separation short of divorce) rather than divorce by proof of the identical grounds mentioned above.⁹⁰ Additional grounds for obtaining a judgment of separation from bed and board include proof of “habitual intemperance of the other spouse, or excesses, cruel treatment, or outrages of the other spouse, if such habitual intemperance, or such ill-treatment is of such a nature as to render their living together insupportable.”⁹¹ A divorce may also be obtained if the spouses have been living apart continuously without reconciliation for one year after the execution of a judgment for separation from bed and board.⁹² That period is extended to eighteen months if there exists at least one minor child of the marriage, unless abuse of a child is the basis for obtaining the judgment of separation from bed and board, in which case the period reverts to one year.⁹³

Finally, the statute requires that the spouses take all reasonable steps to preserve the marriage, including the marital counseling described in the declaration of intent, whenever the spouses experience marital difficulties. In the event of a separation, marital counseling must continue until a divorce is obtained.⁹⁴ However, marital counseling is not required “when the other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses.”⁹⁵

87. *Id.*

88. *Id.* § 9:273(A)(2)(b).

89. *Id.* § 9:307(A).

90. *Id.* § 9:307(B).

91. *Id.*

92. *Id.* § 9:307(A)(6)(a).

93. *Id.* § 9:307(A)(6)(b).

94. *Id.* § 9:307(C).

95. *Id.* § 9:307(D). As stated above, the covenant marriage statutes in Arizona and Arkansas are substantially similar to Louisiana’s, with just a few minor differences. See Brummer, *supra* note 83, at 276–78. (“The only major differences in the Arizona law appear in the grounds for marital dissolution. The Arizona covenant marriage statute permits a party to seek a divorce when the other

2. *Criticism of Covenant Marriage*

a. The Divorce Provisions

Covenant marriage laws have been the subject of much criticism. Most criticism revolves around the statute's divorce provisions, chiefly the return to the fault-based divorce laws that proved so unworkable in the past. Regardless of one's opinion regarding whether fault-based divorce laws or no-fault divorce is preferable from a public policy standpoint, making a divorce more difficult to obtain forces married couples desiring a divorce to discover more creative ways of achieving that objective. This is apparent from examining the practices of divorcing couples at a time when most of the states required fault-based divorce.

A common way of avoiding the stringent requirements of a fault-based divorce statute was to examine the required fault grounds, collude with each other and with third parties, and create a situation to satisfy at least one of the statutory grounds for divorce. For example,

[t]he use of "hotel perjury" was widespread during the height of fault-based divorce. In trying to secure a divorce based on the grounds of adultery, couples would "team up" to recreate the famous hotel scene. Couples arranged for the husband to be caught in the act of "sitting beside a scantily clad" anonymous female (preferably blonde) when the wife, a process server, and private detective armed with a camera burst in. This practice became common knowledge when an expose in the *New York Mirror* led with the headline "I Was the Unknown Blonde in 100 NY Divorces."⁹⁶

For couples unwilling to lie in court to obtain their divorce, other methods were available. Because every state's divorce statute was different, spouses could simply cross state lines to find a state with more liberal divorce laws than their resident state. Some states, mostly in the western region, saw the opportunity for profit by attracting spouses from more restrictive states and convincing them to vacation there for long enough to satisfy a short residency requirement and subsequently obtain a divorce.⁹⁷ Spouses who lacked the

spouse has habitually used drugs or alcohol, . . . [and] permits parties to a covenant marriage to obtain a divorce when they mutually agree to do so.").

96. Heather Flory, "I Promise to Love, Honor, Obey . . . and Not Divorce You": *Covenant Marriage and the Backlash Against No-Fault Divorce*, 34 *FAM. L.Q.* 133, 136 n.24 (2000) (citing J. HERBERT DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH CENTURY AMERICA* 89 (1997)). See also Jeanne Louise Carriere, "It's Déjà vu All Over Again": *The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 *TUL. L. REV.* 1701, 1743-45 (1998). ("A less expensive form of perjury also proved useful in obtaining annulments for fraud. It required not hotel rooms and paid correspondents, but merely witnesses willing to testify that they were present prior to the marriage and heard one spouse misrepresent his position on, for example, birth control.").

97. See Flory, *supra* note 96, at 136. See Carriere, *supra* note 96, at 1731-43, for an extensive discussion of "migratory divorce" as it was practiced when fault-based divorce laws were still prevalent. "Migratory divorce" was enabled by the Full Faith and Credit Clause of the United States Constitution, which requires that a divorce granted by a U.S. jurisdiction be given effect in every sister state.

means or wherewithal to find ways around stringent divorce requirements simply abandoned their spouses and families and disappeared, oftentimes leaving families without much-needed support.⁹⁸

Some commentators have examined the specific fault-based grounds of the covenant marriage statutes and concluded that they exclude situations that may present serious risk of harm to a spouse or child. For example, the Louisiana statute provides grounds for divorce if the spouse seeking the divorce or a child of either spouse is subject to physical or sexual abuse. But it makes no provision for other dangerous behavior, such as “extreme emotional abuse, threatening behavior, confinement or the withholding of financial support.”⁹⁹ This failure is tempered by a spouse’s ability to obtain a separation from bed and board for “habitual intemperance of the other spouse, or excesses, cruel treatment, or outrages of the other spouse, if such habitual intemperance, or such ill-treatment is of such a nature as to render their living together insupportable.”¹⁰⁰ It provides “a covenant marriage spouse who has been victimized in . . . [non]-physical ways with a means by which [he or] she can escape an abusive marriage without waiting two years for a no-fault divorce . . .”¹⁰¹ However, a victimized spouse still could not obtain a divorce until either the one year or eighteen month period (as applicable) after the execution of a judgment for separation from bed and board has passed.¹⁰² Those waiting periods, although shorter than the standard two year waiting period for a no-fault divorce,¹⁰³ are particularly troubling in the case of an abusive marriage.

During this period, the lives of everyone involved are on hold. Neither partner may go forward and remarry, and the partners may not temporarily reconcile without erasing all of the time accrued under the statutory waiting period. Furthermore, this waiting period offers the abuser the opportunity to manipulate and harass the victim for an additional [time period].

Moreover, these potential effects of delay increase the danger that a psychologically damaged and frail person might decide that it is easier to return to the unhealthy marriage than to endure the [applicable] separation period.¹⁰⁴

Commentators have identified another problem with a fault-based divorce regime regarding when the statutory fault grounds have been met. Courts have experienced significant difficulty determining the meaning of such terms as adultery and cruelty given the multiplicity and variety of fact patterns with which they have been forced to deal.¹⁰⁵ Furthermore, difficult questions regarding the meaning of certain fault-based terms and issues as to whether the fault grounds can be proved in a particular case have driven up litigation

98. Carriere, *supra* note 96, at 137.

99. *Id.* at 141.

100. LA. REV. STAT. ANN. § 9:307(B) (2000).

101. Carriere, *supra* note 96, at 1725–26.

102. *See supra* notes 92–93 and accompanying text.

103. *See supra* note 89 and accompanying text.

104. Daniel W. Olivas, *Tennessee Considers Adopting the Louisiana Covenant Marriage Act: A Law Waiting to Be Ignored*, 71 TENN. L. REV. 769, 791 (2004).

105. Carriere, *supra* note 96, at 1708–09.

expenses and significantly protracted the divorce process.¹⁰⁶ Protracting the process is, of course, one of the key points of covenant marriage. The hope is that by slowing down the process considerably the spouses will decide to reconcile before the final divorce judgment. In abusive marriages, this delay simply extends the time for the abuser to continue victimizing the other spouse, and reconciliation is hardly the desired result. But even where abuse is not a factor, utilizing fault grounds for this purpose will have the undesirable effect of ratcheting up the acrimony between the spouses.¹⁰⁷

Encouraging fault litigation can harden attitudes of self-righteous defensiveness, contempt for the spouse, and vindictiveness that may contribute to the breakdown of the marriage, regardless of the specific fault ground on which divorce is brought. It also discourages reconciliation; partners who are marshaling evidence against one another of fundamental violations of the marital understanding, and accusing each other of these in the public records, are more likely to nurse a sense of grievance and less likely to be in a mood to resume the marital life together than those who are merely living separate and apart.¹⁰⁸

Increasing the cost of divorce is a particularly egregious result that should be avoided to the extent possible. Litigation is an enormously expensive process for all parties, but it creates hardships particularly for spouses litigating a divorce. Financial difficulties are a major cause of divorce in the first place.¹⁰⁹ Divorce costs consume critical financial resources that spouses need for living expenses for themselves and their children. The aggregate cost of living for the spouses as a whole increases significantly after divorce because they now must support two households. The financial effects of divorce are often particularly burdensome for women. Studies have concluded that divorced women and their children experience a significant decline in their standard of living in the first year after divorce, while divorced men experience a significant increase.¹¹⁰

b. The Counseling Requirements

Another major criticism of the covenant marriage laws has been the counseling requirements. As stated above, the Louisiana statute requires that a couple desiring to enter a covenant marriage must attest that they have received premarital counseling regarding the nature, purpose and responsibility of marriage, and they have committed themselves to take all reasonable efforts to preserve the marriage, which include marital counseling if necessary.¹¹¹

The Louisiana statute originally required that counseling also include a discussion of the exclusive grounds for legally terminating a covenant

106. *Id.* at 1722.

107. *Id.*

108. *Id.* at 1723–24.

109. Margaret M. Mahoney, *Debts, Divorce and Disarray in Bankruptcy*, 73 *UMKC L. REV.* 83, 91 (2004).

110. VanSickle, *supra* note 43, at 169.

111. LA. REV. STAT. ANN. § 9:273(A)(1) (2000).

marriage.¹¹² This requirement has been heavily criticized primarily on grounds that the persons authorized by the statute to provide the counseling had no legal training and were wholly unqualified to provide any such legal advice.¹¹³ In addition, this requirement prompted the Catholic Church to refuse to require that couples seeking to marry in the church choose covenant marriage,¹¹⁴ reasoning that “[a]ny discussion of divorce ‘would confuse or obscure the integrity’ of church teaching on the permanence of marriage.”¹¹⁵ The Church also “prohibit[ed] their counselors from discussing this issue with couples.”¹¹⁶ The Louisiana statute was amended in 1999 to eliminate this requirement and was replaced with an obligation that the couple attest in their affidavit that they have “received and read the informational pamphlet developed and promulgated by the [O]ffice of the [A]ttorney [G]eneral entitled ‘Covenant Marriage Act’ which provide[d] a full explanation of the terms and conditions of a covenant marriage.”¹¹⁷ The Arizona¹¹⁸ and Arkansas¹¹⁹ covenant marriage statutes continue to include the requirement that counseling include a discussion of the exclusive grounds for legally terminating a covenant marriage by divorce.

The principal criticism of the counseling requirements focuses on the statute’s silence regarding the amount and quality of counseling a couple must receive. The topics required to be included in the premarital counseling are extremely general and vague, and there is no indication of how many hours of counseling are required. It has been suggested that the premarital counseling requirements are so ambiguous as to be rendered meaningless.¹²⁰ Further, although the statute lists categories of persons who are allowed to provide the counseling, it requires no particular qualifications. As a result, the premarital counseling requirement “may be reduced to an empty formality.”¹²¹ The absence of any meaningful requirements regarding the counseling aspects of the covenant marriage statutes was apparently intentional to “avoid serious objections from those issued an invitation to assist in preserving marriages[.]”¹²² however, it is hardly a justification for including statutory counseling requirements that are virtually worthless. If premarital counseling has any real value, the statute should require real counseling that is designed to achieve the desired results.¹²³

112. Carriere, *supra* note 96, at 1707.

113. *Id.* at 1708–09.

114. *Id.* at 1708.

115. Nichols, *supra* note 78, at 955.

116. *Id.*

117. LA. REV. STAT. ANN. § 9: 273(A)(2)(a) (2000).

118. ARIZ. REV. STAT. ANN. § 25-901 (2000).

119. ARK. CODE ANN. § 9-11-804(2)(B).

120. Carriere, *supra* note 96, at 1705.

121. *Id.* at 1708.

122. Olivas, *supra* note 104, at 789.

123. See *infra* pp. 29–30, proposing requirements for premarital counseling.

The concept of making premarital counseling a requirement or at least an option before couples receive a marriage license is hardly novel.¹²⁴ There are two basic propositions that can be advanced for requiring premarital counseling. First, appropriate premarital counseling will better prepare couples for the realities of marriage and the issues they will inevitably face. That preparation will give them a greater chance at a successful marriage, and allow them to build a stronger foundation for their marriage before it even begins. Ultimately, the number of marriages that end in divorce will be reduced because “offering couples a realistic picture of love, marriage, and their future companion . . . provides couples with the opportunity to ‘test’ their marriage before it begins (or ends). The inevitable result is a stronger marriage, and consequently lower divorce rates.”¹²⁵ Second, appropriate premarital counseling will force couples who are ill-suited to acknowledge their differences, and possibly decide to avoid entering into a problematic marriage that might eventually end in divorce. As Tony Perkins, the lead sponsor of Louisiana’s covenant marriage legislation explained, deciding whether to enter into a covenant marriage

requires a couple to stop in the midst of a process that is driven by feeling and emotion to have a discussion about the depth of their marital commitment. Some couples may have their first and last argument over whether to [enter into a covenant marriage]. In my view avoiding a bad marriage is just as good as creating a good marriage. [Discussing whether to enter into a covenant marriage] will prevent a number of broken homes because the couple will part ways when they cannot agree on the depth of their marital commitment.¹²⁶

The basic question is whether requiring premarital counseling will achieve either of those two goals to any measurable extent. There are examples where premarital counseling, appropriately structured, has successfully achieved at least some of the above-described objectives. One particularly noteworthy example involves a Maryland organization named Marriage Savers, which “has established community-wide marriage policies and provides premarital education programs to prepare engaged couples for a lifelong marriage commitment, as well as marriage mentoring programs for couples in troubled marriages.”¹²⁷ The programs are church-based and clergy in a particular community agree to require participation by couples they marry.¹²⁸ The program involves a

4-month marriage preparation course, which includes religious teachings; a premarital assessment of the couple’s individual opinions on significant issues, such as finances and childrearing, by using premarital inventory like PREPARE

124. See, e.g., Lynne Marie Kohm, *A Comparative Survey of Covenant Marriage Proposals in the United States*, 12 REGENT U. L. REV. 31, 36 (1999–2000) (discussing legislation enacted in Florida dealing with the optional availability of premarital counseling); Carriere, *supra* note 96, at 1706–07 (discussing unsuccessfully proposed legislation in Michigan requiring premarital counseling).

125. Flory, *supra* note 96, at 146.

126. Nichols, *supra* note 78, at 446.

127. Nicole Licata, *Should Premarital Counseling Be Mandatory as a Requisite to Obtaining a Marriage License?*, 40 FAM. CT. REV. 518, 523 (2002).

128. *Id.*

and FOCCUS; mentoring from married couples; a program that guides couples through the first years of marriage; and also a program to strengthen existing marriages.¹²⁹

Marriage Savers programs and community-wide policies have been adopted in more than 135 cities and have resulted in a dramatic reduction in the number of divorces.¹³⁰ Modesto, California was the first city to adopt a premarital counseling requirement using a Marriage Savers program, after which “the divorce rate plummeted 47.6%.”¹³¹ Subsequently, Marriage Savers programs were adopted in other cities with similar results, including El Paso, Texas; Kansas City, Kansas; Charleston, West Virginia; Fairfield, Connecticut; Harrisonburg, Virginia; and Jamestown, New York.¹³²

In addition to Marriage Savers, premarital counseling programs that have achieved some degree of success include: “Practical Application of Intimate Relationship Skills (PAIRS); Prevention and Relationship Enhancement Program (PREP); Save Your Marriage Before It Starts (SYMBIS); and Relationship Enhancement (RE).”¹³³ Professor of psychology David Olson at the University of Minnesota has developed a program entitled “Premarital Personal and Relationship Evaluation” (PREPARE) which includes a psychological test he calls a “premarital inventory” composed of “one hundred and twenty-five questions on personal values and perceptions; its purpose is ‘to unearth issues that don’t come up during courtship.’ It is so revealing that ten percent of the couples who take it decide against marrying one another.”¹³⁴ Professor Olson’s program also requires “a waiting period of four months before the wedding.”¹³⁵

A number of studies and surveys have been conducted regarding the effectiveness of premarital counseling programs. The authors of one study found that participants in a premarital counseling program were “half as likely to get divorced within five years of marriage.”¹³⁶ Another study “found that within the first 4 years of marriage, 80% of the individuals surveyed reported the counseling as valuable to the strength and duration of their marriage.”¹³⁷

To achieve the desired goals, the quality and duration of premarital counseling is undeniably important. Couples in love and on the brink of marriage are typically overly optimistic, idealistic and naïve and are generally not thinking about the issues they will face once married. Premarital counseling should offer a more realistic picture by bringing these couples to terms with

129. *Id.* (explaining that “PREPARE and FOCCUS” are research-based inventories of compatibility for marriage. These assessments help couples improve their relationship by getting them to discuss potential areas of conflict). *Id.* at 523 n.56.

130. *Id.* at 523.

131. *Id.*

132. *Id.* (describing statistics provided by the founder and President of Marriage Savers emphasizing that “he has not tracked the couples that actually participated in Marriage Savers. Therefore, the data are based on general marital statistics in the community irrespective of the couple’s participation in premarital counseling programs.”).

133. Flory, *supra* note 96, at 145.

134. Carriere, *supra* note 96, at 1707.

135. *Id.*

136. Licata, *supra* note 127, at 523.

137. *Id.*

many important issues requiring attention before the wedding. Examples include:

1. An analysis of each partner's personality and a discussion of how differences identified in that analysis will be addressed and accommodated by each of them;
2. An analysis of each partner's communication style, and a discussion of the manner in which they intend to communicate with each other during the marriage;
3. An analysis of the manner in which each partner resolves conflict in their lives, and a discussion of the manner in which they intend to resolve conflict in their marriage;
4. A discussion of the individual needs of each partner, and the manner and frequency in which each partner expects those needs to be met;
5. A discussion of the level of commitment to the marriage that each partner expects of the other;
6. An analysis of each partner's sexual expectations, and a discussion of how differences identified in that analysis will be addressed and accommodated by each of them;
7. A discussion of whether each partner desires to have children. If both partners desire to have children, then they should fully discuss all issues with regard to parenting them, including discipline, education, religion, health and finance;
8. An analysis of the manner in which each partner views relationships with extended family members, and a discussion of how differences in that analysis will be addressed and accommodated by each of them;
9. An analysis of the manner in which each partner views relationships with friends, and a discussion of how differences in that analysis will be addressed and accommodated by each of them;
10. A discussion of financial issues that will arise during the marriage. This should include a discussion of each partner's expectations with regard to whether one or both of them will be responsible for managing their finances after marriage, and whether one or both of them will be responsible for providing the financial resources required by the family. The partners should fully disclose to each other their current financial status, including the source and amount of income, and all assets and liabilities. Ideally, the couple should jointly complete a financial management course to prepare them for all the financial issues and problems that will inevitably arise during their marriage;
11. An analysis of each partner's religious beliefs, and a discussion of how differences identified in that analysis will be addressed and accommodated by each of them;

12. An analysis of the physical and mental health of each partner, and a discussion of how any issues identified will affect their relationship and marriage. With regard to mental health, many couples enter marriage with one or both of them having unresolved childhood issues that detrimentally affect their relationship with their spouse, oftentimes even explaining why they chose that person as a future spouse in the first place. In many cases, individual therapy prior to the marriage for a partner with those issues would be extremely beneficial, either to assist the partner in having a healthy relationship with his spouse; or to assist the partner in determining that, because of those issues, the person he chose as a future spouse is not a good match for him, thereby avoiding entering into a problem marriage in the first place.

The covenant marriage laws are on the right track by requiring premarital counseling, but they must go much further in specifying both the amount and quality of counseling and the requisite qualifications of counselors. First, the covenant marriage laws should provide at minimum for a specific counseling program that would be designed by a committee of highly qualified, state-appointed, professional marriage counselors and mental health professionals. A financial management course should be required in addition to the counseling. In appropriate cases, when counselors determine that one or both partners have unresolved personal issues or mental health concerns that might detrimentally affect the marriage or relationship of the partners, they should be required to refer a partner for individual therapy and to suspend the counseling process until the partner has appropriately addressed the issues identified. The program should be subject to revision from time to time as may be necessary.

Second, there should be a minimum number of hours required to successfully complete the program and which should be sufficiently substantial to meaningfully cover all of the required topics. The counseling should be provided at set intervals over a significant period of time, preferably at least six months, to allow for appropriate discussion and reflection during the periods between counseling sessions.

Finally, persons providing counseling should have obtained the minimum level of education appropriate to the degree of services rendered. The financial issues associated with such an extensive premarital counseling requirement can be addressed by implementing a fee schedule used by counselors. The fees can be set on a sliding scale based on a couple's income, if necessary.

Covenant marriage laws have also been criticized for requiring that couples seek counseling whenever marital difficulties arise. Specifically, the Louisiana statute provides that a couple entering a covenant marriage must commit to taking all reasonable efforts to preserve the marriage, including marital counseling.¹³⁸ As with the premarital counseling requirement, the statute is silent as to the amount and quality of counseling that the couple must receive.¹³⁹ In addition, the statute makes no attempt to define any terms, such as "marital

138. LA. REV. STAT. ANN. § 9:273(A)(1) (2000).

139. See Olivas, *supra* note 104, at 790 (stating that the statute does not specify who will provide the counseling, the required content of the counseling, or for how long the counseling must be continued).

difficulties” or “reasonable efforts.”¹⁴⁰ As a practical matter, these provisions are best viewed as a course of conduct to which a covenant marriage couple agrees to aspire.

The marital counseling provisions have been heavily criticized even when viewed in the most favorable light. A principal criticism is that the inclusion of these provisions in the statute implies that they may somehow be enforced. Courts could most efficiently enforce these provisions by forcing couples who have filed a divorce action to participate in some form of marital counseling.¹⁴¹ However, various authors have questioned the value of forcing couples into “coercive” marital counseling.¹⁴² If the goal is reconciliation, both marital partners must fully participate in good faith in the counseling effort. Professor Carriere supports that argument by citing previously unsuccessful efforts in Los Angeles and New Jersey in the 1950s, which required marital counseling prior to obtaining a divorce with the stated goal of reconciliation.¹⁴³ The New Jersey experiment “ended with a failure rate of 97.3 percent.”¹⁴⁴

One particularly compelling criticism of the marital counseling requirements relates to statistics showing that many marriages ending in divorce involve domestic violence.¹⁴⁵ Professor Carriere cites Martha Mahoney’s estimate that “domestic violence is an experience common to [u]p to one half of all American women—and approximately two thirds of women who are separated or divorced.”¹⁴⁶ An abused spouse is particularly vulnerable when separating from her abuser or filing for divorce.¹⁴⁷ The Louisiana covenant marriage statute originally contained no exemption in the marital counseling provisions for abused or battered spouses.¹⁴⁸ Requiring abused spouses to engage in marital counseling with their abusers makes little sense and creates potentially tragic results. In such a case, reconciliation is impossible and would be wholly undesirable from any perspective. Professor Carriere argues that requiring a battered spouse to comply with a counseling requirement could put such spouse at great risk of harm: seeking counseling could be interpreted by the batterer spouse as an imminent departure by the battered spouse; it would be impossible for the battered spouse to keep her intentions to file for divorce secret; and the counseling would permit the batterer spouse continued contact with the battered spouse and increase the possibility that the battered spouse will be located. Professor Carriere points to the Post-Separation Family Violence

140. See *id.* at 789–90 (asserting that couples must decide for themselves when their marriage is in such a state that marital counseling is required, and how much effort to save their marriage is reasonable).

141. See Carriere, *supra* note 96, at 1711 (noting that other methods of enforcement, such as an action in contract filed by one spouse against the other, would be problematic at best).

142. *E.g., id.* at 1712.

143. See *id.* at 1712–13 (suggesting that requiring couples to engage in counseling before a divorce could be granted serves no benefit in most cases, other than possibly assuring them that there is no hope of reconciliation, thereby helping them adjust to their divorce).

144. *Id.* at 1713.

145. See *id.* at 1714.

146. *Id.*

147. *Id.* at 1714–15.

148. *Id.* at 1715–16.

Relief Act, which exempts victims of family violence from court-ordered mediation, as a model for adoption in the covenant marriage law.¹⁴⁹ Consequently, the statute was appropriately amended in 2004 to provide that marital counseling is not required “when the other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses.”¹⁵⁰

c. Other Criticisms

Although the divorce and counseling provisions have produced the most criticism, covenant marriage laws have been criticized in various other ways. Some commentators have praised the enactment of covenant marriage laws as an alternate form of marriage and the subsequent establishment of a two-tiered marriage system in the adopting states.¹⁵¹ Even so, some of these commentators lament that couples will likely feel coerced into choosing a covenant marriage over the standard form.¹⁵² One author suggests that

couples deciding on the type of marriage that best suits them may be vulnerable to internal pressure that one person places upon the other to select a covenant marriage. For example, one partner might frame the choice as proof of the depth of love between them or as a test of the other partner’s degree of commitment. . . . Therefore, the desire of one partner for a standard arrangement may signal doubts to the other about the marriage as a whole.¹⁵³

The implication is that the partner desiring the standard form of marriage will instead be coerced by his partner into a covenant marriage. In addition, “a couple’s choice may be strong-armed by the religious community. . . . Some members of the clergy may refuse to perform standard marriages, forcing couples involved in a particular church to choose a covenant marriage or go elsewhere to have a ceremony.”¹⁵⁴ Finally, couples may feel pressure to choose a covenant marriage if they perceive that the covenant marriage laws “devalue or stigmatize standard marriage.”¹⁵⁵ One author opines that “[t]his is perhaps the ugliest aspect of the law. By creating a separate class of marriage, the Act expressly endorses the policy of grading the sanctity of matrimony and fosters by implication the notion that some bonds are holier, godlier, or more courageous than others.”¹⁵⁶ These concerns are exacerbated by the risk that couples choosing covenant marriage will not have sufficient legal information,

149. *Id.* at 1716–17.

150. LA. REV. STAT. ANN. § 9.307(D) (2000).

151. *See, e.g.,* Olivas, *supra* note 104, at 784 (suggesting that allowing couples to choose between covenant marriage and regular marriage is appealing to both supporters and critics of covenant marriage); Nichols, *supra* note 82, at 454 (suggesting that the strongest argument in favor of the covenant marriage law is that it is not mandatory).

152. *See id.* at 454–55 (suggesting that an individual may be pressured into choosing covenant marriage by his intended spouse or by religious leaders).

153. Olivas, *supra* note 104, at 784–85.

154. *Id.* at 785. *See also* Nichols, *supra* note 78, at 454–55.

155. Olivas, *supra* note 104, at 785. *See also* Nichols, *supra* note 78, at 449.

156. Olivas, *supra* note 104, at 786.

particularly with regard to the divorce provisions of the legislation, to make a fully informed choice.¹⁵⁷

These criticisms miss the point altogether. As for one partner pressuring the other into a covenant marriage, that is precisely one of the principal goals of the legislation. To emphasize Tony Perkins' explanation (quoted above) of the covenant marriage legislation in Louisiana, deciding whether to enter into a covenant marriage forces a couple in the midst of the highly emotional process of planning their wedding and finalizing their marriage to have a deep and meaningful discussion regarding the level of commitment they desire to make to each other; that discussion may result in a decision not to marry if they are unable to agree on that issue, which would be a desirable result if it prevents a subsequent divorce.¹⁵⁸ As for the religious community strong-arming couples into choosing covenant marriage, one must first consider whether a religious organization encouraging its members to follow the organization's teachings is classifiable as "strong arming." If so, then of course that is what will happen. No one is required to belong to a particular religious organization or be married in a particular church. If some members of the clergy refuse to perform standard marriages, then a couple choosing that form of marriage will simply have to be married elsewhere. As for covenant marriage laws devaluing or stigmatizing standard marriage, that may or may not be the result, depending on society's constantly evolving views toward marriage in general. It is just as likely that society may place a higher value on standard marriage than on covenant marriage, or even place a higher value on avoiding marriage altogether.¹⁵⁹

The covenant marriage laws have often been criticized simply because they have not proven to be popular. Thus far, relatively few couples have opted for covenant marriage in the states that have adopted it.¹⁶⁰ A study conducted in 1998 surveyed a random sample of Louisiana residents regarding, among other issues, their "knowledge of and perceived effects of covenant marriage."¹⁶¹ The authors found that

[v]ery few couples choose covenant marriage. The public knows relatively little about the law and the clerks and their staff only partially implement the law as originally envisioned.

157. See *id.* at 786–88 (discussing the failure of the Louisiana covenant marriage law to require that a legal professional explain the legal consequences of covenant marriage to couples considering that option).

158. Nichols, *supra* note 78, at 446.

159. As discussed above, couples are increasingly choosing cohabitation over marriage. See *supra* notes 49–50 and accompanying text.

160. See Cynthia DeSimone, *Covenant Marriage Legislation: How the Absence of Interfaith Religious Discourse Has Stifled the Effort to Strengthen Marriage*, 52 CATH. U. L. REV. 391, 419–20 (2003) (citing statistics reflecting that, in Louisiana, no more than three percent of couples marrying during the first two years after the effective date of the covenant marriage legislation chose covenant marriage; in Arizona, only about four percent of marrying couples chose covenant marriage).

161. Laura Sanchez, et al., *The Implementation of Covenant Marriage in Louisiana*, 9 VA. J. SOC. POL'Y & L. 192, 198 (2001).

Proponents want the covenant marriage law to force every young couple to consider the question, "Are you serious about this marriage or not?" In practice, this happens only rarely. Unless couples come to the clerks' office armed with knowledge and intent, all they will usually hear about covenant marriage is that it is not something they are likely to be interested in.¹⁶²

The authors suggest that covenant marriage is not likely to catch on in Louisiana unless the state does a better job educating the public about the law and effectively trains staff in the clerks' offices to explain the covenant marriage option.¹⁶³

Feminist scholars have been particularly vitriolic in criticizing the covenant marriage laws. Professor VanSickle asserts that covenant marriage imposes "anti-feminist limitations upon the ability to seek and obtain a divorce [that] serve to catapult women back into positions of subordination to and financial dependence upon men."¹⁶⁴ She argues that the introduction of no-fault divorce laws "forced women to become better educated, more marketable, and consequently, more financially independent. To revert to a traditional, fault-based divorce system would encourage women to resume traditional gender roles, which emphasize the financial dependence of women on their spouses."¹⁶⁵ As a result, "covenant marriage laws are anti-feminist in their conception and application. Indeed, they are infantilizing to women and cast them into a place of perpetual subordination."¹⁶⁶

Professor VanSickle also criticizes the religious underpinnings to the covenant marriage laws. She argues that covenant marriage is a dangerous impediment to women's attempts to escape the stigma associated with western religions, particularly Christianity, and their "fundamental belief in the necessity of female submission to male dominance."¹⁶⁷ Professor VanSickle uses examples from the Bible to assert that western religions treat women as "inferior and impressionable creatures that require the guidance of men."¹⁶⁸ The implication is that marriage laws based on these teachings are unacceptably sexist and paternalistic, and do great harm to advances made by women in their long and painful "uphill battle toward gender equality."¹⁶⁹

3. *Should It Stay or Should It Go?*

Should the covenant marriage laws be embraced as the cure-all to society's marriage-related ills, or should the entire concept of covenant marriage be rejected as an ill-conceived notion that creates more problems than it solves? Over the course of history, marriage has always been deeply entangled with human relationships, family values and expectations, religious beliefs, and

162. *Id.* at 222.

163. *Id.* at 222-23.

164. VanSickle, *supra* note 43, at 156.

165. *Id.* at 159 (quoting Nicole D. Lindsey, *Marriage and Divorce: Degrees of "I Do," an Analysis of the Ever-Changing Paradigm of Divorce*, 9 J. LAW & PUB. POL'Y 265, 280 (1998)).

166. VanSickle, *supra* note 43, at 160.

167. *Id.* at 163.

168. *Id.*

169. *Id.* at 178.

societal traditions and customs. As such, it is easily one of the most convoluted and problematic social issues in today's society. It is unsurprising that so much disagreement exists over what form or forms of marriage should be available under our laws. It is this article's contention that the concept of covenant marriage is an essential ingredient to the law of marriage in the United States, and that enactment of the covenant marriage statutes that presently exist in Louisiana, Arizona and Arkansas is a good start in developing that concept; however, many of the criticisms described above are valid and compelling. It is now time to take the next step by amending these laws to further develop covenant marriage and address these criticisms while at the same time reaching higher to establish an elevated standard for marriage. This standard should effectively account for the spiritual, physical, emotional, financial, and legal components that the union of two separate lives represents.

Especially compelling are the criticisms of the divorce provisions of the covenant marriage laws. The fault-based divorce laws of the past failed miserably for all the reasons stated above.¹⁷⁰ Returning to a system that we already know cannot work would be ludicrous and is certainly no path to progress. New pathways must be found to achieve the ideals of the covenant marriage laws while leaving the divorce provisions of current law generally intact. The counseling provisions of the covenant marriage laws provide the best opportunity for achieving this objective.

As stated earlier, requiring premarital counseling is aimed at achieving two basic goals. First, appropriate premarital counseling will better prepare couples for the realities of marriage and the issues they will inevitably face, thereby allowing them to build a stronger foundation for their marriage and increasing the chances that the marriage will be successful. Second, appropriate premarital counseling will force couples who are ill-suited for each other to come face to face with their differences, and possibly decide to avoid altogether entering into a problematic marriage that might eventually end in divorce.

The problem with the covenant marriage legislation currently in effect is that the premarital counseling requirements are woefully ineffective in achieving those goals.¹⁷¹ As discussed above, premarital counseling has been shown to be effective, but the counseling must be based on a carefully crafted program substantial enough to meaningfully address the multitude of issues couples face during marriage.¹⁷² Accordingly, this article argues that the covenant marriage laws should at minimum provide for a specific counseling program which would be designed by a committee of highly qualified, state-appointed, professional marriage counselors and mental health professionals, and which would include the additional components discussed in Part III.B.2.b. In addition, there should be a minimum number of hours of counseling required to complete the program, which should sufficiently cover all of the required topics. The counseling should be provided at set intervals over a significant period of time, preferably at least six months, to allow for appropriate discussion and reflection during the periods between the counseling sessions.

170. See *supra* note 96 and accompanying text.

171. See *supra* notes 120–122 and accompanying text.

172. See *supra* notes 127–137 and accompanying text.

Finally, the persons authorized to provide the counseling should be required to have completed a minimum level of education appropriate to the counseling services being provided.

Many of the criticisms of the post-marital counseling provisions of the covenant marriage laws are also valid. As discussed above, the statute is silent with regard to the amount and quality of counseling that a couple must receive, and the statute makes no attempt to define many of the terms used.¹⁷³ In addition, these provisions are difficult, if not impossible, to enforce and many have questioned the wisdom of forcing a married couple into counseling after significant marital difficulties have already surfaced.¹⁷⁴

Marital counseling would be more beneficial to couples before they begin experiencing significant marital difficulties. Accordingly, the covenant marriage laws should require couples to participate in a minimum number of hours of counseling each year they are married. The statute could provide several different options for a couple to satisfy this requirement, including traditional counseling provided by a qualified counselor, group counseling with other couples, marriage retreats, or the like. The goal would be to enhance the couple's communication skills regarding marital issues as they arise, rather than waiting for more serious difficulties that are more difficult to resolve. Counseling would also make it easier for couples to seek counseling at those times when they need it most.

Enforcement issues would most certainly arise with respect to these requirements. An approach that provides both a carrot and a stick might be more efficient than standard enforcement practices. Many jurisdictions have some type of post-filing waiting period before a divorce can be obtained.¹⁷⁵ The covenant marriage laws could shorten the waiting period for couples who could prove that they fully complied with the marital counseling provisions. These couples could argue they addressed their marital issues as they arose and therefore require no additional counseling before they divorce. They did their best to make the marriage work and complied with all statutory requirements designed to give them the best chance for marital success; the marriage simply did not work. On the same theory, the covenant marriage laws could lengthen the waiting period for couples who could not prove that they fully complied with the marital counseling provisions. Arguably, these couples need more time to sort out the emotional issues that led to their decision to divorce; some may ultimately decide they were too hasty in deciding to file a divorce petition. Couples entering into a covenant marriage should also not be allowed to simply discard the covenant when they have not completed the work during the marriage that the statute requires. The statute should mandate completion of the work before the marriage is allowed to end. If they effectively refuse by giving less than full participation to the marital counseling when they are finally forced to engage in it, they should at least be required to endure a longer waiting period before they are allowed to divorce. If, as is often the case, that there is a "guilty" spouse and an "innocent" spouse, forcing the "innocent"

173. See *supra* notes 139–140 and accompanying text.

174. See *supra* notes 141–144 and accompanying text.

175. See generally Nichols, *supra* note 78, at 419.

spouse to endure the longer waiting period along with the “guilty” spouse is not an unduly burdensome requirement because they both agreed to enter into a covenant marriage in the first place.

Furthermore, another incentive could be provided by the covenant marriage laws to encourage couples to comply with the post-marital counseling provisions. Financial incentives tend to be more effective than other types of incentives in encouraging human behavior. States could provide some form of tax relief on an annual basis to those couples who can show that they fully complied with the marital counseling provisions each year of their marriage.

An additional, compelling criticism of the post-marital counseling provisions focuses on the role of domestic violence in causing divorce. The Louisiana covenant marriage statute originally provided no exemption from counseling for abused or battered spouses, although it was later amended to provide that marital counseling is not required in the case of physical or sexual abuse of the spouse seeking the divorce or a child of one of the spouses.¹⁷⁶ The covenant marriage laws should clearly provide that the post-marital counseling provisions have no application to spouses who can make an adequate showing that they or their children have been subjected to any kind of abuse. Domestic violence is simply intolerable either in covenant marriage or in any other legally recognized relationship.

IV. SHOULD SAME-SEX COUPLES BE ALLOWED TO MARRY?

A. The Debate

Whether same-sex couples should be allowed to marry has become a hotly contested issue. Proponents began challenging the constitutionality of state laws banning marriage between same-sex couples as early as the 1970s.¹⁷⁷ They scored their first victory in Hawaii in 1993 when “the Supreme Court of Hawaii ruled that under the Hawaiian Constitution’s Equal Protection Clause a marriage license denial to a same-sex couple was presumptively unconstitutional unless the state established a compelling reason for the denial.”¹⁷⁸ That victory was undone when the Hawaiian legislature amended the constitution to limit the definition of marriage to unions between a man and a woman.¹⁷⁹ The legislature subsequently enacted legislation extending domestic partnership rights to same-sex couples, which gave them a limited form of marital rights.¹⁸⁰

176. See *supra* notes 145–150 and accompanying text.

177. See Kindregan, *supra* note 7, at 36 (citing to decisions in Kentucky and Washington holding that those states were not constitutionally required to issue marriage licenses to same-sex couples). See *Jones v. Halliahan*, 501 S.W.2d 588 (Ky. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974).

178. *Id.* See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

179. *Id.*

180. *Id.*

An Alaskan court ruled in 1998 that the right of privacy guaranteed by the Alaska Constitution “gave same-sex couples the right to choose life partners.”¹⁸¹ That decision, *Brause v. Bureau of Vital Statistics*, was rendered moot when the legislature also amended the Alaska Constitution to limit the definition of marriage to relationships between a man and a woman.¹⁸² In 1999, the Supreme Court of Vermont held that the “state constitution required Vermont to provide qualified same-sex couples with the same legal benefits accorded to opposite-sex couples in marriage. The Vermont legislature responded by authorizing same-sex couples to enter civil unions, in which the partners enjoy a lengthy list of benefits previously available only to married couples.”¹⁸³

In 2003, the Massachusetts Supreme Judicial Court declared that “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”¹⁸⁴ The decision paved the way for Massachusetts to become the first state to allow same-sex couples to marry pursuant to the general marriage law applicable to opposite-sex couples. The court’s constitutional analysis centered on due process and equal protection principles as set forth in the Massachusetts Constitution¹⁸⁵ and was based on the denial to same-sex couples of the “enormous private and social advantages” that marriage bestowed on opposite-sex couples who choose to marry.¹⁸⁶ Subsequently, New Jersey adopted a civil union statute granting same-sex couples all the rights and responsibilities of marriage except the title,¹⁸⁷ and the Connecticut legislature granted same-sex couples the right to enter into civil unions.¹⁸⁸

Proponents of same-sex marriage have been extraordinarily diligent in advancing their cause in California. In 1999, the California legislature enacted a domestic partnership law that allowed same-sex couples, and opposite-sex couples if at least one partner was more than sixty-two years of age, to establish domestic partnerships officially recognized by the State.¹⁸⁹ Registering as domestic partners initially entitled a couple to some, but by no means all, of the state benefits enjoyed by married couples.¹⁹⁰ This legislation was amended several times through 2007, to provide additional benefits to domestic partners

181. *Id.* at 37. See *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

182. *Id.*

183. *Id.*

184. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

185. *Id.* at 953.

186. *Id.* at 954.

187. *Drobac & Page, supra* note 4, at 368.

188. *Kindregan, supra* note 7, at 38. In addition, Maine and the District of Columbia have enacted legislation granting limited domestic partnership rights to same-sex couples. See *Knauer, supra* note 2, at 1271 nn.58 and 62.

189. *In re Marriage Cases*, 183 P.3d 384, 413 (Cal. 2008).

190. *Id.* The legislation initially granted domestic partners certain specified hospital visitation privileges, and authorized the state to provide health benefits to domestic partners of some state employees. *Id.*

and further equalize domestic partners with married couples.¹⁹¹ In 2003, the legislature substantially amended the domestic partnership law with the stated goal to provide domestic partners all of the legal rights and benefits available to married couples.¹⁹² Specifically, the legislation provided:

Registered domestic partners shall have the same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law, whether they derive from statutes, administrative regulations, court rules, government policies, common law, or any other provisions or sources of law, as are granted to or imposed upon spouses.¹⁹³

The Supreme Court of California has determined that the current effect of California's domestic partnership law "generally afford[s] same-sex couples the opportunity to enter into a domestic partnership and thereby obtain virtually all of the benefits and responsibilities afforded by California law to married opposite-sex couples."¹⁹⁴ Nevertheless, on May 15, 2008 the Supreme Court of California significantly changed the legal landscape with regard to same-sex marriage by deciding *In re Marriage Cases*.¹⁹⁵ The court held that California's statutory provisions limiting the right to marry to opposite-sex couples violated the California Constitution.¹⁹⁶ Along with Massachusetts, California became one of only two states allowing same-sex couples to marry pursuant to the general marriage law applicable to opposite-sex couples. The court reasoned that the legislature's distinction "between the name for the official family relationship of opposite-sex couples (marriage) and that for same-sex couples (domestic partnership)"¹⁹⁷ and its exclusion of same-sex couples from the definition of marriage impermissibly discriminated against same-sex couples on the basis of sexual orientation, which the court declared to be a suspect classification for purposes of constitutional analysis. Furthermore, the exclusion "impinge[d] upon a same-sex couple's fundamental interest in having their family relationship accorded the same respect and dignity enjoyed by an opposite-sex couple."¹⁹⁸ The court concluded that California's marriage and domestic

191. *Id.* at 413–16. In 2000, the legislature amended the statute to grant access to domestic partners to specially designed housing reserved for senior citizens. *Id.* at 413–14. In 2001, domestic partners were afforded numerous additional rights, "including the right to sue for wrongful death, to use employee sick leave to care for an ill partner or an ill child of one's partner, to make medical decisions on behalf of an incapacitated partner, to receive unemployment benefits if forced to relocate because of a partner's job, and to employ stepparent adoption procedures to adopt a partner's child." *Id.* at 414. In 2002, domestic partners were provided with the right to automatically inherit a portion of a deceased partner's separate property (and certain other rights related to probate), and the right to receive paid family leave from their employment to care for an ill domestic partner. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 417–18. Additional amendments were made in 2006 to equalize the rights of domestic partners and married couples with regard to state income taxes, and in 2007 to allow domestic partners the option of a name change in connection with the registration process. *Id.* at 415–16.

195. 183 P.3d 384 (Cal. 2008).

196. *Id.* at 402.

197. *Id.* at 400.

198. *Id.* at 401.

partnership statutes violated both the Equal Protection Clause and the fundamental right to marry embodied in the California Constitution.

Other states have taken the opposite approach. A significant number of “states have amended their constitutions to limit marriage to heterosexual couples or to prohibit the recognition of marriages and civil unions entered into by same-sex couples in other states.”¹⁹⁹ In addition, as proponents of same-sex marriage were making advances, opponents began to express concern regarding whether a same-sex marriage legal in one state would be entitled to recognition in the other states under the Full Faith and Credit Clause of the U.S. Constitution.²⁰⁰ Ultimately in 2006, Congress was pressured to enact the Defense of Marriage Act, which provided that

no state, territory, possession or Indian tribe shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.²⁰¹

A prodigious amount of commentary has been produced on both sides of this debate. Following is a summary of the arguments, both pro and con, that have been most commonly offered.

1. *Arguments Against Same-Sex Marriage and Rebuttals*

A refrain often heard in opposition to same-sex marriage is that marriage is and always has been defined as a union of one man and one woman.²⁰² A corollary to that proposition is that expanding the definition of marriage to include same-sex couples would eliminate all previous marriage entrance requirements and open the floodgates to movements to expand the definition further to include “unions of three or more, of immediate family members, or (most absurdly) of people and members of different species.”²⁰³ Proponents of same-sex marriage respond that justifying the refusal to expand the definition of marriage through assertions that the current definition of marriage is limited to a union of one man and one woman utilizes circular logic.²⁰⁴ Justice Greaney stated in his concurring opinion in *Goodridge*, “[t]o define the institution of marriage by the characteristics of those to whom it always has been accessible, in order to justify the exclusion of those to whom it never has been accessible, is conclusory and bypasses the core question we are asked to decide.”²⁰⁵ As for the assertion that expanding the definition of marriage would lead to the elimination of all entrance requirements for marriage, proponents respond that

199. Elizabeth B. Cooper, *Who Needs Marriage? Equality and the Role of the State*, 8 J. L. & FAM. STUD. 325, 344. See also Cynthia M. Davis, “The Great Divorce” of Government and Marriage: Changing the Nature of the Gay Marriage Debate, 89 MARQ. L. REV. 795, 795 (2006).

200. Kindregan, *supra* note 7, at 37.

201. *Id.*

202. Culhane, *supra* note 1, at 1183.

203. *Id.*

204. See *id.* at 1183–84.

205. 798 N.E.2d at 972–73.

expanding the definition to same-sex couples “does not open an unsealable rift through which every candidate for marriage could then pour. If advocates of polygamy wish to make the case for recognition of unions of more than two persons, that issue should and must be addressed on its own terms.”²⁰⁶

Several commentators have argued that same-sex couples should not be allowed to marry because homosexuals are “immoral, are incapable of maintaining stable relationships and are prone to communicating disease.”²⁰⁷ Professor Lynn Wardle “asserts that homosexuals cannot enter successfully into marital relationships grounded on fidelity in light of statistics that gay people, particularly gay men, have many sexual partners, and that their intimate relationships are of relatively short duration.”²⁰⁸ Allowing homosexuals to marry, argues Professor Wardle, would denigrate the value of marriage in society and would “undermine existing and future marriages of heterosexuals or threaten family life.”²⁰⁹ Proponents of same-sex marriage disagree, of course, with the premise that homosexuality is immoral *per se*²¹⁰ and object to stereotyping all gays and lesbians based on the conduct of some members of the group.²¹¹ They suggest that such conduct may in fact be the natural result of “the tremendous difficulty in sustaining relationships that receive almost no support from society at large and that many people, including a number of critics of same-sex marriage, actively will [these relationships] to fail.”²¹²

The argument that homosexuality is immoral is based in part on religious doctrine, specifically passages from the Bible that promote opposite-sex relationships and condemn homosexuality.²¹³ Proponents of same-sex marriage have responded by asserting that government regulation of marriage should not be based on religious doctrine because the Constitution requires the separation of Church and State.²¹⁴ However, some commentators have based the immorality argument not on the Bible but on “natural law” principles.

The “natural law” position is mostly premised upon the notion of “the natural sexual complementarity of men and women,”²¹⁵ which results in “a natural correspondence between the notion of marriage and the sexual coupling, the merging of bodies, in the “unitive significance” of marriage.”²¹⁶

[Because] only the male/female pair can be sexually complementary, only such a union can realize the true, unifying goods of marriage. . . . Members of the

206. Culhane, *supra* note 1, at 1184.

207. Sparling, *supra* note 1, at 196.

208. *Id.* at 201.

209. *Id.* at 198.

210. *Id.*

211. *Id.* at 203.

212. *Id.*

213. See, e.g., *Genesis* 2: 18–24; *Leviticus* 20:7–16, 20:22–27; *Roman.* 1:18–19, 1:22–32; and *1 Corinthians* 6:1–3, 6:7–11.

214. See, e.g., Culhane, *supra* note 1, at 1187 (explaining that reliance on the Bible to resolve legal questions would impermissibly further the establishment of religion).

215. *Id.* at 1203.

216. *Id.* (quoting Defense of Marriage Act: Hearing on H.R. 3396 Before the House Comm. on the Judiciary, 104th Cong. (1996) (testimony of Hadley Arkes, Ney Professor of Jurisprudence and American Institutions, Amherst College) [hereinafter Hearing on H.R. 3396]).

same sex, by contrast, do not bring anything mutually complementary to sexual activity, so that their activity could just as well have been realized by either of the partners acting alone (*i.e.*, masturbation).²¹⁷

Professor Teresa Collett defines “complementarity” as the “innate desire and unique capacity for union” of a man and a woman.²¹⁸ She asserts that “[t]he willing joinder of [the] inherent differences [between a man and a woman] constitutes the mystery of marriage,” and that most heterosexual couples achieve their greatest fulfillment through marriage.²¹⁹ She argues that same-sex couples could never achieve such fulfillment because “[w]hile same-sex unions contain some diversity, in that they involve two unique and distinctive persons, the differences are individual rather than inherent.”²²⁰ In contrast to heterosexual couples, “[t]he similarities in a same-sex union weaken the union in the same manner that similarly formed pieces joined by adhesive are less durably connected than interlocking pieces of the same material joined by the same adhesive.”²²¹

Professor Sparling challenges Professor Collett’s view of complementarity by asserting that the concept can be understood to embrace a much broader realm than merely the differences between the sexes. He observes that, “[g]iven that Professor Collett is heterosexual, it is hardly surprising that she views the male/female dichotomy as the catalyst that allows a man and a woman to achieve so complete a union in marriage,”²²² and argues that complementarity is not so narrow a concept that it cannot be achieved by a same-sex couple in a different sense.

For homosexuals, the spark that ignites and sustains our intimate relationships is fired not by gender differences, or even by individual differences, but rather by the force that emanates powerfully and mysteriously from the innate qualities of our own sex. Because the sexual and spiritual desires of homosexual couples spring from their celebration of likeness, rather than difference, they experience total communion (the completeness that stands at the heart of complementarity) through the unique bond of man to man or woman to woman. Thus, complementarity nurtures and sustains homosexual relationships just as it does heterosexual ones; it simply flows from a different source. For many homosexuals, like their heterosexual brothers and sisters, this sense of being with one’s partner reaches its culmination in a relationship based on love and commitment or, more precisely, marriage.²²³

Another argument commonly made by opponents to same-sex marriage is that the primary purpose of marriage is procreation, and same-sex couples lack

217. *Id.* at 1206.

218. Teresa Stanton Collett, *Recognizing Same-Sex Marriage: Asking for the Impossible?*, 47 CATH. U. L. REV. 1245, 1262 (1998).

219. *Id.*

220. *Id.*

221. *Id.*

222. Sparling, *supra* note 1, at 193.

223. *Id.*

the biological capacity to reproduce.²²⁴ Proponents of same-sex marriage respond that many heterosexual couples marry with no plan—and often with no practical ability—to procreate. Examples include couples who are elderly or those that are otherwise infertile.²²⁵ *Goodridge* similarly rejected this rationale when it stated:

the state's interest in regulating marriage is based on the traditional concept that marriage's primary purpose is procreation. This is incorrect. Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. [The state's marriage statute] contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married.²²⁶

A particularly heated debate has also emerged over the effect that legalizing same-sex marriage would have on children. Opponents of same-sex marriage assert that

[t]he primary social function of marriage is rearing children. . . . Not only do children need two parents; it also seems that ideally a child should have both a mother and a father. . . . [I]t is reasonable to assume that children with both a mother and a father will learn better how to live in a world composed of males and females."²²⁷

Professor Wardle writes that “[h]eterosexual marriage provides the best environment into which children can be born and reared; the profound benefits of dual-gender parenting to model intergender relations and show children how to relate to persons of their own and the opposite gender are lost in same-sex unions.”²²⁸ Proponents of same-sex marriage vehemently disagree with those assertions. They cite to various studies that show “no appreciable difference between children brought up in stable homosexual homes and those brought up in stable heterosexual ones,”²²⁹ although there is wide disagreement over the validity and proper interpretation of these studies.²³⁰ The court in *Goodridge* similarly rejected the proposition that “confining marriage to opposite-sex couples ensures that children are raised in the ‘optimal’ setting.”²³¹ The court took note of the state’s concession that same-sex couples can be excellent parents, and stated that the exclusion of “same-sex couples from civil marriage

224. See, e.g., *id.* at 194; Culhane, *supra* note 1, at 1194; *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (rejecting the proposition that the primary purpose of marriage is procreation).

225. See Sparling, *supra* note 1, at 194.

226. *Goodridge*, 798 N.E.2d at 961.

227. George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 593–95 (1999).

228. Lynn D. Wardle, *Legal Claims for Same-Sex Marriage: Efforts to Legitimize a Retreat From Marriage by Redefining Marriage*, 39 S. TEX. L. REV. 735, 754–55 (1998).

229. SAME-SEX MARRIAGE: PRO AND CON 239 (Andrew Sullivan ed., 1997).

230. See *id.* at 239–69 (collection of articles and essays discussing the results and validity of various studies investigating the effects on children of being raised by gay and lesbian parents).

231. *Goodridge*, 798 N.E.2d at 962.

will not make children of opposite-sex marriages more secure, but it does prevent children of same-sex couples from enjoying the immeasurable advantages that flow from the assurance of" the kind of stable family structure associated with marriage.²³²

2. *Arguments For Same-Sex Marriage and Rebuttals*

Not all gays and lesbians embrace the concept of traditional marriage. Andrew Sullivan writes that the American gay rights movement initially rejected the concept of traditional marriage on grounds that it was an oppressive and sexist institution; its "goal was to weaken the institution as a whole, to subvert and undermine it, and to create alternative structures within which to explore homosexual desire, love, and family."²³³

The more recent trend has been to view marriage as the "linchpin of gay civil rights,"²³⁴ and to be supportive of "the many lesbian and gay couples who have sought the right to marry."²³⁵

Professor John Culhane asserts that the case for same-sex marriage is extraordinarily simple and clear.²³⁶ His position is that marriage enjoys almost universal support from all of society; it is "encouraged by family, friends, and community, financially supported by the government, and seen as a common incidence of citizenship."²³⁷ It is "recognized by religious groups as well as the state. The Supreme Court's recognition of the fundamental nature of the right to marry reflects this view, which is as close to one of consensus as is likely in a democratic society."²³⁸ He argues that the Supreme Court has ruled that prisoners, debtors, and interracial couples cannot be denied the right to marry, and the same treatment should apply with regard to same-sex couples.²³⁹ According to Professor Culhane,

[b]asic equality demands that people who identify themselves as being of same-sex orientation be permitted entry into the institution of marriage. By expressly disallowing same-sex unions, the state devalues the lives of its gay and lesbian citizens, denying their very citizenship in a vital respect that others take for granted.²⁴⁰

Similar, sometimes even more emotional, appeals have been made for the right of gays and lesbians to marry. Professor Sparling asserts that gay marriages are in actuality no different than their heterosexual counterparts; many gay and lesbian couples view their relationships as traditional marriages, committing themselves for life to monogamy and mutual support.²⁴¹ He argues

232. *Id.* at 963–64.

233. SAME-SEX MARRIAGE: PRO AND CON, *supra* note 229, at 117.

234. *Id.*

235. *Id.*

236. *See* Culhane, *supra* note 1, at 1180.

237. *Id.* at 1180–81.

238. *Id.* at 1181.

239. *Id.*

240. *Id.*

241. *See* Sparling, *supra* note 1, at 189.

that same-sex marriage is no different than opposite-sex marriage in the sense that in both instances marriage

revitalizes the family through the inclusion of spouses who can create new bonds and strengthen existing ties. These new sons and daughters-in-law may enhance the family in a material way by bringing talents that the family has heretofore lacked or by introducing the family to new opportunities for advancement. Gay marriage, like different-sex marriage, can serve also as the wellspring for sustaining the family by raising another generation of children. Same-sex marriage carries great potential to enrich the family spiritually. The gay marriage that is a model of love and commitment can serve as a powerful example to other family members, whether they are heterosexual or homosexual, married or unmarried, minors or of marriageable age. . . .

Advocates of same-sex marriage view marriage as a dynamic and vital institution that is so deeply rooted in the human consciousness and the human sense of family that it can and should incorporate all members of the human race, homosexual as well as heterosexual, who share its ideals and accept its duties and responsibilities. We deem the right to marry to be a basic human right, one which should no more distinguish on the basis of sexual orientation than on race or religion. To deny gay people the right to marry is to deny a part of our humanity, to deprive us of the opportunity to achieve one of the pinnacles of human fulfillment, and to forswear our ability to participate most fully in family life. This denial brands us as alien to the human family when, in fact, we are all in the family.²⁴²

Opponents of same-sex marriage disagree with this basic premise that same-sex marriages are the functional equivalent of opposite-sex marriages.²⁴³ Professor Wardle argues that

[t]he nature of the relationship between two persons of the same sex is fundamentally different than the heterosexual relationship that is marriage. Certainly some other relationships can provide the setting for some type of intimacy, other relationships can provide for economic support of individuals, children can be propagated in other relationships, children can be raised in other environments, and so forth. But no other companionate relationship provides the same great potential for benefiting individuals and society as the heterosexual covenant union we call marriage, and that is why committed heterosexual unions are given the legal status of marriage.²⁴⁴

These conflicting arguments are advanced with equal passion and commitment on both sides of the debate, and are impossible to reconcile. The side one chooses depends upon individual beliefs and value systems. In the arena of public opinion, opponents of same-sex marriage will generally win out because of the overwhelming numerical advantage that opposite-sex couples hold over their same-sex counterparts.²⁴⁵

242. *Id.* at 190–91.

243. *See, e.g.,* Wardle, *supra* note 228.

244. *Id.* at 749.

245. This is because gays and lesbians represent a distinct minority of the population. A national study published in 1993 showed that “only about 2% of the men surveyed had engaged in homosexual sex and that 1% considered themselves exclusively homosexual.” Sparling, *supra* note 1,

The more compelling argument in favor of same-sex marriage claims that denying same sex couples the right to marry violates the U.S. Constitution and/or the constitution of the applicable state.²⁴⁶ The Massachusetts Supreme Judicial Court adopted this view when it declared that “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”²⁴⁷ The court focused its constitutional analysis on the due process and equal protection principles set forth in the Massachusetts Constitution.²⁴⁸

Central to the *Goodridge* court’s decision were the “enormous private and social advantages” that marriage bestows on opposite-sex couples.²⁴⁹ The court identified a substantial number of tangible and intangible benefits that flow from marriage.²⁵⁰ Examples include: valuable property rights in the assets of the other partner to the marriage; tax advantages; the right to hold title to property in a tenancy by the entirety; enhanced homestead protection; inheritance rights; medical insurance benefits; alimony rights and the equitable division of marital property in the event of divorce; the right to bring claims for wrongful death and the loss of consortium; presumptions of legitimacy and parentage of children born to a married couple; and the application of predictable rules of child custody, visitation, support, and other issues involving children in the event of divorce.²⁵¹ Children of married couples also receive special legal and economic protections that are unavailable to children of unmarried parents. Specifically, they benefit from the enhanced family stability and economic security associated with marriage; the societal approval attached to having married parents; and the greater accessibility to family-based federal and state benefits that results from the legal presumption of parentage of children born in wedlock.²⁵²

In his concurrence, Justice Greaney argued that the marriage statutes did not violate the Massachusetts Constitution because they did not prevent gay individuals from marrying; they merely prevented gay individuals from marrying the person of their choice if that person was of the same sex. These individuals were free to marry anyone who qualified under the statutes.²⁵³ The majority rejected that argument, holding that the statutes violated the Massachusetts Constitution because they prevented an individual desiring to

at 200 n.73. Of course, many heterosexual individuals support the right of same-sex couples to marry.

246. A complete analysis of the constitutional issues with regard to denying persons of the same sex the right to marry is beyond the scope of this article.

247. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

248. *Id.* at 953. The court noted that “[t]he Massachusetts Constitution is, if anything, more protective of individual liberty and equality than the Federal Constitution; it may demand broader protection for fundamental rights; and it is less tolerant of government intrusion into the protected spheres of private life.” *Id.* at 948–49.

249. *Id.* at 954.

250. *See id.* at 955–57.

251. *Id.* at 955–56. *See also* Cooper, *supra* note 199, at 329–37 (2006) (discussing the substantial benefits resulting from marriage, and stating that federal law alone accounts for over one thousand rights).

252. *Goodridge*, 798 N.E.2d at 956–57.

253. *Id.* at 975.

marry a person of the same sex from marrying the person of his choice.²⁵⁴ To support its reasoning, the *Goodridge* court cited to the United States Supreme Court's decision in *Loving v. Virginia*,²⁵⁵ which held that a statutory bar to interracial marriage violated the United States Constitution. Following the Supreme Court's rationale, the *Goodridge* court then stated that "the right to marry means little if it does not include the right to marry the person of one's choice, subject to appropriate government restrictions in the interests of public health, safety, and welfare."²⁵⁶

The court's reasoning in *Goodridge* is highly persuasive. Regardless of one's value system, personal beliefs and feelings regarding homosexuality and gay marriage, it is extraordinarily difficult to make objective and persuasive counter arguments to the constitutional basis for the court's decision. Denying substantial rights and benefits to a class of individuals based solely on their choice of whom to marry would certainly seem to be constitutionally impermissible.

Professor Wardle attempts to diminish the constitutional basis for same-sex marriage by asserting that

homosexual behavior is not comparable to race as a basis for marriage regulations. Race is unrelated to almost any legitimate purpose the law could have for distinguishing between two persons, especially irrelevant to the purposes of marriage; but homosexual behavior is directly related to the fundamental purposes of marriage laws—that is, the regulation of sexual behavior and protection of the mores that define the core identity, boundaries, and basic structure for the moral order of a society. As General Colin Powell puts it: "Skin color is a benign non-behavioral characteristic. Sexual orientation is perhaps the most profound of human behavioral characteristics. Comparison of the two is a convenient but invalid argument."²⁵⁷

Professor Wardle thus argues that denying the rights and benefits of marriage to a class of individuals based on their behavior, as opposed to immutable characteristics like skin color, is constitutionally permissible. For this argument even to be plausible, one would have to assume that the preference of gays and lesbians to form relationships with members of their own sex is based solely on their choice of how they wish to behave, rather than on biological factors. Professor Wardle acknowledges that biological factors could possibly contribute to homosexual behavior;²⁵⁸ but even if that is false, justifying the denial of the right to marry a person of one's choice and thus all the benefits that marriage offers on the perceived behavior of a class of individuals is irrational. No other class of individuals is denied the right to marry based on their behavior. Professor Wardle is correct that the law should distinguish some legally recognized relationships from others based on behavioral factors, but any such distinction must not be the basis for affording greater rights and

254. *Id.* at 958.

255. 388 U.S. 1 (1967).

256. *Goodridge*, 798 N.E.2d at 958.

257. Wardle, *supra* note 228, at 752–53.

258. *Id.*

benefits to one class of relationships than any other such class. This issue will be further explored in Part V of this article.

B. Responsive Proposals

Massachusetts and California are the only states thus far to allow same-sex couples to marry pursuant to the general marriage law applicable to opposite-sex couples. Various commentators have made a number of proposals they believe would resolve the marriage debate, but would do so in some other manner.

Some commentators propose creating a legally recognized status for same-sex couples that would afford them all the rights and benefits that opposite-sex couples already enjoy under the current marriage laws. That legally recognized status would exist alongside the current legal status of marriage, but would be called something other than marriage—such as “civil union.”²⁵⁹ This is the approach taken, at least to some degree, in several states including Vermont, New Jersey and Connecticut.²⁶⁰

Opinions regarding the effectiveness of the civil union approach are mixed. Vermont enacted a civil union law that gives “same-sex couples all the rights, benefits, and responsibilities of marriage. It treats same-sex couples as if they were married in every respect, from inception to dissolution, withholding only the word ‘marriage’ itself.”²⁶¹ Although same-sex proponents in Vermont supported enactment of the legislation, they now feel short-changed, perhaps in part because of the subsequent adoption of same-sex marriage in Massachusetts and California. As a result, they have renewed their fervor for the right to marry pursuant to the general marriage law applicable to opposite-sex couples.²⁶² The principal criticism of civil unions is that they are viewed as discriminatory and “an unconstitutional ‘separate-but-equal’ regime akin to the Jim Crow laws struck down by the Supreme Court in *Brown v. Board of Education* and other cases.”²⁶³ This view is rejected by respected constitutional law scholars,²⁶⁴ but is at least indicative of the dissatisfaction of gay and lesbian couples with a multi-tiered approach that creates one status of legally

259. See, e.g., Johnson, *supra* note 5 (suggesting that couples could choose their form of legally recognized relationship from several options, including civil union).

260. See *supra* notes 184, 187–188 and accompanying text.

261. Johnson, *supra* note 5, at 891.

262. See *id.* at 892.

263. *Id.* at 902.

264. *Id.* at 903–904. But see *In re Marriage Cases*, 183 P.3d 384, 400 (Cal. 2008) (holding that the California legislature’s distinction between the use of the term marriage for the official legal relationship of opposite-sex couples and domestic partnership for the official legal relationship of same-sex couples unconstitutionally discriminated against same-sex couples based on sexual orientation). See *supra* notes 194–198 and accompanying text. In addition, the Massachusetts legislature, subsequent to the *Goodridge* decision, drafted a civil union law comparable to Vermont’s and requested an advisory opinion from the Massachusetts Supreme Judicial Court as to whether the law satisfied the court’s constitutional concerns stated in *Goodridge*. The court replied that the law created even more constitutional infirmities because it would relegate same-sex couples to second-class status, and would deprive them of a “status that is specially recognized in society and has significant social and other advantages.” Johnson, *supra* note 5, at 904–905.

recognized relationships applied solely to them and another status applied solely to everyone else. Even those advocating for civil unions do so primarily as a stepping-stone to full adoption of same-sex marriage.²⁶⁵

Professor Greg Johnson would go even further with this approach and suggests that a couple could choose their form of legally recognized relationship from a “menu of options.”²⁶⁶

Some couples may want the handful of rights (such as health care benefits) and limited commitment that domestic partnership offers. Others, who seek full commitment but chafe at the stale trappings of marriage, may opt for civil union. Many couples would undoubtedly prefer traditional marriage, and some might even choose “covenant marriage.”²⁶⁷

Professors Drobac and Page have taken a different approach, proposing that the legal status of marriage be entirely replaced with a new status bearing different nomenclature and creating different rules, rights and obligations than currently pertain to the status of marriage.²⁶⁸ They propose adoption of the “Uniform Domestic Partnership Act,” which

would work (1) to secure the parentage and welfare of children (conceived of as analogous to limited partners), (2) to create an efficient and unified domestic economic enterprise, (3) to obtain legal rights and benefits based on a partnership status, and (4) to reduce the financial costs and mutual acrimony often associated with divorce.²⁶⁹

This new law would create four different types of domestic partnerships: (1) the enduring domestic partnership, which is intended to continue until the death of one of the partners, but may be terminated earlier and applies to couples who intend to remain childless; (2) the provisional domestic partnership, which lasts for only one year, is renewable annually if the partners choose and is intended for couples who are not sure they want to commit to each other for life; (3) the filial domestic partnership, which is intended for couples who intend to raise children together; and (4) the caregiving domestic partnership, which is intended for couples who agree to divide income-earning and domestic caregiving tasks unequally.²⁷⁰ Any two adult persons may form any of these partnerships, with the proviso that “no one person may be in more

265. See, e.g., *id.* at 906–908 (asserting that advances in gay and lesbian civil rights must begin with the most basic rights and proceed to more advanced rights as the public becomes more accustomed to antidiscrimination laws applicable to gays and lesbians, and becomes more accepting of the gay and lesbian community).

266. Johnson, *supra* note 5, at 908.

267. *Id.*

268. Drobac & Page, *supra* note 4. This proposal is vaguely analogous to recommendations made in 2002 by the American Law Institute, which suggests that “couples—gay and straight—in a domestic partnership be treated the same as couples in a marriage for purposes of property division and support upon dissolution of the relationship.” Johnson, *supra* note 5, at 910 (quoting Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353, 354–58).

269. Drobac & Page, *supra* note 4, at 355.

270. *Id.* at 404–406.

than one domestic partnership at a time.”²⁷¹ The Act would provide specific rules regarding formation of a partnership; rights and obligations of the partners regarding the operation of a partnership; property rights with regard to partnership property; rights and obligations with regard to children; fiduciary obligations owed by partners to each other and to children; and termination of a partnership.²⁷² Drobac and Page maintain that this model would “facilitate economic and strategic legal planning to benefit loving domestic partners, . . . satisfy constitutional strictures[,] and leave marriage to the exclusive control of the religious institutions.”²⁷³

Some commentators advocate the abolition of marriage altogether, or at least abolition of the governmental regulation of marriage. Professor Daniel Crane proposes that marriage be privatized wherein the state would step aside and allow couples to define and regulate their marriages by private contract.²⁷⁴ His reasoning is theological; he argues that religious communities, by lobbying for a restrictive legal definition of marriage as protection against the inclusion of same-sex couples, “are implicitly acknowledging and confirming the state’s right to dictate the definition and contours of marriage.”²⁷⁵ He concludes that “marriage is the province of religious communities, not the state, and that empowering the state to define marriage uniformly not only profanes a holy institution but threatens the ultimate autonomy and authority of religious communities with respect to marriage.”²⁷⁶

Professor Edward Zelinsky proposes that civil marriage be abolished:²⁷⁷ “The law should not define, regulate, or recognize marriage. Marriage—the structured, publicly-proclaimed, communally-supported, relationship of mutual commitment—should become solely a religious and cultural institution with no legal definition or status.”²⁷⁸ He offers three reasons for deregulating marriage. First, he asserts that marriage in our society has functionally changed and now plays a different role than in the past. Because the legal doctrines governing married couples are increasingly applied to both married and unmarried couples, marriage is becoming unnecessary as a separate legal category.²⁷⁹ Second, he makes a law and economics argument and states that “abolishing civil marriage would strengthen marriage by ending the government’s legal monopoly in defining that institution; this would encourage a productive competition among alternative versions of marriage.”²⁸⁰ He argues that once the state removes itself from the business of recognizing, defining and regulating marriage, various competitive forms of marriage will emerge and only the best of such forms will survive.²⁸¹ Traditional religions would have an equal

271. *Id.* at 402.

272. *Id.* at 406–17.

273. *Id.* at 402.

274. Crane, *supra* note 2, at 1259.

275. *Id.* at 1222.

276. *Id.*

277. Zelinsky, *supra* note 2, at 1163.

278. *Id.*

279. *Id.*

280. *Id.* at 1163–64.

281. *Id.* at 1164.

opportunity to convince couples that their form of marriage is the best.²⁸² Third, abolishing civil marriage would fully and finally resolve the debate with regard to same-sex marriage.²⁸³

If some people believe that gay marriage is an ethical imperative while others believe that it is a serious moral error, one or the other group will be disappointed, if not aggrieved, by a single legal definition of marriage. However, each group can promulgate its own definition of marriage in a world with no civil marriage, a world in which the law does not define, recognize, or regulate marriage.²⁸⁴

V. PROPOSAL FOR REFORM

“The law that will work is merely the summing up in legislative form of the moral judgment that the community has already reached.”

Woodrow Wilson, American President (1856–1924)

In spite of assertions to the contrary,²⁸⁵ the state has compelling reasons to regulate relationships between couples:

[w]ithout question, civil marriage enhances the “welfare of the community.” It is a “social institution of the highest importance.” Civil marriage anchors an ordered society by encouraging stable relationships over transient ones. It is central to the way the [state] identifies individuals, provides for the orderly distribution of property, ensures that children and adults are cared for and supported whenever possible from private rather than public funds, and tracks important epidemiological and demographic data.²⁸⁶

Discussing the U.S. Supreme Court’s decision in *Zablocki v. Redhail*,²⁸⁷ the *Goodridge* court asserted that, “[a]s a practical matter, the State could not abolish civil marriage without chaotic consequences.”²⁸⁸ This statement is particularly poignant when considering Professor Wardle’s description of the official state effort in Russia following the Bolshevik Revolution in 1917, which radically transformed and de-privileged the institution of marriage.²⁸⁹ As quoted by Professor Wardle in his article:

“Soviet social reconstruction was paid for in the coin of individual suffering and broken families.” For some subgroups of Russian society, especially some “peasants, family life often simply ceased to exist.” After the Revolution, “moral decline and psychological excesses developed which ‘further deepened

282. *See id.* (asserting that traditional religions could prove to offer the most appealing choice and thus emerge as the big winner).

283. *Id.*

284. *Id.*

285. *See supra* notes 274–280 and accompanying text, arguing for the deregulation of marriage by the state.

286. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 954 (Mass. 2003).

287. 434 U.S. 374 (1978).

288. *Goodridge*, 798 N.E.2d at 957 n.14.

289. Wardle, *supra* note 3. *See also supra* notes 56–77 and accompanying text.

the disorganization of the family . . . and [created] economic hardships,' and in marital family relations" reduced the family to a condition lower than had "existed in Tsarist Russia."²⁹⁰

Which relationships to include in the regulatory scheme of civil marriage is the object of debate. It is not possible to reach a consensus with regard to a universal definition of a legally recognized relationship that would replace the current status of marriage. At the same time, both sides of the marriage debate appear woefully unhappy with the current state of affairs. Regardless of whether the status of marriage is modified in some particular way or remains the same, a substantial number of people are going to feel that their personal sense of morals, ethics and beliefs have been violently offended, and are going to be significantly unhappy with the result. If effective change is to be achieved, it will have to be based on a multi-faceted approach that provides for more than one legally recognized relationship that couples may enter, each with different requirements but offering the same rights and benefits.

This article proposes an approach that defines two legally recognized relationships: first, for opposite-sex couples desiring a traditional marriage, a definition termed "marriage" that comports with the covenant marriage laws enacted in Louisiana, Arizona and Arkansas, but with the modifications proposed by this article, as discussed above;²⁹¹ second, for all couples, whether same-sex or opposite-sex, a definition termed "domestic partnership" (or "civil union" or any other acceptable term other than "marriage") that generally follows the current system that we now call marriage. Both relationships would be entitled to the same rights and benefits. The distinction between the two relationships would be confined to their respective legal definitions.²⁹²

A. Same-Sex Couples Have Rights Too

The arguments over same-sex marriage are advanced with equal passion and commitment on both sides of the debate, and are impossible to reconcile. The side one chooses depends upon individual beliefs and value systems. But a compelling argument can be made that denying persons of the same sex the right to form legal relationships that are entitled to the same rights and benefits as legal relationships opposite-sex couples may form violates the U.S. Constitution and/or the constitution of the applicable state.²⁹³ Regardless of one's value system, personal beliefs and feelings regarding homosexuality and gay marriage, it is extraordinarily difficult to objectively and persuasively argue that it is constitutionally permissible to deny substantial rights and benefits to a class of individuals based solely on their choice of with whom they form a legally recognized relationship.

290. Wardle, *supra* note 3, at 490–91 (quoting H. KENT GEIGER, *THE FAMILY IN SOVIET RUSSIA* (1968)).

291. See *supra* notes 78–176 and accompanying text.

292. New Jersey has a similar structure currently in place. Opposite-sex couples may choose between marriage and domestic partnership, while same-sex couples are limited to domestic partnership. See Kindregan, *supra* note 7, at 39.

293. See *supra* notes 246–258 and accompanying text.

Constitutional requirements should not negate the adoption of a multifaceted approach that defines different legally recognized relationships that are available to some couples and not to others.²⁹⁴ The same state-conferred rights and benefits must, of course, be available to each type of relationship that is legally recognized. Some of the states that have adopted civil union statutes have done exactly that.²⁹⁵ This proposal would afford the same rights and benefits to both types of legally recognized relationships.

B. Public Policy Perspective

From a public policy standpoint, the conundrum is determining the basis for the different relationships that a state will legally recognize and to whom they will apply. Each legally defined relationship must be justified on the basis of public policy; otherwise, there is no reason for that relationship to have a legal definition different from any other legally recognized relationship.

The problem with the states' adoption of civil unions or domestic partnerships that have the same rights and benefits as marriage is that they have distinguished those relationships from marriage solely on the basis of sexual orientation. The public policy justification reflected an attempt to award the rights and benefits of marriage to same-sex couples while appeasing those who believed that same-sex relationships should not be legally recognized in any form. Although laudable for its valiant effort to find middle ground in the marriage debates, distinguishing legally recognized relationships based solely on sexual orientation fails to recognize that not all opposite-sex relationships are functionally equivalent to each other. One of the chief concerns about legally recognizing same-sex marriage, or even recognizing marriage alternatives such as civil unions, is the denigration in value of marriage in society and its ultimate destruction as an institution.²⁹⁶ As discussed in Part III.A of this article, opposite-sex couples have been doing a fine job of devaluing marriage all by themselves; they need no assistance from same-sex couples in accomplishing that result.²⁹⁷

Two legally recognized relationships are defined under this proposal: one (termed "marriage") for opposite-sex couples desiring a traditional marriage, and another for all other couples, whether opposite-sex or same-sex. One principal objective of this approach is to elevate "marriage" to a much more honored and valued status than it currently enjoys in our society while

294. *But see* *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008). *See supra* notes 194–198 and accompanying text. In addition, the Massachusetts legislature, subsequent to the *Goodridge* decision, drafted a civil union law comparable to Vermont's and requested an advisory opinion from the Massachusetts Supreme Judicial Court as to whether the law satisfied the court's constitutional concerns stated in *Goodridge*. The court replied that the law created even more constitutional infirmities because it would relegate same-sex couples to second-class status, and would deprive them of a "status that is specially recognized in society and has significant social and other advantages." Johnson, *supra* note 5, at 904–905.

295. *See, e.g., supra* note 181 and accompanying text (describing the adoption by the Vermont legislature of a civil union statute that provides the same legal benefits to same-sex couples that marriage provides to opposite-sex couples).

296. *See generally supra* notes 202–232 and accompanying text.

297. *See supra* notes 30–69 and accompanying text.

recognizing that not all opposite-sex couples view marriage in that regard. Those couples along with same-sex couples would be entitled to enter into a legally recognized relationship that has the same rights and benefits as marriage, but very different obligations and characteristics based on the definitions applicable to each relationship.

This proposal distinguishes between these two legally recognized relationships not solely on the basis of sexual orientation, but primarily on their functional distinctions and qualities and the purposes for which the couples desire to form them. For example, couples desiring a traditional marriage are intent on forming a life-long relationship that will involve child-bearing and parenting. The covenant marriage laws, with the modifications proposed by this article,²⁹⁸ will assist a couple in accomplishing those objectives.

C. What Makes Marriage So Special?

What is the public policy justification for treating marriage as a separate, legally recognized relationship different from all others? Marriage has long held an esteemed and privileged status in our society; the U.S. Supreme Court, in *Griswold v. Connecticut*,²⁹⁹ described marriage as

a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.³⁰⁰

Of course, marriage has changed over time; “[f]or most of human history, marriage and kin were obvious, urgent, personal necessities.”³⁰¹ Marriage and family were essential to survival. Family and marital loyalty was an extremely important concept, and the decisions of young people to marry and bear children “was not just a private, personal taste, but an urgent necessity for the family and community.”³⁰² Much has changed in our society in recent decades. “Today, government and the market have taken over the family’s once-undisputed roles as the prime source of key goods; [that is], wealth production and social insurance,”³⁰³ resulting in a radical change in the importance of the family to society and to the individual.³⁰⁴ So, is the *Griswold* Court’s noble description of marriage simply an outdated notion belonging to a bygone era? Has the necessity for treating marriage as “intimate to the degree of being sacred” gone the way of the buggy whip, so that we can now simply treat all

298. See *supra* note 78–176 and accompanying text.

299. 381 U.S. 479 (1965).

300. *Id.* at 486. The Court was speaking of marriage in the traditional sense; *i.e.*, between a man and a woman.

301. Maggie Gallagher, *If Marriage is Natural, Why Is Defending It So Hard? Taking Up the Challenge to Marriage in the Pews and the Public Square*, 4 AVE MARIA L. REV. 409, 412 (2006).

302. *Id.*

303. *Id.* at 413.

304. *Id.*

relationships between any two persons the same, at least for purposes of legal recognition and regulation?

Noted authors have devoted much of their scholarship to the repudiation of that proposition. Professor Wardle asserts that “historically marriage has always referred to the union of a man and a woman in a unique relationship of commitment and intimacy. . . . This is one of the great constants in human history—constant across time and across cultures.”³⁰⁵ While legal definitions evolve,

the union of a man and a woman is part of the very nature and reality of the marriage relationship itself. . . . Certainly some other relationships can provide the setting for some type of intimacy, other relationships can provide for economic support of individuals, children can be propagated in other relationships, children can be raised in other environments, and so forth. But no other companionate relationship provides the same great potential for benefiting individuals and society as the heterosexual covenant union we call marriage

. . .

. . . [I]n some societies and eras, some other companionate or sexual relationships have been tolerated, accommodated, permitted, or even encouraged, but those other relationships were recognized to be something different, not marriages. The legal status of marriage has been reserved exclusively for special covenant heterosexual unions because those unions are unique and uniquely beneficial. The right to enter that unique relationship is now generally recognized to be one of the basic human rights because that relationship is unique and uniquely important to humanity.³⁰⁶

Maggie Gallagher has focused particularly on the benefits that marriage offers to children, and the benefits to society that result when children prosper.³⁰⁷ She asserts that “when mothers and fathers fail to make reasonably decent marriages in which to raise their children, most children suffer, and many children are damaged.”³⁰⁸ Children of unmarried parents are exposed to risks that include “poverty, suicide, mental illness, physical illness, infant mortality, lower educational attainment, juvenile delinquency and conduct disorder, adult criminality, early unwed parenthood, lower life expectancy, and distant relations with both mothers and fathers.”³⁰⁹ These risks cannot be entirely controlled simply by the presence in the home of another adult who is not the child’s biological parent. Research on the effects of marriage on children demonstrates

that family structure matters for children, and the family structure that helps children the most is a family headed by two biological parents in a low-conflict

305. Wardle, *supra* note 228, at 748.

306. *Id.* at 749–50.

307. See generally Gallagher, *supra* note 301, at 417–22 (asserting that marriage exists in some form in every society because men and women are naturally and powerfully attracted to sex, sex makes babies, society needs babies to survive, and babies need parents who will nurture and care for them).

308. *Id.* at 420.

309. *Id.* at 420–21.

marriage. Children in single-parent families, children born to unmarried mothers, and children in stepfamilies or cohabiting relationships face higher risks of poor outcomes. . . . There is thus value for children in promoting strong, stable marriages between biological parents.³¹⁰

According to thirteen leading family scholars, “[m]arriage is an important social good, associated with an impressively broad array of positive outcomes for children and adults alike. . . . [W]hether American society succeeds or fails in building a healthy marriage culture is clearly a matter of legitimate public concern.”³¹¹

It can certainly be persuasively argued that the representations quoted above are purely a matter of opinion and cannot be proven with any degree of accuracy. Indeed, Part IV of this article discusses the counter-arguments made by proponents of same-sex marriage particularly in response to Professor Wardle’s assertions. Regardless of which side of this debate one chooses, there is a much more compelling reason for separating marriage from all other relationships and giving it a separate legal status.

Presumably it is incontestable that the relationships that provide the most benefit to individuals and stability to society are those that are engaged in by couples who are deeply committed to each other for life and agree to monogamy and to mutual support of each other emotionally, physically and financially. If the relationship involves or produces children, the individual family members and society as a whole will benefit most if those children are properly parented and nurtured, and receive the necessary care and resources to avoid the risks of maladjustment. Professor Wardle uses sexual orientation as the dividing line, asserting that only heterosexual unions can provide those benefits, but his use of the term “heterosexual covenant union” reminds us that not all heterosexual marriages are functionally equivalent.³¹² Many heterosexual marriages under the current system are not “covenant unions” by any stretch, and fall far short of the kind of relationship that provides those benefits assumed by Professor Wardle. Furthermore, attaining the current legal status of marriage requires nothing more than a marriage license. There is no assurance that couples wishing to attain that status have any idea what it entails, much less understand the concept of a “covenant union.” Simply keeping same-sex couples out of the club does nothing to further the objective of strengthening marriage for the benefit of society.

One of the principal goals of this proposal is to elevate marriage to a much more honored and valued status than it currently enjoys in our society. This goal will be achieved by separating marriage from all other relationships and defining it by use of the covenant marriage laws, with the modifications proposed by this article. The premarital counseling provisions, in particular, will better prepare couples for the realities of marriage and the issues they will inevitably be forced to deal with. That preparation will provide them with a greater chance that the marriage will be successful, and allow them to build a stronger foundation for their marriage prior to the ceremony. Ultimately, the

310. *Id.* at 420.

311. *Id.* at 421.

312. Wardle, *supra* note 228, at 749.

number of marriages that end up in divorce will be reduced. Furthermore, appropriate premarital counseling will force couples who are ill-suited for each other to come face to face with their differences, and possibly decide to avoid altogether entering into a problematic marriage that might eventually end in divorce.

The proposal defines marriage to include only opposite-sex couples. It will perhaps be criticized for that reason, but there exists no rational basis for any such criticism. As a practical matter, inclusion of same-sex couples in the definition of marriage would surely result in more of the same vigorous debate we have suffered for the past several decades, with no resolution possible. More importantly, if proponents of same-sex marriage have been truthful in advancing their side of the debate, their principal and most compelling argument is that denying persons of the same sex the right to marry violates the U.S. Constitution and/or the constitution of the applicable state. This proposal arguably solves the constitutional issue by including same-sex couples in the definition of domestic partnership, which would be entitled to the same rights and benefits as marriage.³¹³

Some proponents of same-sex marriage, however, have gone further with this issue and argued that the right to marry is a basic human right. By denying same-sex couples the right to marry, "the state devalues the lives of its gay and lesbian citizens, denying their very citizenship in a vital respect that others take for granted."³¹⁴ Professor Sparling makes an even more emotional appeal. "To deny gay people the right to marry is to deny a part of our humanity, to deprive us of the opportunity to achieve one of the pinnacles of human fulfillment, and to forswear our ability to participate most fully in family life."³¹⁵ These statements fuel suspicions long held by opponents of same-sex marriage; that gays and lesbians have become intransigent with regard to insisting that they be included in the definition of marriage because what they really want is the acceptance and approval by society of their sexual orientation.³¹⁶ This rationale has sometimes been acknowledged by gay and lesbian authors. Paula Ettelbrick

313. *But see* In re Marriage Cases, 183 P.3d 384 (Cal. 2008). *See supra* notes 195–198 and accompanying text. In addition, the Massachusetts legislature, subsequent to the *Goodridge* decision, drafted a civil union law comparable to Vermont's and requested an advisory opinion from the Massachusetts Supreme Judicial Court as to whether the law satisfied the court's constitutional concerns stated in *Goodridge*. The court replied that the law created even more constitutional infirmities because it would relegate same-sex couples to second-class status, and would deprive them of a "status that is specially recognized in society and has significant social and other advantages." Johnson, *supra* note 5, at 904–905 (quoting Opinions of the Justices to the Senate, 802 N.E. 2d 565 (Mass. 2004)). If the Supreme Court of California and the Massachusetts Supreme Judicial Court are correct on the constitutional law point, I would make the same proposal, but amend it to include same-sex couples in the definition of marriage as well as domestic partnership. I would make that concession only if required to do so because of the constitutional issue. I do not believe, as a matter of public policy, that they should be so included, for reasons stated in this section of this article.

314. Culhane, *supra* note 1, at 1181.

315. Sparling, *supra* note 1, at 191.

316. *See, e.g.,* Dent, *supra* note 227, at 617 (asserting that a segment of those supporting gay marriage reject domestic partnership and civil union laws, even though they provide the same benefits as marriage, because what those supporters really want is the honor, respect and social approval associated with traditional marriage).

writes that “[m]arriage provides the ultimate form of acceptance for personal, intimate relationships in our society Given the imprimatur of social and personal approval that marriage provides, it is not surprising that some lesbians and gay men among us would look to legal marriage for self-affirmation.”³¹⁷ But, she insightfully concludes that “[w]e must not fool ourselves into believing that marriage will make it acceptable to be gay or lesbian. We will be liberated only when we are respected and accepted for our differences and the diversity we provide to this society.”³¹⁸

Another suspicion long held by opponents of same-sex marriage is that gays and lesbians desire the right to marry for the purpose of destroying the institution from within. In its early years, the Gay Rights Movement supported this view: “Marriage, the argument ran, was an oppressive, sexist, and inherently heterosexual institution. The movement’s goal was to weaken the institution as a whole, to subvert and undermine it, and to create alternative structures within which to explore homosexual desire, love, and family.”³¹⁹

Professors Culhane and Sparling will perhaps still feel devalued and excluded by this proposal of two legally recognized relationships, or perhaps they will be satisfied by the inclusion of same-sex couples in the definition of domestic partnership. In any event, they will be unable to make a valid argument that the proposal somehow violates their constitutional rights.

There is another, more intangible reason this proposal will strengthen marriage and elevate it to a more honored and valued status. A significant proportion of heterosexual couples will, for various reasons, be attracted to marriage rather than domestic partnership. They may be attracted to the more rigid requirements for entering that relationship and the improved chances of success that those requirements provide, or they may be attracted to the elevated status society may award to marriage over domestic partnership. Couples may decide on marriage because of pressure from family or from their future partners, or encouragement from their religious leaders. They may choose marriage simply because it is the relationship couples in our society have traditionally chosen since the beginning of our culture. For whatever reason, there will be a significant number of heterosexual couples who choose the marriage option.

A substantial number of people in our society consider themselves actively religious,³²⁰ and most of those couples will choose marriage because of these religious beliefs. The vast majority of Americans who are members of an organized religion belong to Judeo-Christian denominations³²¹ and believe that marriage is created by God. Catholicism views marriage as a sacrament;³²² one

317. Paula Ettelbrick, *Since When Is Marriage a Path to Liberation?*, in SAME SEX MARRIAGE: PRO AND CON 118, 118–19 (Andrew Sullivan, ed., 1997).

318. *Id.* at 124.

319. SAME-SEX MARRIAGE: PRO AND CON, *supra* note 229, at 117. See also Dent, *supra* note 227, at 617.

320. Anthony R. Benedetto, *The Impact on “The Vanishing Trial” If People of Faith Were Faithful to Religious Principles of Settling Disputes Without Litigation*, 6 PEPP. DISP. RESOL. L.J. 253, 266–67 (2006).

321. *Id.*

322. Randy Lee, *Finding Marriage Amidst a Sea of Confusion: A Precursor to Considering the Public Purposes of Marriage*, 43 CATH. LAW. 339, 350 (2004).

author cites Pope Pius XI for the proposition that “[m]arriage is the promise to love just one other human being in the way that God loves everyone.”³²³ Christians of all denominations adhere to the teachings of Saint Paul. In his letter to the Ephesians, Paul gives the following instructions to wives and husbands:

Wives, submit to your husbands as to the Lord. For the husband is the head of the wife as Christ is the head of the church, his body, of which he is the Savior. Now as the church submits to Christ, so also wives should submit to their husbands in everything.

Husbands, love your wives, just as Christ loved the church and gave himself up for her to make her holy In this way, husbands ought to love their wives as their own bodies. He who loves his wife loves himself. . . . “For this reason a man will leave his father and mother and be united to his wife, and the two will become one flesh.”³²⁴

Contrary to frequent interpretation, what Paul is describing in these verses is not a relationship where the husband and wife each pursue their own personal fulfillment and satisfaction of their own personal needs, or a one-sided relationship where the wife submits to the authority of the husband and the husband gives nothing of value to the wife; instead, Paul is describing a mutually loving, supportive, Godly, sacrificial, spiritual, *service-centered* relationship, where *both* spouses focus all of their energies and gifts to satisfying the needs of each other.

When a significant number of deeply religious couples choose the marriage option under this proposal and experience much stronger marriages because of the counseling and other required provisions, society will have a successful model to which other couples can aspire. If marriage becomes a highly successful, rewarding, and mutually enjoyable institution in our society, more couples will be interested in choosing that option, and society will reap the benefits resulting from a greater number of stable relationships and stronger families. To borrow Professor Zelinsky’s reasoning, if more than one option exists for couples to form a legally recognized relationship, “a productive competition” will ensue. Traditional religions will have an equal opportunity to convince couples that their form of relationship is the best.³²⁵

VI. CONCLUSION

There is no question that both the concept and practice of marriage in America have dramatically evolved over the last half-century or so. The divorce rate has exponentially increased to the extent that approximately half of all marriages end in divorce;³²⁶ both men and women are increasingly delaying marriage or rejecting it altogether; and more than one-third of births are to unmarried mothers. These factors have all contributed to the notion that the

323. Gallagher, *supra* note 301, at 429.

324. *Ephesians* 5:22–31.

325. Zelinsky, *supra* note 2, at 1163–64.

326. Wardle, *supra* note 32.

institution of marriage in the United States is “withering away,” resulting in peril to families and to society.

In addition, a prodigious debate has erupted over the meaning of “marriage” and its role in society. One side desires an expansion of the definition of marriage, and the other desires the restrictive definition already currently in place in most jurisdictions. The camp in favor of expansion is most particularly interested in including same-sex couples in the definition of marriage, or at least creating a parallel relationship status for same-sex couples that would exist alongside marriage and would confer all the same rights and benefits. The restrictive camp is adamantly opposed to including same-sex couples in the definition of marriage, and most members are opposed to creating any other type of legal status for same-sex couples that is similar in any way to marriage. Each side of this debate is equally convinced of the merits of its arguments, making them vigorously with legal, ethical, moral and religious overtones.

Various responses and proposals have been made to address the concerns that many have expressed regarding their perception that the institution of marriage is in decline, and to offer compromise in hopes of resolving the convoluted, often bitter, marriage debate. Three states have enacted covenant marriage laws, which establish a second tier of marriage that couples can choose if they desire. Covenant marriages have very stringent entrance and exit requirements, and require a couple to acknowledge that they agree to be married for life. Some commentators have proposed replacing the legal status of marriage with a new status bearing different nomenclature, and others have suggested abolishing marriage, or at least the regulation of marriage by government.

No consensus has been reached regarding a universal definition of a legally recognized relationship that would replace the current status of marriage, yet no one seems satisfied with the status quo. It is likely not possible to define marriage in any single way that would not violate the personal sense of morals, ethics and beliefs of a significant portion of the population. Resolution of this issue will require a multi-faceted approach that provides for more than one legally recognized relationship that couples may enter, each with different requirements but offering the same rights and benefits.

This article proposes an approach that defines two legally recognized relationships: first, for opposite-sex couples desiring a traditional marriage, a definition termed “marriage” that comports with the covenant marriage laws enacted in Louisiana, Arizona and Arkansas, but with the modifications proposed by this article, as discussed above; and second, for all couples, whether same-sex or opposite-sex, a definition termed “domestic partnership” (or “civil union” or any other acceptable term other than “marriage”) that generally follows the current system that we now call marriage. Both relationships would be entitled to the same rights and benefits. The distinction between the two relationships would be confined to their respective legal definitions.

As discussed above, it is extraordinarily difficult to objectively and persuasively argue that it is constitutionally permissible to deny substantial rights and benefits to a class of individuals, based solely on their choice of with

whom they form a legally recognized relationship. This proposal arguably solves that constitutional issue by including same-sex couples in the definition of domestic partnership, which would be entitled to the same rights and benefits as marriage.

In addition, this proposal elevates marriage to a much more honored and valued status than it currently enjoys in our society by separating marriage from all other relationships, and defining it by use of the covenant marriage laws, with the modifications proposed by this article. If marriage becomes a highly successful, rewarding and mutually enjoyable institution in our society, more couples will be interested in choosing that option, and society as a whole will reap the benefits resulting from a greater number of stable relationships and stronger families.