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Katherine Shaw Spaht

A PROPOSAL: LEGAL *RE*-REGULATION OF THE CONTENT OF MARRIAGE

KATHERINE SHAW SPAHT*

INTRODUCTION

With growing concern expressed about the vitality of the institution of marriage and simultaneously, the increasingly impatient demands for access to marriage, it is forgivable for a person to have missed the fact that these ultimately inconsistent strains of argument from two different sides of the cultural divide *do make* the same fundamental assumption—that marriage is important as a *public* matter. The deep concern about marriage expressed in different ways—by social science researchers, as evidence mounts about the toll that broken families inflict;[1] by the formation and growth of a National Marriage Movement; and by the appearance of marriage as a centerpiece in state and federal "governmental" policy—draws together citizens who are committed to revitalizing the institution of marriage. These supporters of marriage begin by reminding us that we all have an enormous stake in the maintenance of a vigorous and healthy "marriage culture." And, if we have a stake in a marriage culture, then we are talking about the "public's interest" or the common good. Marriage is *not*, nor has it ever been, about a purely "private" relationship; this relationship has *very public* consequences.

In fact it is those *public* consequences that motivate those on the opposite side of the cultural divide to press for unrestricted access to "marriage;" they interpret *marriage* as a bundle of "legal" rights. Rarely among these advocates of same-sex marriage do you hear about the imposition of obligations, the corollary to rights. Furthermore, at least some of the advocates are honest enough to admit that they intend to transform marriage—*re-*

* Jules F. and Frances L. Landry Professor of Law, Louisiana State University Law Center. The author is a member of the newly organized Society of Louisiana Civil Law Scholars.

1. Editorial, *The Marriage Amendment*, FIRST THINGS, Oct. 2003, at 16. After decades of experiments with single-parent families, "open marriages," and easy divorce, the evidence is in and there is today near-unanimous agreement on what should always have been obvious: judged by every index of well-being, there is no more important factor in the lives of children than having a mother and father in the home. *Id.*

imagine marriage. That re-imagining of marriage consists of questioning not simply the historical and universal requirement of sexual complementarity, but also the shared common understandings of the marital obligation of fidelity, of the manner in which married persons organize their property relationships, and of the other restrictions regulating entry into marriage. After all, once sexual complementarity, the most fundamental of assumptions about marriage, is purged from the legal institution it becomes difficult to argue justification for any other traditional moral view of marriage.

If traditional marriage advocates who are deeply anguished about this fundamental institution desire to reinvigorate and strengthen marriage and convey the substantial public interest in marriage, they should propose restoring legal regulation of the content of marriage. A result of the *re*-regulation of marriage's content through law might be to arrest the clamor for universal access since increasing legal regulation makes marriage far less desirable. A second result might be that the adoption of new laws suggests that the public rejects re-imagining marriage.

This essay first recounts briefly the historical retreat of law from regulation of the content of marriage,[2] regulation often accomplished indirectly through statutory grounds for separation or divorce. This essay also offers alternatives from comparative law for the *re*-regulation of marriage and considers the threat posed by *Lawrence v. Texas*,[3] the United States Supreme Court decision invalidating the Texas sodomy statute, to any state statutory *re*-regulation of marriage. Lastly, this essay offers a legal mechanism for avoiding the threat of *Lawrence*, whether real or imagined. In the same way that the proposed marriage amendment to the United States Constitution[4] attempts to take "preemptive" action to prevent the Supreme Court from redefining marriage, the proposals in this essay assume a similar offensive tactic. If the decision in the *Lawrence* case is as radical as it reads,

2. *See* Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243 (2003) [hereinafter Spaht, *The Last One Hundred Years*], for a much longer and more detailed exposition of the deconstruction of legal barriers and constraints that protected the relationship from both a spouse and third persons.

3. 123 S. Ct. 2472 (2003).

4. *See The Marriage Amendment*, *supra* note 1, at 14.

> Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any state, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred on unmarried couples or groups.

Id.

the American people need to understand the seriousness of the threat and decide whether and how to respond.

I. BRIEF HISTORICAL SURVEY OF THE DEREGULATION OF MARRIAGE

In an earlier article, I described the retreat of law from the regulation of marriage over the last century.[5] I chose the date arbitrarily with the knowledge that the retreat began long before that date. I selected the state of Louisiana simply as an example of what has happened in the United States. I did so because of my familiarity with the law and its historical evolution and because of the possibility that other civil law jurisdictions in North and South America, as well as in Europe, might offer useful examples of how to *re*-regulate marriage. My search was restricted to civil law jurisdictions for two reasons: (1) familiar construction and codification of the private law of the family (in other words, a statutory formulation that declares relatively broad principles) and (2) the widely recognized and lengthy historical use of law to do more than simply constrain—for example, to teach.[6] An example, which is my personal favorite currently appearing in the Louisiana Civil Code, is the content of Civil Code article 215: "A child, *whatever be his age*, owes honor and respect to his father and mother."[7] Obviously, the statute describes the behavior of a "good" child, one who is obliged to honor and respect his parents until their death. Its breach has few legal consequences. After minority, the only consequence of the child's failure to honor and respect his parents is, if the child is a forced heir,[8] grounds for disinherison which consist of *serious* acts of dishonor and disrespect.[9] The fact that this law does not

5. *See* Spaht, *The Last One Hundred Years*, *supra* note 2.

6. Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 496 (1992).

7. LA. CIV. CODE ANN. art. 215 (West 2003) (emphasis added).

8. LA. CIV. CODE ANN. art. 1493(A) (West 2003) (defining forced heirs as descendants of the first degree who are under twenty-four years of age or permanently incapable of caring for their persons or administering their estates). Forced heirship is a civil law concept that reserves a portion of a parent's estate for descendants. Until January 1, 1996, forced heirship applied to all descendants regardless of age; after that date forced heirship was limited to the two described categories of descendants, with some limited exceptions for grandchildren. *Id.* (as amended by 1995 La. Acts 1180, 1996 La. Acts. 77 (1st Exec. Sess.)).

9. *See* LA. CIV. CODE ANN. art. 1621 (West Supp. 2003) (including eight acts by the child, such as cruel treatment, raising of his hand to strike the parent, attempting to kill the parent, and violence to keep a parent from making a will).

prohibit, punish, or constrain does not mean that it lacks value. It states a biblical command, and I have found it useful on more than one occasion with my own children.

Historically, the law of Louisiana, as was true of the law of other states as well as other countries in the West, highly regulated entry into marriage. The legal consequences of a breach of the promise to marry, which Louisiana still recognizes, the affirmative defenses to such an action, and the aggravation of damages if there was seduction, communicated in a most direct fashion the public's view about the seriousness of the decision to marry. The public considered the decision to marry, evidenced by an exchange of promises, as serious, which is why the law provided a remedy for its breach. Furthermore, affirmative defenses to the action for breach of promise, such as lack of chastity of the claimant and the rule that seduction aggravated the damages recoverable by a claimant also communicated society's view of sexual relations before marriage.[10] There were a myriad of regulations prescribing prerequisites to marriage that required time to complete and provided information about the other party that could prove decisive, such as a medical certificate attesting to a fiancé's freedom from venereal disease. Most of the laws regulating entry into marriage have been repealed or judicially declared to be merely directory.

Those who were legally prohibited from marrying reflected an even more fundamental interest of the public; the marriage of a person already married to another or that of close blood relatives violated *public* order and good morals.[11] What may be a surprise is that the marriage of a woman within ten months of the dissolution of her marriage to another[12] or the marriage of an adulterer to his accomplice was also absolutely null in Louisiana until the 1970s.[13] These marriages were considered as violative of the public interest as bigamous or incestuous marriages, although for different reasons. The marriage of a woman within ten months of dissolution of her prior marriage could create the potential issue of *two* legal fathers, one the husband of the

10. Spaht, *The Last One Hundred Years*, *supra* note 2, at 247–50, 268–75.

11. *Id.* at 250–61. The proscriptions against bigamous marriages and incestuous marriages still survive in Louisiana. *See* LA. CIV. CODE ANN. arts. 88, 90 (West 2003).

12. LA. CIV. CODE art. 137 (1870) (repealed 1970) (compiled in 16 LA. CIV. CODE ANN. (West 1973)) ("The wife shall not be at liberty to contract another marriage, until ten months after the dissolution of her preceding marriage.").

13. LA. CIV. CODE art. 161 (1870) (repealed 1972) (compiled in 16 LA. CIV. CODE ANN. (West 1973)). *See* Spaht, *The Last One Hundred Years*, *supra* note 2, at 256–61.

mother at the time of the child's conception and the other, the husband of the mother at the time of birth. That dilemma could ultimately adversely affect the child and his legal rights. The "rights" and desires of adults simply had to yield to the potential interest of a child who would suffer as a result of the adult's desire to remarry. As to prohibiting the marriage of an adulterer to his accomplice, the obvious purpose was to protect the marriage relationship from third persons; the denial of a subsequent right to marry removed one incentive for seduction since an affair with a married person precluded his remarriage to his co-respondent. Other provisions of the Louisiana Civil Code reinforced the barrier around the marital relationship; the law denied to the children of such adulterous (and incestuous) unions rights afforded to other illegitimate children not conceived or born under such circumstances.[14] Moreover, if the innocent spouse obtained a divorce on grounds of adultery, that spouse was awarded custody of any minor children of the marriage.[15] Indeed, there were other punitive legal consequences imposed upon a spouse who engaged in egregious behavior. Other states chose different mechanisms as barriers around the marriage relationship, such as the alienation of affection action; but all had legal barriers to protect marriage from external threats.

Marriage was also protected from internal threats by creating legal obstacles to its dissolution and prescribing what constituted the conduct expected of a "good" spouse. *Fault* grounds for separation and divorce were especially articulate in describing the public's expectation as to how spouses should act toward each other: (1) faithfully, by not sharing his or her sexual potential with another person (adultery); (2) not criminally, in the form of a felony punishable by physical separation (conviction of a felony and sentenced to death or imprisonment at hard labor); (3) not cruelly, either physically or mentally, and not intemperately; (4) willingly living together (abandonment without lawful

14. *See, e.g.*, LA. CIV. CODE art. 245 (1870) (repealed 1979) (compiled in 16 LA. CIV. CODE ANN. (West 1973)) (requiring support of such children only by mothers, not fathers); LA. CIV. CODE art. 920 (1870) (compiled in 16 LA. CIV. CODE ANN. (West 1973)) (revised, amended, and reenacted by 1982 La. Acts 919 § 1) ("Bastard, adulterous or incestuous children shall not enjoy the right of inheriting the estates of their natural father or mother . . . .").

15. LA. CIV. CODE art. 161 (1870) (repealed 1972) (compiled in 16 LA. CIV. CODE ANN. (West 1973)) ("In case of divorce, on account of adultery, the guilty party can never hereafter contract matrimony with his or her accomplice in adultery, under the penalty of being considered and prosecuted as guilty of the crime of bigamy, and under the penalty of nullity of the new marriage . . . .").

cause and a constant refusal to return); (5) not publicly defaming each other (public defamation); (6) not attempting to kill each other (an attempt on the life of the other spouse); and (7) adequately supporting the other spouse (intentional non-support of a spouse in destitute or necessitous circumstances).[16] Each spouse owed the obligations of fidelity, support, and assistance;[17] thus, the grounds for separation and divorce were the remedies provided for breach of those obligations. Although it was not a constituent part of the law regulating rights and duties of married persons, the law of separation and divorce spoke eloquently:[18] "Certain conduct was so egregious and such a serious violation of one's marital obligations that the law permitted the aggrieved spouse to seek a separation from bed and board, which did not have the effect of terminating the marriage, or, if the conduct was especially egregious, a divorce."[19]

The assumption historically in the law of marriage—entry into marriage, who can marry, content of marriage, and grounds for dissolution—was that marriage was a *public,* albeit *natural,* institution. How one entered marriage and with whom, as well as the conduct of spouses during the marriage, were matters of utmost concern to the community in which the married couple lived, including most importantly their own children. Spouses "were to behave toward each other civilly and compassionately so that the marriage might serve the public interests of channeling the two adults' sexual passions into marriage and of assuring that the acculturation of any children born of the union be done in a cooperative and caring manner."[20] Furthermore, "[e]ach spouse was to yield to the other in sexual matters as long as the request was reasonable and to conduct himself so as not to bring dishonor and shame to the family formed by the marriage, which could occur by adulterous affairs, outrageous or felonious behavior, and constant intemperance."[21] The rest of society "had expectations about a married person's conduct and if those expectations were not met, although deeply interested in preserving the stability of marriages, society was willing to yield to the individual desires of the aggrieved spouse."[22]

16. LA. CIV. CODE art. 138 (1870) (repealed 1990) (compiled in 16 LA. CIV. CODE ANN. (West 1973 & Supp. 2003)).

17. LA. CIV. CODE art. 119 (1870) (repealed 1997) (compiled in 16 LA. CIV. CODE ANN. (West 1973)).

18. Spaht, *The Last One Hundred Years, supra* note 2, at 294.

19. *Id.* at 293.

20. *Id.* at 294.

21. *Id.*

22. *Id.*

By examining the evolution of marriage law over the last century, it is easier "to see the withdrawal of the expression of public interest in marriage through changes in the laws of divorce . . . and of the legal content of marriage[:] [o]ver the last century, the law found significantly less to prohibit, less to protect, and less to regulate."[23] To evolve from "an institution that could not be terminated by the spouses to a 'relationship' that can be ended by the decision of one spouse alone for no good or sufficient reason is a radical revolution."[24] As the law has withdrawn from regulating marriage, it is not unreasonable for our citizens to believe that marriage is a private relationship, the content of which can be created by the parties, for the parties, and for their individual fulfillment and satisfaction. Marriage in effect has been "privatized."

Even by its absence, law can shape culture in destructive ways.[25]

II. RECONSTRUCTION BY *RE*-REGULATION OF MARRIAGE: WHAT MIGHT IT LOOK LIKE?

Culture does not exist in a legal vacuum . . . . For law is necessary to civilization. Even the absence of law—the choice to omit or remove legal regulation in some area of cultural life—shapes culture, for better or for worse. . . . Alone, it cannot cure moral defects in a people. It can, however, change people's sense of their hierarchy of values and of what finally falls out of the realm of acceptable behavior. Law teaches more than it prevents.[26]

By concentrating upon *re*-regulating the content of the marriage relationship, I do not intend to ignore the need for greater legal regulation of entry into marriage (with mandatory or permissive pre-marital counseling), or of dissolution of marriage through various divorce reform efforts. However, one area of legal *re*-regulation often overlooked is the content of the marriage relationship itself, personal rights and obligations. The content of marriage, how spouses are to act toward each other, has suffered from the trend toward private ordering in marriage. The retreat of law from regulation of the content of marriage means that the spouses are now free to "regulate" themselves, with few exceptions, as they see fit. Yet, any sort of custom related to the content of marriage, such as monogamy or perma-

23. *Id.* at 301.

24. *Id.*

25. Francis Cardinal George, Law and Culture, Dedication Address at Ave Maria School of Law (Mar. 21, 2002), *in* 1 AVE MARIA L. REV. 1, 13 (2003).

26. *Id.* at 16-17.

nence, necessarily requires "a culture" that supports it; "monogamy . . . cannot be practiced by an individual."[27]

A civil law jurisdiction may have a natural advantage over a traditional common law jurisdiction in re-regulating the content of marriage. The natural advantage results from the fact that the law of the family, including that of husband and wife, is the subject of codification in a civil law jurisdiction. In other words, a civil law jurisdiction is not dependent upon judicial decisions to formulate and reassert legal regulation of the content of marriage. Nor is a civil law jurisdiction confined to the ordinary type of statutory regulation in a common law jurisdiction—narrowly tailored legislation to solve a particular problem. In a civil law jurisdiction, a statute drafter may craft a law stating general principles about the content of marriage, some with legal consequences intended to constrain or punish and others intended to be simply hortatory. To that extent the statute drafter in a civil law jurisdiction enjoys a luxury that the drafter in the ordinary common law jurisdiction does not.

Currently under the law of Louisiana, whose private law is derived from civil law jurisdictions (France and Spain), there are three statutory obligations imposed upon a wife and a husband.[28] These obligations are personal not patrimonial.[29] Louisiana Civil Code article 98 simply states:

> Married persons owe each other fidelity, support, and assistance.[30]

The official comments explain the meaning of each of the three words. *Fidelity* "refers not only to the spouses' duty to refrain from adultery [negative aspect of fidelity], but also to their mutual obligation to submit to each other's reasonable and

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27. *Id.* at 13, *quoting* JOSEPH RAZ, THE MORALITY OF FREEDOM 162 (1986).

28. LA. CIV. CODE ANN. art. 98 (West 2003). The author is the Reporter of the Marriage/Persons Committee of the Louisiana State Law Institute; Article 98 and the revision of the law of marriage was proposed by her committee and ultimately the Council of the Law Institute. However, the author had suggested a far more comprehensive regulation of marriage which more closely resembles the articles that follow in this section. The Committee rejected the recommendations, preferring to permit the spouses to *privately* arrange their own personal, day-to-day relationship. *See* Spaht, *The Last One Hundred Years*, *supra* note 2, at 296.

29. An entirely different Book and Title of the Civil Code of Louisiana governs the patrimonial (property) rights and obligations of spouses—Book III, Title VI, LA. CIV. CODE ANN. arts. 2325–2437 (West 2003). Book I, Title IV contains the law of husband and wife (personal obligations). *See* LA. CIV. CODE ANN. art. 98, cmt. g (West 2003); *see also* KATHERINE SHAW SPAHT, FAMILY LAW IN LOUISIANA 117–40 (3d ed. 2003).

30. LA. CIV. CODE ANN. art. 98 (West 2003).

normal sexual desires [positive aspect of fidelity]. The jurisprudence has held that the latter obligation is a necessary concomitant of marriage."[31] *Support*, under earlier jurisprudence is "limited to furnishing the necessities of life. . . . Nevertheless, the term 'support' has been construed to include the cost not only of food, clothing and shelter, but also of operating such conveniences as telephones, home appliances, and an automobile."[32] *Assistance* "includes the personal care to be given an ill or infirm spouse"[33] or more broadly construed, cooperation in the accomplishment of all tasks necessary for the spouses' life in common. Although there is no longer an explicit obligation imposed upon the spouses to live together, the obligations of fidelity (positive), support, and assistance require that the spouses do live together for significant periods of time.[34] The consequences of a breach of the three obligations by a spouse are to afford the other aggrieved spouse grounds for divorce, in the case of a breach of the negative obligation of fidelity,[35] and, in other cases, denial of support because of *fault* on the part of the claimant spouse.[36] For an economically secure spouse, the only breach of any of the three obligations with consequences is the breach of the obligation of fidelity.[37]

The article in the Louisiana Civil Code that follows Article 98 is both to exhort and to introduce the whole subject matter of parental authority:

> Spouses mutually assume the moral and material direction of the family, exercise parental authority, and assume the moral and material obligations resulting there-from.[38]

Spouses, the article directs, are to assume the direction of the family, both in terms of moral instruction and direction but also material, or economic, direction. They, by marrying, assume the *moral* and *material* obligations resulting from the imposition of responsibility for such *direction*. In fact, there are material obligations owed to the *family*, defined in a limited sense as father,

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31. LA. CIV. CODE ANN. art. 98, cmt. b (West 2003).

32. *Id.*, art. 98, cmt. c.

33. *Id.*

34. *Id.*, art. 98, cmt. f ("[S]pouses are free to live together as necessary to fulfill their obligation mutually to support, assist, and be faithful to each other.").

35. LA. CIV. CODE ANN. art. 103 (West 2003).

36. LA. CIV. CODE ANN. art. 111 (West 2003) (requiring a spouse to be without fault to be eligible for spousal support).

37. *See* LA. CIV. CODE ANN. art. 103(2) (West 2003) (adultery).

38. LA. CIV. CODE ANN. art. 99 (West 2003).

mother, and children;[39] support owed to children and other descendants,[40] as well as their maintenance and education. The reference in Article 99 to "parental authority" refers to an entire title of Book I devoted to the authority of parents over their children. Added in 1987, the article's source was the Quebec Civil Code.[41]

By surveying and comparing some of the other Civil Codes throughout the world[42] there are additional provisions which could easily be adopted to add strength and vitality to the legal content of marriage. Some of the proposed statutes are obligatory articles to which certain consequences are or could be attached (*shall*), and other articles are merely hortatory (*should*). The following examples of such articles have been adapted and the language modified from the original and its translation; these examples are also not exhaustive of the content of every European or European-derived Civil Code.

Spousal Obligations:

- Spouses owe each other respect, fidelity, succour, and assistance.[43]
- Spouses are bound to live together,[44] unless there is good cause otherwise.[45]

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39. LA. CIV. CODE art. 3506(12) (West 2003).

40. *Id.* arts. 227, 229. The latter imposes a limited *lifetime* obligation upon ascendants for the support of their descendants and vice versa; the obligation is relatively unique to Western [historically European] civil law jurisdictions.

41. *Id.* art. 99, annot. (West 1999). *See* CODE CIVIL [C. CIV.] art. 394 (Que.) ("The spouses together take in hand the moral and material direction of the family, exercise parental authority, and assume the tasks resulting therefrom.").

42. *See, e.g.*, FAMILY CODE [FAM. CODE] OF THE PHILIPPINES; CÓDIGO CIVIL [C.C.] arts. 66–71 (Spain); C. CIV. arts. 392–415 (Que.); CODICE CIVILE [C.C.] arts. 143–48 (Italy); CODE CIVIL [C. civ.] arts. 212–26 (Fr.); CÓDIGO CIVIL [C.C.] arts. 137–40 (Venez.). Translations of the Italian Civil Code, Spanish Civil Code, and Venezuelan Civil Code were the work of my research assistance, Mr. Crosby C. Lyman, to whom I am deeply indebted.

43. C. CIV. art. 392 (Que.) ("[T]hey owe each other respect, fidelity, succour and assistance . . . .").

44. *Id. See also* C.C. art. 137 (Venez.); FAM. CODE art. 68 (Phil.); C.C. art. 68 (Spain); C.C. art. 143 (Italy).

45. Consider the following provision of the FAM. CODE art. 69 (Phil.): "The court may exempt one spouse from living with the other if the latter should live abroad or there are other valid and compelling reasons for the exemption. *However, such exemption shall not apply if the same is not compatible with the solidarity of the family.*" *Id.* (emphasis added).

- The spouses shall determine by mutual consent the family (or conjugal) residence,[46] according to their requirements and those of the family.[47]
- Spouses are obliged to observe mutual love and respect.[48]
- Spouses mutually oblige themselves to a community of living.[49]
- Spouses should reciprocally attend to the satisfaction of the other's needs.[50]
- The management of the household shall be the right and the duty of both spouses.[51]

Familial Obligations:[52]

- Spouses by mutual consent after collaboration[53] shall make decisions relating to family life.[54]
- Spouses should act in the interest of the family.[55]
- Marriage obligates the spouses to maintain, to teach, and to educate their children in accordance with their capaci-

46. C.C. art. 70 (Spain): "The spouses will determine by common consent the conjugal residence and, in case of discrepancy, the judge will resolve the dispute, keeping in mind the interest of the family." *See also* FAM. CODE art. 69 (Phil.); C. CIV. art. 215 (Fr.); C.C. art. 140 (Venez.).

47. C.C. art. 144 (Italy).

48. FAM. CODE art. 68 (Phil.).

49. C. CIV. art. 215 (Fr.).

50. C.C. art. 139 (Venez.) ("This obligation ends if a spouse is removed from the common residence without just cause. If a spouse fails to comply with the above obligations, without just cause, the other spouse may petition for judicial enforcement of the obligations.").

51. FAM. CODE art. 71 (Phil.) ("The expenses for such management shall be paid in accordance with the provisions of Article 70 [joint responsibility; paid first from community property].").

52. *See also* Katherine Shaw Spaht, *The Family as Community: Implementation of the "Children-First" Principle, in* MARRIAGE IN AMERICA: A COMMUNITARIAN PERSPECTIVE, 235–56 (Martin King Whyte ed. 2000).

53. C.C. art. 143 (Italy) ("From the marriage derives the reciprocal obligation to be faithful, to provide moral and material assistance, to collaborate in the interest of the family, and to cohabitate.").

54. C.C. art. 140 (Venez.).

55. C.C. art. 67 (Spain). The Quebec Civil Code actually creates a "family patrimony": "Marriage entails the establishment of a family patrimony consisting of certain property of the spouses regardless of which of them holds a right of ownership in that property." C. CIV. art. 414 (Que.). Article 415 lists in detail what property constitutes a part of the "family patrimony."

ties, natural inclination, and aspirations,[56] and to prepare them for their future.[57]

- Spouses must contribute to the needs of the family in proportion to their actual capacity, be it economic or in service within the household.[58]
- Spouses shall contribute to the expenses of the marriage, such as the care and maintenance of the common home, in proportion to their respective means.[59] Each spouse may incur an obligation that relates to an expense of the marriage, which includes the support of the household and education of the children,[60] and this obligation shall be joint[61] (and several[62] or solidary[63]).

Remedies for General Breach of Obligations:

- When one of the spouses neglects his or her duties to the conjugal union or commits acts which tend to bring danger, dishonor or injury to the other or to the family, the aggrieved party may apply to the court for relief.[64] (*Relief* could consist of an order of support, injunctive relief in the form of a temporary restraining order, or other appropriate legal mechanisms.)

The only potential legal obstacle to the *re*-regulation of the content of marriage is *Lawrence v. Texas*.[65]

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56. C.C. art. 147 (Italy) ("The marriage imposes the obligation on the spouses to maintain, to teach and to educate the offspring taking into account the capacity, the natural inclination and the aspirations of the sons."); *see also* LA. CIV. CODE ANN. art. 99, *supra* note 38 and accompanying text; C. CIV. art. 394 (Que.).

57. C. CIV. art. 213 (Fr.).

58. C.C. art. 143 (Italy).

59. C. CIV. art. 213 (Fr.). *See also* LA. CIV. CODE ANN. art. 2373 (West 1985) (applying to spouses who choose a separation of property regime).

60. C. CIV. art. 220 (Fr.).

61. FAM. CODE art. 70 (Phil.) ("The spouses are jointly responsible for the support of the family.").

62. C. CIV. art. 220 (Fr.) ("Each one of the spouses has the power to make alone contracts which relate to the support of the household or the education of children: any debt thus contracted by the one binds the other jointly."). Nevertheless, joint and several obligations do not arise as regards expenditures that are manifestly excessive with the reference to the way of living of the household, to the usefulness or uselessness of the transaction, to the good or bad faith of the contracting third party. *Id. See also* LA. CIV. CODE ANN. art. 2372 (West 1985) (source: C. CIV. art. 220 (Fr.)) (applying to spouses who choose a separation of property regime).

63. *See* LA. CIV. CODE ANN. art. 1794 (West 1987) (providing 'solidary' as a civil law term for joint and several).

64. FAM. CODE art. 72 (Phil.).

65. 123 S. Ct. 2472 (2003).

III. THE THREAT TO *RE*-REGULATION OF MARRIAGE POSED BY *LAWRENCE V. TEXAS*

To assess the threat that the *Lawrence* case poses to a legal *re*-regulation of marriage, it is necessary to examine carefully the emphasis of the author of the opinion, Justice Kennedy, upon certain distinguishing features of the Texas legislation. The Texas statute was declared unconstitutional under the due process clause of the Fourteenth Amendment because (1) *the Texas statute was a criminal statute punishing acts of adult, consensual sexual intimacy in the home.* Such acts are, according to the majority, within the protected "liberty" interest of adults:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . . Freedom extends [however] beyond spatial bounds. *Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.*[66]

The special offensiveness of the criminal nature of the statute according to Justice Kennedy is that: "[i]f protected conduct [adult, consensual, sexual intimacy in the home] is made criminal and the law which does so remains unexamined for its substantive validity, its stigma might remain even if it were not enforceable as drawn for equal protection reasons."[67] Furthermore,

> [w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. . . . Its continuance as precedent demeans the lives of homosexual persons.

The stigma this criminal statute imposes, moreover, is not trivial [even though it is a Class C misdemeanor].[68]

Justice Kennedy likewise emphasized that (2) *the case did not involve minors,* "persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused."[69] (3) Nor, *did the case "involve public conduct or prostitution."*[70] In addition, Justice Kennedy assures us, (4) "[i]t *does not*

66. *Id.* at 2475 (emphasis added).
67. *Id.* at 2482.
68. *Id.*
69. *Id.* at 2484 (emphasis added).
70. *Id.* (emphasis added).

involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter."[71]

> The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an *institution* the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons. When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. *The liberty protected by the Constitution allows homosexual persons the right to make this choice.*[72]

Forgive me, but I am not reassured.

The implications of the decision in *Lawrence* for proposed new statutory regulation of the content of marriage lie in its recognition and description of the "liberty" interest protected under the Fourteenth Amendment. *Bowers v. Hardwick*,[73] expressly overruled in the *Lawrence* case,[74] clearly limited "fundamental rights" recognized within the concept of "liberty" and protected by the Fourteenth Amendment to those "deeply rooted in this Nation's history and tradition."[75] That categorization of the "liberty" interest of an individual to be free from unnecessary governmental regulation and intrusion anchored "liberty" to the history and traditions of our country and established certain parameters beyond which the Court could not stray to nullify state law. Contrary to Justice Kennedy's declaration that "there has been no individual or societal reliance on *Bowers* of the sort that could counsel against overturning its holding,"[76] scholars, legislators, and policymakers *have relied* upon the definition of

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71. *Id.* (emphasis added).

72. *Id.* at 2478 (emphasis added).

73. 478 U.S. 186 (1986).

74. *Lawrence*, 123 S. Ct. at 2484 ("*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.").

75. *Bowers*, 478 U.S. at 194.

76. *Lawrence*, 123 S. Ct. at 2483.

"liberty" in the *Bowers* case since it was decided. I was one of them, in my capacity as scholar and as legislator.[77]

Unanchored from and unmoored to our history and traditions, the "liberty" interest Justice Kennedy finds in the Fourteenth Amendment "presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[78] That "liberty" interest is both spatial and transcendent.[79] The transcendental dimension of the "liberty" from governmental intrusion to which the Justice refers includes personal decisions relating to marriage [entry into marriage], procreation, contraception, family relationships, child rearing and education—decisions "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy . . . ."[80] But, among the most radical of statements contained in the entire opinion is the following: "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life."[81] *Breathtakingly radical individual autonomy.*[82] With the pulling up of the anchor of the "liberty" interest which sets us adrift from our history and traditions, Justice Kennedy expressly rejects as a part of the project of defining "liberty" the considera-

77. In Michael H. v. Gerald D., 491 U.S. 110, 127 (1989) the majority opinion relied upon the same definition of "liberty" interest to uphold the constitutionality of a California statute that denied to a biological father the right to institute a filiation action against his child born to a married woman whose husband was thus presumed to be the father of the child. *See id.* at 127 n.6.

As a drafter of statutes, most recently of a revision of the law of filiation, I relied upon footnote 6 for the proposition that the due process clause of the Fourteenth Amendment of the United States Constitution does not require that when a child has a legal father (husband of the mother) the biological father must be allowed to institute a filiation action to establish his paternity and seek custody or visitation.

78. *Lawrence*, 123 S. Ct. at 2475.

79. *Id.*

80. Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 851 (1992).

81. *Id., quoted in Lawrence*, 123 S. Ct. at 2489.

82. *See Lawrence*, 123 S.Ct. at 2484 ("They [drafters and ratifiers of the Due Process Clause] knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in *their own search for greater freedom.*") (emphasis added).

It is possible to conceive of a decision by a federal court, even the Supreme Court itself, that finds within the fundamental right to marry, the fundamental right to remarry (since it need not be a part of our historical traditions) which may necessarily include obtaining a divorce (without undue governmental interference)—divorce "piggybacks" on remarriage to create a fundamental right to divorce.

tion of "religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family."[83] The Justice admits that these considerations are not "trivial," but indeed are "profound and deep convictions accepted as ethical and moral principles to which [citizens] aspire and which thus determine the course of their lives."[84] However, *we* must not "'mandate *our own moral code.*'"[85] That is what *we* have always done. Not surprisingly, Justice O'Connor's separate opinion, like so many of her other opinions which lack logical rigor,[86] seeks to distinguish good and acceptable laws that "preserve the traditions of society" from those bad and unacceptable laws that "express moral disapproval."[87] *A distinction without a difference.*

With radical individual autonomy now at the heart of the "liberty" interest of the Due Process Clause, there appear to be *no* parameters within which that "liberty" dwells. Furthermore, there appears to be no consideration in the identifying and protecting of this evolving "liberty," of the impact such decisions by one individual may have on others—not even on an existing spouse or children. Nor is there any apparent hesitation in creating a broad right of autonomy that attaches to one individual which will inevitably come into conflict with the same right of other individuals. How are those conflicts to be resolved? Whose right to autonomy "trumps?" At the heart of the *re*-regulation of marriage by the law is governmental regulation (interference) within the home (geographical dimension of "liberty") of adult, consensual, intimate, and in some cases, sexual behavior (transcendent dimension). The legal obligation of a spouse not to share her sexual potential with another and to submit to the reasonable sexual desires of her husband is not punishable criminally nor does it involve public criminal behavior. However, the obligation does involve mandating *our* shared moral code, principally the result of deep religious convictions. And, although it is

83. *Id.* at 2480.

84. *Id.* Comparing the language of Justice Stevens in his dissenting opinion in *Bowers*, the words are almost identical. *See* Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (arguing that neither the history nor tradition of immoral conduct held by a majority of state citizens is relevant to a decision about the fundamental nature of a right recognized under the Fourteenth Amendment).

85. *Lawrence*, 123 S. Ct. at 2484.

86. *See, e.g.*, Troxel v. Granville, 530 U.S. 57 (2000) (holding a Washington state statute affording broad visitation rights to non-parents unconstitutional as "applied" to the grandparents asserting such a right). For two years scholars and legislators have tried to determine what the *Troxel* decision means for other state visitation statutes with little success.

87. *Lawrence*, 123 S. Ct. at 2488 (O'Connor, J., concurring).

not a *criminal* statute, it may have serious consequences for the spouse who makes the *wrong* choice—divorce and/or denial of spousal support. Without objective limitations in the nature of the common good on "liberty" as radical individual autonomy, any distinction drawn between a *criminal* statute and a *civil* statute seems weak and arbitrary, and in the end unpersuasive.

At the end of the twentieth century after suffering through the sexual revolution, the therapeutic revolution, the feminist revolution, and the divorce revolution,[88] a nascent counter-revolution aimed at restoring traditional marriage has begun, both at the elite opinion level and at the grassroots level. Science, both physical and social, is revealing that long-held traditions, customs, and moral beliefs, many of which are derived from religion, are demonstrably correct. Thus, a question to ponder is whether Justice Scalia, who observed that later generations can change their minds, is right: "[I]t is the premise of our system that those judgments are to be made by the people, and not imposed by a governing caste that knows best."[89] A governing caste of five, unelected, unaccountable judges? Can they arrest the counter-revolution to rescue and reinvigorate marriage and the traditional family? Can they arrest this counter-revolution launched solely for the protection of children?

IV. ACTION PLAN

If the revitalization of marriage and its content through legal regulation is threatened by the United States Supreme Court, *we* should know it sooner rather than later. The only way to know if the threat is real, not imagined, is to enact legislation and await constitutional litigation. It would be a service to the people of this country to expose the threat of a "governing caste" of five Supreme Court justices, if indeed *Lawrence* foreshadows such power. Should the eventuality be that the "liberty" interest of the due process clause of the Fourteenth Amendment prevents legal regulation of the content of marriage, there is another solution suggested by constitutional jurisprudence.

A "liberty" interest incorporated within the Due Process Clause may be waived as long as the waiver is *voluntary* and *knowing*.[90] For states with a covenant marriage law,[91] such as Louisi-

88. *See* Katherine Shaw Spaht, *Revolution and Counter-Revolution: The Future of Marriage in the Law*, 49 LOY. L. REV. 1, 1–2 (2003).

89. *Lawrence*, 123 S. Ct. at 2497 (2003) (Scalia J., dissenting).

90. *See* Illinois v. Rodriguez, 497 U.S. 177 (1990) (discussing voluntary and knowing waiver of Fourth Amendment rights in the context of criminal law); Connick v. Myers, 461 U.S. 138 (1983) (discussing First Amendment rights

ana,[92] Arkansas,[93] and Arizona,[94] legal regulation of the content of marriage would be consistent with the covenant spouses' choice of a more highly regulated form of marriage, a form distinguished by the obligation to take reasonable steps to preserve their marriage if difficulties arise and by the more restrictive grounds for divorce. To add legal content to the marital relationship during its existence would be unobjectionable to the couples who choose covenant marriage; they are qualitatively different in a myriad of ways from the general population of "standard" couples.[95] Even more importantly, pre-marital counseling is mandatory and it is during the pre-marital counseling that the couple receives information about the content of a covenant marriage. That information comes from the government in the form of a pamphlet prepared by the Attorney General.[96] The covenant couple must execute an affidavit (in the presence of a notary) attesting to having received pre-marital counseling (accompanied by an attestation by the counselor) and to *having read the Attorney General's pamphlet.*[97] Additional information in the pamphlet about newly enacted laws regulating a spouse's behavior toward the other during marriage and their joint responsibility to the members of the new family being formed would be a simple matter. The affidavit executed by both spouses attesting to having read the pamphlet[98] should suffice as a voluntary and knowing waiver of their "right to be free from governmental regulation of their adult, consensual, intimate relationship" and, furthermore, constitute adequate proof of the waiver.

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in government employment context); Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (discussing waiver of Fourth Amendment rights against unreasonable searches); Johnson v. Zerbst 304 U.S. 458 (1938) (discussing waiver of Sixth Amendment rights to legal counsel).

91. Covenant marriage legislation permits couples who wish to marry a choice of a more binding and restrictive form of marriage than the current "no-fault" divorce legislation. The three distinct features of a covenant marriage statute are mandatory pre-marital counseling, a legally binding agreement obligating the spouses to take reasonable steps to preserve their marriage if difficulties arise, and restricted grounds for divorce.

92. LA. REV. STAT. ANN. § § 272–275.1 (2000).

93. ARK. CODE ANN. § § 9-11-801 to -811 (2001).

94. ARIZ. REV. STAT. ANN. § § 25-901 to -906 (2000).

95. STEVEN N. NOCK ET AL., INTIMATE EQUITY: THE EARLY YEARS OF COVENANT AND STANDARD MARRIAGES 6 (2003), *available at* http://www.bgsu.edu/organizations/cfdr/research/pdf/2003/2003_04.pdf (on file with the Notre Dame Journal of Law, Ethics & Public Policy).

96. LA. REV. STAT. ANN. § 9:237 (2000).

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

98. *Id.*

CONCLUSION

There is a hunger among a growing number of Americans, young and old, even the cynical, to recapture the mystery and stability of the institution of *marriage*. One of many possibilities using the law as the collective voice of the citizenry is to *re*-regulate the content of marriage. A legal system that permits the two spouses to regulate their own relationship without direction concerning their behavior toward each other or their children suggests a lack of interest and concern for marriage by the broader community. Nothing could be further from the truth, yet by the withdrawal of law from the regulation of marriage, couples believe that *their* marriage is a creation of their own, intended for their individual happiness. By withdrawing from the regulation of marriage, society has abandoned their interest in the relationship to the significant detriment of children. Surely no one could have predicted that parents would themselves by the end of the twentieth century assume that their individual interests and desires mattered more than their duty to their own children. Nonetheless, they do. It is time to reassert the public's interest in marriage by subjecting its content to legal regulation, an expression of society's expectations for every marriage. To the extent that *Lawrence v. Texas* poses a constitutional threat to such *re*-regulation, that threat should be exposed and the raw and undisguised usurpation of power by the Supreme Court confronted.

Even if *Lawrence* prohibits the statutory *re*-regulation of marriage, there is a viable alternative for such *re*-regulation—covenant marriage legislation. I have on numerous occasions[99] argued that covenant marriage legislation offers to those people of the dissident culture, either those who belong to a religious community or those who adhere to traditional morality, a safe haven from the post-modern, dominant culture. *Lawrence v. Texas* adds new urgency to the construction of "safe havens" for all who desire protection from a corrosive culture advanced by an elite, "governing caste." Within a "safe haven," spouses who desire to restore the institution of marriage may offer themselves collectively as witnesses to others about sacrificial love and its central role in binding male and female to each other and their offspring. Marriage itself for such couples is a transcendent real-

99. *See, e.g.*, Katherine Shaw Spaht, *Why Covenant Marriage May Prove Effective as a Response to the Culture of Divorce, in* REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY: AN AGENDA FOR STRENGTHENING MARRIAGE 59–69 (Alan J. Hawkins et al. eds., 2002); Katherine Shaw Spaht, *Marriage: Why a Second Tier Called Covenant Marriage?*, 12 REGENT U.L. REV. 1 (1999–2000).

ity,[100] a virtual legal personality deserving of the ultimate deference. The opposite of radical individual autonomy. And it is a choice, an exercise of free will.

100. *See* NOCK ET AL., *supra* note 95.