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Nostalgic Attempts to Recapture What Never Was: Louisiana's Covenant Marriage Act

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Nostalgic Attempts to Recapture What Never Was: Louisiana's Covenant Marriage Act

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I. INTRODUCTION: THE STATE OF THE MARITAL UNION

There are widespread concerns nationwide about the impact of the towering divorce rate currently plaguing this nation. Roughly fifty percent of new marriages entered into today can expect to end in divorce.¹ Most Americans are aware that divorce rates in the United States rose steadily through the seventies and through the mid-eighties.² In fact, the divorce rate has been rising since the mid-nineteenth century.³ What many do not know is that the precipitous increase has

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1. See Kristi Wright, *Until Death Do Us Part; Covenants, Other Programs Help Couples Keep Their Vows*, OMAHA WORLD-HERALD, Dec. 28, 1997, at 1E.

2. See 39 NATIONAL CENTER FOR HEALTH STATISTICS, No. 12, SUPP. 2, MONTHLY VITAL STATISTICS REPORT 7 (divorce rate in 1940 was 2.0 per 1000 population; 4.0 percent per 1000 population in 1972 and 5.0 in 1985).

3. See Andrew Cherlin, *The Trends: Marriage, Divorce, Remarriage*, in FAMILY IN TRANSITION 80, 83-87 (Arlene Skolnick & Jerome Skolnick eds., 5th ed. 1986).

leveled off and remained steady since the mid-eighties.⁴ Nevertheless, many Americans, and especially their lawmakers, are extremely interested in curbing the American divorce rate. Anyone who has experienced the impact of a divorce would say that this is a worthwhile aspiration.

Divorce wreaks havoc on children and on families, both economically and socially. These effects are well documented. Increasing numbers of children are raised in single-parent families.⁵ Single-parent families earn significantly less on average than two-parent households.⁶ Fathers, in the aggregate nationwide, are behind in child support payments totaling several billion dollars.⁷ Children raised in single-parent homes are more likely to suffer from behavioral and emotional problems, to become sexually active, to use drugs, and to fare poorly in school.⁸ Commentators refer to the American family as being in crisis. The previously mentioned conditions indicate that this could be correct.

Given the plight involved in the culture of divorce, many have begun searching for ways to fix the near preponderance of broken American marriages. Taking what some feel is a rather myopic view, many lawmakers and commentators have begun putting the blame for the staggering divorce rate on no-fault divorce laws. In almost every state legislature, the nostalgic yearning for some return to the previous regime of fault divorce law can be found, and Louisiana is one state that passed legislation aimed at putting some fault back into divorce proceedings.⁹

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4. See *id.*; see also Edward B. Furey Jr., *The Dwindling Divorce Rate*, *NEWSDAY*, Oct. 1, 1997, at A49 (The divorce rate in the United States peaked in 1980 at 5.2 per 1000 populations compared to 4.6 per 1000 population in 1994 down from 4.7 per 1000 population in each of years 1992, 1991 and 1990).
 5. See DANIEL PATRICK MOYNIHAN, *FAMILY AND NATION* 147 (1986)(Female-headed households are expected to grow at five times the rate of two-parent households in the last two decades of the 1900s).
 6. According to the statistics of the Census Bureau, "[t]he median income for a married couple with children in 1994 was \$47,244; for a household headed by a single mother, it was \$14,902." Dana Milbank, *Blame Game: No-Fault Divorce Law is Assailed in Michigan, and Debate Heats Up*, *WALL ST. J.*, Jan. 5, 1996, at A1.
 7. The estimated amount of child support that was not paid in 1985 was 3.7 billion. See Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, in *DIVORCE REFORM AT THE CROSSROADS* 166, 174 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).
 8. See Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 *VA. L. REV.* 9, 31-2 (1990)(citing studies that demonstrated that "children of divorce exhibited more delinquent and antisocial behavior, used more mental health services, and performed worse in school").
 9. See *Covenant Marriage Act*, *LA. REV. STAT. ANN.* §§ 9:272-73 (West Supp. 1998). The Act took effect on August 15, 1997.

Louisiana enacted legislation that will allow its state's couples to opt to have a "covenant marriage" rather than a standard marriage. The language of the statute reads:

A covenant marriage is a marriage entered into by one male and one female who understand and agree that the marriage between them is a lifelong relationship. Parties to a covenant marriage have received counseling emphasizing the nature and purposes of marriage and the responsibilities thereto. Only when there has been a complete and total breach of the marital covenant commitment may the non-breaching party seek a declaration that the marriage is no longer legally recognized.¹⁰

As this language indicates, the legislation precludes couples who have chosen to have a "covenant marriage" from access to the state's general no-fault divorce law. The law declares that covenant marriage couples may only have their marriage dissolved when a "non-breaching party" can show that there has been a "complete and total breach of the marriage covenant commitment."¹¹ The legislation sets forth "exclusive means to terminate a covenant marriage."¹² These means do not include the ground of "living apart," or a six month separation, which is available in the no-fault divorce law.¹³ However, the covenant marriage can be dissolved after two years of separation.¹⁴ Couples choosing covenant marriage must also document that they received pre-marital counseling and agree to undergo counseling before seeking a divorce.¹⁵

Legislators in Louisiana and other like-minded advocates hope that solutions such as "covenant marriage" will induce couples to enter marriage more solemnly and be less likely to seek divorce.¹⁶

10. LA. REV. STAT. ANN. § 9:272 (West Supp. 1998).

11. *Id.* § 9:272A.

12. Historical and Statutory Notes to LA. REV. STAT. ANN. § 9:272 (West Supp. 1998).

13. Compare LA. REV. STAT. ANN. § 9:307 (West Supp. 1998) (setting forth the "exclusive grounds" for dissolution of a covenant marriage) with LA. CIV. CODE ANN. art. 103(1) (West 1993) (setting forth the no-fault divorce ground for ordinary marriages in Louisiana).

14. See LA. REV. STAT. ANN. § 9:307A(5) (West Supp. 1998).

15. See LA. REV. STAT. ANN. § 9:273A(1) (West Supp. 1998), Covenant marriage; contents of declaration of intent:

We do solemnly declare that marriage is a covenant between a man and a women who agree to live together as husband and wife for so long as they both shall live. We have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into this marriage. We have received premarital counseling on the nature, purposes, and responsibilities of marriage. We have read the Covenant Marriage Act, and we understand that a Covenant Marriage is for life. If we experience marital difficulties, we commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling.

Id. § 9:273A(1).

16. Tony Perkins, Louisiana state representative and the author of the covenant marriage legislation, said in an interview that he believed the law's definition of "breach of the marital contract" is based on "what was historically the law back

Their battle cry calls for strengthening marriage. Covenant marriage bills and other no-fault alternatives have been introduced into the legislatures in almost every state. Louisiana was the first state to enact a covenant marriage bill.¹⁷ There appears to be some evidence that many Americans are at least nominally in favor of "strengthening the marital bonds" as well. In a Time/CNN poll, fifty percent of those surveyed answered "yes" when asked if it should be harder for couples to get divorced.¹⁸ If the premarital counseling, fault and fault-like divorce grounds, and reinforced pledge of commitment involved in the covenant marriage experiment operate to decrease the divorce rate in Louisiana, then many states will likely follow suit.

This Comment will examine covenant marriage in light of the experiences of both fault and no-fault divorce laws. It will begin with an overview of fault and no-fault divorce law. Next, the Louisiana covenant marriage legislation will be discussed. The spotlight will be on whether this legislative salve will be able to deliver what its proponents intend. There are many legal and societal components of covenant marriage that suggest that it will not.

It is this Comment's proposition that returning to fault based divorce law will do little to curb the American divorce rate. The divorce culture of the latter half of the twentieth century was the product of a changing society. It was not principally the product of no-fault divorce. Putting the blame squarely on the shoulders of no-fault divorce laws for the high divorce rate is misplaced. In reality, the fault system operated like a no-fault system in disguise. Couples facing fault divorce laws were adept at evading these laws in the 1950s. They will be no less adept at evading covenant marriage's return to fault principles in the 1990s. The very people who are the least adept at evading fault-like divorce laws, the poor and abused spouses, will be hurt the most by a return to fault divorce laws as embodied in covenant marriage.

when there was weight to the marriage contract." Daniel Radosh, *Covenant Marriage: Tightening the Ties that Bind*, PLAYBOY, Dec. 1, 1997, at 59.

17. An online search of newspaper articles found similar covenant marriage legislation being discussed in Virginia, Indiana, Washington, Kansas, Alabama, Tennessee, Nebraska, Ohio, and Oklahoma. Subsequent to the writing of this article, Arizona has followed Louisiana in enacting similar covenant marriage legislation. See ARIZ. REV. STAT. ANN. §§ 25-901 through 25-906 (West 1998).
18. See Wendy King & Walter Kirn, *The Ties That Bind: Should Breaking Up Be Harder To Do? The Debate Over Easy Divorce Rages On*, TIME, Aug. 18, 1997, at 48 (61% said it should be harder for couples with young children to get divorced, and 64% agreed that people should be required to take a marriage education course before they could get their licenses. However, when asked if the government should make it harder for people to get divorced, only 37% said "yes.").

II. AN OVERVIEW OF FAULT AND NO-FAULT DIVORCE

Under the old fault divorce regime, the law in every state required a showing that one of the parties to the marriage had violated one of the narrowly defined marital transgressions. Most typically, these included adultery, cruelty, and desertion.¹⁹ Other grounds included certain crimes—insanity, homosexuality, and drug addiction.²⁰ Only an “innocent” or “non-breaching” spouse could apply for a divorce. That is, only a spouse who had not also committed one of the defined breaches of the marriage listed above could be granted a divorce. Further, if the court concluded *sua sponte* that the couple had colluded together to fabricate a fault ground, the court was to deny the divorce. A non-breaching spouse continuing a relationship with a spouse who had breached one of the fault grounds was viewed as condoning the behavior and would be denied a divorce for that transgression. On paper, the grounds for divorce under the fault regime were quite difficult to prove.

In reality, the substance of dissolution proceedings diverged widely from the rigid form of the fault divorce laws.²¹ By the early 1960s (and long before that) “divorce-seeking couples often subverted or ignored the restrictive fault rules. The most common evasions were migration and collusion; couples would either go to a jurisdiction with more lenient divorce laws, or would perjure themselves before the court to manufacture instances of marital ‘fault.’”²² “In the 1960s, ninety percent of American divorces on fault grounds were granted without contest.”²³

By the 1960s, many commentators felt that American divorce court proceedings had transformed into “adversary theater[s] of the absurd.”²⁴ American society was increasingly viewing marriage and the family as less of an autonomous unit and more of a partnership between individuals that was “terminable at will when it failed to meet the needs or desires of either party.”²⁵ Divorce evolved into “a regrettable, but necessary, legal definition of a marital failure, where very often the factors leading to the marriage breakdown were not all one-sided and based solely on the fault of one guilty party, but they were also caused by the incompatibility and irreconcilable differences of

19. See Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 610 (1997).

20. See *id.*

21. See *id.* at 611.

22. *Id.*

23. *Id.* (citing Scott, *supra* note 8, at 16).

24. J. Herbie DiFonzo, *Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change*, 34 IDAHO L. REV. 1, 2 (1997).

25. Bradford, *supra* note 19, at 611.

both spouses.”²⁶ Opinion turned against the fictions and excesses of the rigid fault regime. It was at this point that no-fault divorce laws began to enter the picture. This changed attitude toward divorce drove the movement toward no-fault divorce laws, not the other way around.

Central to the movement toward no-fault divorce was the preservation of judicial integrity.²⁷ No-fault divorce laws were never originally conceived as either a way of encouraging easy divorces or encouraging serial marriages.²⁸ Rather, they were intended to give trial judges more latitude to explore whether or not each marriage was viable on a case-by-case basis.²⁹ Under a no-fault system, the trial judge would no longer be bound to find that the parties had proven specific marital transgressions. Instead, the judge was to “inquire into the whole picture of the marriage” to see if it was irretrievably broken.³⁰

However, the legacy of no-fault divorce law has not been this individual evaluation of the viability of each marriage. Rather, in most instances it has resulted in marriages being dissolved at the request of both or even one of the parties. Like the fault regime before it, the no-fault regime simply mirrored what unhappy couples desired because no-fault essentially rubber stamped most divorces. The main difference was that without the specific requirements of fault to prove, divorce hearings were less about fiction and more about the fact that society had learned that marriages often break down. Between 1969 and 1985, all fifty states incorporated no fault provisions into their laws governing divorce.³¹

As was noted earlier, the divorce rate has been increasing since the mid-nineteenth century.³² It increased steadily up through the conclusion of World War II.³³ From the period of about 1950 through 1962, the annual divorce rates were lower than statistical models

26. Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 270 (1997); see also Max Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633 (1956).

27. See Bradford, *supra* note 19, at 613-14.

28. See *id.*

29. See Scott, *supra* note 8, at 17.

30. See Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 667 (1984).

31. California was the first state to adopt no-fault divorce provisions in 1969, and South Carolina was the last in 1985. See Bradford, *supra* note 19, at 617 n.53. Currently, fifteen states have pure no-fault divorce grounds, twenty one states have added a no-fault provision to their existing fault grounds, and fourteen states and the District of Columbia have combined fault grounds with a no-fault provision based on voluntary separation or incompatibility. See *id.* at 613; Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, in DIVORCE REFORM AT THE CROSSROADS 211 n.18 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

32. See Cherlin, *supra* note 3, at 83-87.

33. See *id.*

would have predicted based on the long term increases since the mid-nineteenth century.³⁴ Starting around 1962, the divorce rates rose sharply and have continued to do so until the mid-eighties, when they leveled off remaining at that same high level.³⁵

The laying of blame on no-fault divorce for the precipitous rise in the divorce rate of the latter half of the twentieth century warrants an examination of the rate of increase of divorce in the no-fault era as compared to the preceding fault era. Just prior to California becoming the first state to adopt no-fault divorce grounds in 1970, the national divorce rate was 3.5 per thousand.³⁶ That increased to 5.1 per thousand in 1977.³⁷ During the first seven years of having the no-fault option, California's divorce rate jumped more than forty-five percent.³⁸ Armed with these statistics, it is no wonder that many blame no-fault divorce for the increase in the American divorce rate.

While this stark increase suggests that no-fault divorce laws have caused divorce rates to sky-rocket, a more expansive view of the data is necessary before the big picture of the American divorce rate can be seen. Beginning in 1962, the national divorce rate began to outgrow what previous mathematical models would have predicted.³⁹ This severe increase in the divorce rate preceded the introduction of no-fault divorce in California by a full eight years. California introduced no-fault divorce in 1970. Commentators have further noted that "the increase in divorce [was] not . . . a phenomenon restricted solely to states that . . . adopted . . . [no-fault] standard[s]."⁴⁰ To illustrate this point, researchers found that, between 1970 and 1974, the divorce rates in Arkansas, Mississippi, Rhode Island, and South Dakota climbed at an increased rate compared to the increase in the divorce rate in Nebraska for the same period. This occurred even though Nebraska adopted no-fault divorce laws in 1972, while the other states mentioned made no significant changes in their divorce laws.⁴¹ Using Nebraska as a model, researchers concluded in 1979 that, when Nebraska switched to no-fault in 1972, there was an increase in the rate of divorce. However, the increase was consistent with a sharp upswing in the divorce rate that began in the early 1960s before the onset of no-fault divorce laws.⁴²

34. *See id.*

35. *See Furey, supra* note 4, at A49.

36. *See* Alan H. Frank et al., *No Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary*, 58 *NEB. L. REV.* 1, 5 (1979).

37. *See id.*

38. *See id.* at 6.

39. *See* Cherlin, *supra* note 3, at 83-87.

40. Frank et al., *supra* note 36, at 8.

41. *See id.* at 8-9.

42. *See id.* at 18.

III. THE LOUISIANA SOLUTION FOR TAMING THE DIVORCE RATE

It's a starry night at Brennan's in the French Quarter. A 10-carat diamond has been nestled in the Bananas Foster by a handsome swain under the influence of one too many romantic comedies. As his lovely maiden scoops up the ring, he asks, "Will you marry me?" Her face lights up with joy. But a moment later a slight frown crosses her pretty brow. Looking deep into his eyes, she inquires, "Do you mean really, really marry you?"⁴³

When a Louisianan gets engaged these days, he or she has more meaningful decisions to make than what china pattern to select and setting a date for the ceremony. Louisianans now have to decide whether they want to get married or, as some have termed it, "really married." In other less dramatic words, they must determine whether they want to enter into a standard marriage or into a covenant marriage. On August 15, 1997, the controversial Covenant Marriage Act officially went into effect.⁴⁴ The next section of the Comment will discuss the obvious and not-so-obvious implications of this new legislation; what it will mean for the couples who opt for it; and what it will mean for couples who have elected a covenant marriage and desire to exit it.

A. An Overview of Covenant Marriage

There are two outstanding features of the covenant marriage legislation. The first is the mandated premarital and predivorce counseling requirements. The second is the restricted divorce grounds that foreclose covenant marriage couples from access to the state's current no-fault divorce law. These restrictive divorce components feature a return to the fault regime of the past, along with some newer less traditional (strikingly similar to fault) grounds for divorce. A third less obvious component of covenant marriage may turn out to be the mandated disclosure prior to the marriage of "everything which could adversely affect the decision to enter . . . [the] marriage."⁴⁵ An additional lingering question is whether the principles of conflict of laws will take the wind out of covenant marriage's sails, as parties may be able to establish domicile in any of the states that do not recognize covenant marriage and obtain a divorce under that state's ordinary no-fault divorce laws. However, the ultimate question in discussing these and other features of covenant marriage is whether they will truly lead to lower divorce rates in Louisiana.

43. Margaret Carlson, *Till Depositions Do Us Part*, TIME, July 7, 1997, at 21.

44. See LA. REV. STAT. ANN. §§ 9:272-73 (West Supp. 1998).

45. *Id.* § 9:273A(1).

1. *The Counseling Components*

A marriage license should be at least as hard to obtain as a driver's license. Requiring the marital equivalent of being able to parallel park might knock a little sense into heads more concerned with registering at Bloomingdale's than deciding whether the kids will be baptized.⁴⁶

Parties entering into a covenant marriage must sign a declaration of intent. Included in this attestation is a clause indicating that the couple has undergone premarital counseling and has committed "to take all reasonable efforts to preserve [the] marriage, including marital counseling."⁴⁷ The attestation must be signed by both parties and be notarized.⁴⁸ The parties must also sign an affidavit 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 marriage counselor, which counseling shall include a discussion of the seriousness of covenant marriage, communication of the fact that a covenant marriage is a commitment for life, a discussion of the obligation to seek marital counseling in times of marital difficulties, and a discussion of the exclusive grounds for legally terminating a covenant marriage by divorce.⁴⁹

In addition, the parties must also include a "notarized attestation, signed by the counselor . . . confirming that the parties were counseled as to the nature and purpose of the marriage and the grounds for termination thereof."⁵⁰

2. *The Fault and Fault-like Divorce Grounds*

We need to have a law to help people stay married. Divorce ought to be hard to get, and if it were more difficult, we'd see less of it.⁵¹

In addition to mandated counseling prior to seeking a divorce, people who contract for a covenant marriage also opt themselves out of the no-fault divorce option for dissolving their marriage. A standard marriage in Louisiana may be dissolved if the couple separates for six months. Under covenant marriage, divorce is theoretically much harder to obtain. "Only when there has been a complete and total breach of the marital covenant commitment may the non-breaching party seek a declaration that the marriage is no longer legally recognized."⁵² What constitutes a "total breach of the marital covenant commitment" is as follows:

46. Carlson, *supra* note 43, at 21.

47. LA. REV. STAT. ANN. § 9:273A(1) (West Supp. 1998).

48. *See id.* § 9:273A(3)(a).

49. *Id.* § 9:273A(2)(a).

50. *Id.* § 9:273A(2)(b).

51. Rev. James Lancaster, assistant pastor of First Baptist Church of Kenner, La. *quoted in* Wright, *supra* note 1, at 1E.

52. LA. REV. STAT. ANN. § 9:272 (West Supp. 1998).

A. Notwithstanding any other law to the contrary and subsequent to the parties obtaining counseling, a spouse to a covenant marriage may obtain a judgment of divorce only upon proof of any of the following:

- (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 a period of one year and constantly refuses to return.
- (4) The other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses.
- (5) The spouses have been living separate and apart continuously without reconciliation for a period of two years.⁵³

The above divorce statute also specifies very similar grounds for a legal separation, including the additional grounds of "habitual intemperance of the other spouse, or excesses, cruel treatment, or outrages of the other spouse if, such . . . is of such a nature as to render their living together insupportable."⁵⁴ This is important because parties legally separated under this ground only have to wait one year from the entry of the legal separation to obtain a divorce, so long as they lived apart without reconciliation or lived apart for one and half years if there were minor children from the marriage.⁵⁵

3. *The Complete Disclosure Element of Covenant Marriage*

"Well, what's your answer?" the Bride demands. "Do you want our marriage to be high-test or low-grade?" The Groom hesitates; The Bride narrows her eyes. "Maybe this is the clause that's bothering you: 'We have disclosed to each other everything that could affect the decision to enter into a marriage.' Is there something you haven't disclosed to me?" The Groom flushes. "Why no, darling, nothing at all, really. Well, just one thing." "Is it another woman?" "No . . . of course not . . . it's, it's just that, well, I'm sorry, dear, I can't live without Jerry Springer."⁵⁶

In the language of the declaration of intent, the parties recite their consent to create a covenant marriage. The spouses have to agree to stay together for life. They must aver that they have undergone premarital counseling, that they have read and understood the Covenant Marriage Act, and that they agree to "take all reasonable efforts to preserve [their] marriage, including marital counseling."⁵⁷ In the midst of this recitation that the parties must sign and notarize is a further assertion that could prove extremely important to the legal viability of a covenant marriage. The assertion reads: "We have chosen each other carefully and disclosed to one another everything

53. *Id.* § 9:307A.

54. *Id.* § 9:307B.

55. *See id.* § 9:307A (6)(a), (b).

56. Mary McCarty, *Do You Promise to Love, Honor and Not Watch Springer?*, DAYTON DAILY NEWS, Nov. 21, 1997, at 1B.

57. LA REV. STAT. ANN. § 9:273A(1) (West Supp. 1998).

which could adversely affect the decision to enter into this marriage."⁵⁸

This clause in the covenant marriage contract raises a question as to whether the authors of this legislation intended for a spouse in a covenant marriage to be able to nullify the covenant marriage contract if he or she can prove that the other spouse made a material false representation of fact or failed to disclose something that could "adversely effect the decision to enter into [the] marriage."⁵⁹ Generally, when a party to an ordinary contract makes "a representation of a fact, known to be false, that is intended to and does deceive the other party to his or her detriment," the deceived party has a cause of action for fraud.⁶⁰ Marriage has always been thought of as a special kind of contract, and courts have generally allowed only misrepresentations of fact affecting the decision to marry going to the "essentials" of the marriage to be grounds for the marital equivalent of voiding the contract—an annulment.⁶¹ Exactly what constitutes the "essentials" of the marriage is a nebulous concept. American courts have interpreted "essentials" to mean matters affecting the willingness or ability to have sexual relations, the ability to bear children, or more generally, fraud of such a magnitude that the court becomes convinced that the continuing viability of the marriage is destroyed.⁶² Simple nondisclosure or false representation of negative personal qualities, character, or past history are insufficient. On the other hand, New York courts do not necessarily require the fraud or nondisclosure to go to the "essentials" of the marriage, but instead apply a fraud standard in marriages more like the ordinary contract law standard of "materiality."⁶³

Commentators have observed that the more stringent a state's divorce grounds were in the latter half of the twentieth century, the more liberally courts in those states construed fraud and nondisclosure for the purposes of "essentials" of the marriage.⁶⁴ The phrase "everything that could adversely affect the decision to enter this marriage" already suggests that a nondisclosure of a lesser magnitude than "essentials" to the marriage could allow the unknowing party to annul the covenant marriage and completely avoid the heightened fault grounds necessary for divorce. The phrasing of the disclosure requirement in the covenant marriage legislation may open the door for courts to allow circumstances constituting less than fraud or nondisclosure going to the "essentials" of marriage to annul or void the

58. *Id.*

59. *Id.*

60. LESLIE J. HARRIS ET AL., FAMILY LAW 212 (1996).

61. *See id.* at 211.

62. *See* 1 HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 199 (2d ed. 1987).

63. *See* HARRIS ET AL., *supra* note 60, at 212.

64. *See id.*

covenant marriage contract. If the courts observed in states with restrictive divorce grounds, like New York, are any indication, a court ruling on nondisclosure or fraud in a covenant marriage may be more willing to void such a marriage, even if the fraud was simply "material" to the decision to enter the covenant marriage, rather than "essential."

B. Reactions to Covenant Marriage

The bride fidgeted beside a sign that read "Marriage License \$25." The groom lounged against the scuffed counter top. "Are you all interested in the new covenant marriage?" a clerk asked them brightly. "What's that?" said the groom. . . . "It's just harder to get divorced," explained the clerk. . . . It's just a whole bunch of counseling, that's all I can say."⁶⁵

Few Louisianans have utilized the new covenant marriage option. William Barlow, the state's registrar of vital records said in early October, 1997: "Only a sprinkling of newlyweds have chosen the more-binding covenant nuptials. . . . It will take three or four months to compile meaningful statistics."⁶⁶ Even three months later, covenant marriage in Louisiana was still not very popular. Out of 11,169 marriage licenses issued in Louisiana from August 15, 1997 (the date the new legislation took effect) until January 15, 1998, only 120 were covenant marriages.⁶⁷ That constitutes about one percent. However, the Bureau of Vital Statistics does not keep records of married couples who have "upgraded" from their standard marriage to a covenant marriage.⁶⁸ On February 15, 1998, state representative Tony Perkins, the author and sponsor of the covenant marriage legislation in Louisiana, helped organize a "covenant marriage weekend" opportunistically coinciding with Valentine's Day to promote the marital option or upgrade. Organizers were expecting about 400 to 500 couples to participate.⁶⁹

Government officials predict that the demand for covenant marriages will rise as the public becomes more familiar with it and as some pastors urge it on their flocks.⁷⁰ However, data shows that most Louisiana couples apply for a marriage license just in time to fulfill the state's seventy-two hour waiting period. If that is the first time they learn about the requirements of covenant marriage, then there is no time to get the necessary notarized documents and counseling.

65. Victoria Loe, *Louisiana Tries More-Binding Marriage*, THE SEATTLE TIMES, Oct. 5, 1997, at A18.

66. *Id.*

67. *See Some Couples Seek Extra Commitment*, DES MOINES REG., Feb. 15, 1998, at 002.

68. *See id.*

69. *See Relma Hargus, Covenant Marriage Weekend Set Feb. 14-15*, BATON ROUGE ADVOC., Feb. 7, 1998, at 2E.

70. *See Loe, supra* note 65, at A18.

A further obstacle for covenant marriage has emerged from a rather unlikely source—some of the state's religious leaders. Approximately one-third of the Louisiana population is comprised of Catholics. Louisiana's Roman Catholic bishops have withheld their support from the covenant marriage laws. After studying the fine print of the legislation, the bishops found that they opposed the requirement in the premarital counseling that counselors preparing couples for covenant marriage certify that they have explained covenant marriage's higher standards for divorce.⁷¹ The Bishops explained that their employees will not explore the subject matter of divorce in their marriage preparation programs because to do so "would confuse or obscure the integrity" of church teaching on the permanence of marriage.⁷² This will place covenant marriage at a practical disadvantage among the state's Catholics. Those couples would not only have to undergo the Catholic Church's own mandatory premarital counseling, but they would have to ask an additional counselor to attest that they had been briefed on the required covenant marriage divorce information.⁷³

Rabbi David Goldstein of New Orleans opposes covenant marriages and says he intends to advise against them. "I reject the entire notion as utterly absurd. All marriages should be sacred. It implies that some marriages are not sacred."⁷⁴ The state's evangelicals were initially very quiet as well. Some feared that a two-tiered marriage system might lead to the creation of a third or fourth tier permitting gay marriages.⁷⁵ A United Methodist Bishop called the new law "unnecessary, confusing and intrusive."⁷⁶ He continued:

The church's covenant marriage is sufficient for all seasons and circumstances of marriage. For the state to develop a covenant marriage license utilizing the language of the church's ceremony is to imply that persons will be more faithful to their vows if the state so requires than if their religious faith so requires.⁷⁷

An Episcopal Bishop opposed the legislation as well, stating that "[i]t goes back to the old days regarding divorce. We've been there, and it doesn't work. These old ideas compromised the moral character of couples; they compromised the integrity of judges, courts and attorneys."⁷⁸

71. See *Catholic Bishops Reject Louisiana Marriage Law*, SALT LAKE TRIB., Nov. 1, 1997, at B3.

72. See *id.*

73. See *id.*

74. Janet McConnaughey, *Few Get Covenant Marriage License in La.*, CHATTANOGA FREE PRESS, Oct. 14, 1997, at B2.

75. See Michael J. McManus, *Divorce is Difficult in 'Covenant Marriage'*, FRESNO BEE, Nov. 29, 1997, at A13.

76. *Id.*

77. *Id.*

78. *Id.*

IV. ADDRESSING THE CRITICISMS OF COVENANT MARRIAGE

Covenant marriage has gotten off to a rocky start in Louisiana, but it is still rather new. Meaningful reactions to it will take time. Given the state's religious leaders' initial opposition to the law, the new legislation is fighting an uphill battle. However, not all religious leaders are against covenant marriage. Some pastors, particularly from more rural Baptist areas, have adopted the covenant marriage ceremony as the only kind of marriage they will perform. Although few couples are currently affected by covenant marriage, it still raises some very important social and legal issues that warrant discussion.

A. The Coercion Factor

I am sure you'd choose the covenant if you really loved me, honey.⁷⁹

One important social policy issue with covenant marriage is the coercion factor of one betrothed telling another that he or she wishes to enter a covenant marriage. The spouse being asked is in a position in which to say "no" sounds as though they have doubts about the marriage. A spouse is not the only person who can pressure a couple into a covenant marriage. Reverend Philip Robertson of Philadelphia Baptist Church in Deville, Louisiana, said he only performs covenant marriages now.⁸⁰ He adds, "If a couple is unwilling to accept the legal ties of a covenant marriage, they're worried the marriage may not work."⁸¹ The legal ramifications of entering a covenant marriage affect a couple economically because they are mandated to spend money on premarital counseling and on predivorce counseling, if that need should ever arise. Further, both spouses are opting out of the choice of no-fault divorce. In sum, important legal and economic rights are at stake. Agreeing to a covenant marriage limits both spouses legally and financially. Divorce is hopefully the last thing on an engaged couple's mind. A love-struck spouse will invariably have difficulty saying no to their spouse-to-be or to their pastor when asked if they want to make their marriage stronger and more resistant to divorce.

The possible coercion factor involved in covenant marriage implicates another important aspect of legislation that, like covenant marriage, limits a spouse's ability to leave a marriage. While the United States Supreme Court has never found a constitutional right to divorce, it has recognized that individuals have a fundamental right to make personal intimate decisions relating to marriage. In *Zablocki v.*

79. Madeleine Kingsley, *Get the Hell Out of a Heavenly Match*, TIMES (London), Nov. 29, 1997, (Features), at 6.

80. See McConnaughey, *supra* note 74, at B2.

81. *Id.*

Redhail,⁸² the Court held that the right to marry is of fundamental importance and struck down a Wisconsin statute that barred marriage licenses to individuals who could not prove compliance with pre-existing child support obligations.⁸³ After *Zablocki*, states could not set forth laws that "significantly interfere with decisions to enter into the marital relationship."⁸⁴ In *Boddie v. Connecticut*,⁸⁵ the Court held that requiring filing fees in divorce actions violated the due process rights of indigents who were unable to pay the fees and get divorced.⁸⁶ In closing, the Court referred to access to court for a divorce as a right to "the exclusive precondition to the adjustment of a fundamental human relationship."⁸⁷

Covenant marriage does not bar people completely from access to divorce; entry into a covenant marriage is optional. However, this line of United States Supreme Court cases does suggest that there are limits to what a state may do to impede a citizen from reasonable access to divorce and remarriage. Thus, there is a question as to whether a party who was coerced into agreeing to a covenant marriage could be limited in access to divorce. A further question lies in whether indigent parties to a covenant marriage seeking a divorce could be barred from divorce proceedings because they could not afford to pay for the predivorce counseling mandated by covenant marriage's divorce laws before any dissolution proceedings can begin.

B. Feminist Objections

Some of the feminist objections to covenant marriage naturally build upon objections to coerced covenant marriages. When there is an imbalance of power in a relationship, the less powerful party can be more easily coerced. Power in a marriage often has ties to which party is the primary wage earner. Although many women are now wage earners themselves, women are still economically disadvantaged in the workplace. Most men are still the primary wage earners in the family, particularly if young children are involved.⁸⁸ Women in Louisiana earn sixty cents for every dollar earned by men in Louisiana.⁸⁹ As such, women in Louisiana are kept systematically poorer than their male peers.⁹⁰ Thus, it is logical to assume that women will be more susceptible to coercion into a covenant marriage and, once in

82. 434 U.S. 374 (1978).

83. *See id.* at 375, 383.

84. *Id.* at 386.

85. 401 U.S. 371 (1971).

86. *See id.* at 382.

87. *Id.* at 383.

88. *See* Bradford, *supra* note 19, at 634.

89. *See* Terry A. O'Neill, *This Law Hurts Women*, USA TODAY, Aug. 14, 1997, at 14A.

90. *See id.*

one, be trapped by its more restrictive divorce laws. The longer separation period or the difficulty proving one of covenant marriage's grounds for breach will make it harder for a spouse who is financially dependant on the other spouse to obtain a divorce.

Perhaps the people most harmed by a return to fault principles will be those who need to exit a marriage quickly. Those people are typified by abused spouses. Women comprise a disproportionate number of the victims of domestic violence. Even though the covenant marriage legislation provides that violence is an express divorce ground, victims of domestic violence will likely be reluctant to testify against their abuser for fear of retribution. Even if the abused spouse is able to exit the marriage safely and is prepared to testify as to the abuse, the covenant marriage laws stipulate that an intent to participate in the mandatory predivorce marriage counseling must be revealed. Further, the options of collusion and of migration to establish domicile in another state to avoid covenant marriage's fault divorce grounds may be unavailable.

It is unclear for covenant marriage in Louisiana whether the fault grounds for divorce also carry with them the fault based property division scheme. The old fault regime embodied the idea that fault and alimony were damages for a breach of the terms of the marriage contract.⁹¹ Women who breached the marital contract through desertion, adultery, or other fault grounds were denied support payments from their "innocent" husbands. Conversely, men who breached paid for this transgression economically with continued support. Many who advocate for a return to fault principles see this as a benefit, as both spouses had economic incentives to stay in the marriage.⁹² With the advent of no-fault, alimony and property settlements were for the most part severed from a placing of fault and instead sprung from equity.

However, some feminists criticize the fault based property distribution scheme as more damaging to women.⁹³ Since men in Louisiana earn more on average than women, a return to the economic incentives inherent in the fault system will have a greater impact on women than men. Furthermore, some argue that courts in their "fault-finding" analysis exhibit a double standard for women and men in fault behaviors.⁹⁴ An example is given by analogy to child custody cases. In areas of sexual behavior or work/family preferences, courts are more likely to rule that a woman at "fault" is less able to provide a

91. See Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 876 (1994).

92. See *id.*

93. See Bradford, *supra* note 19, at 634.

94. See *id.*

child a suitable home and identical behavior by a man is less penalized.⁹⁵ There is also more social stigma attached to female adulterers.

A counter argument is that, under a fault regime, the truly innocent spouse or the spouse who does not want to dissolve the marriage has more power. Under no-fault, one spouse can unilaterally dissolve the marriage. Under a fault system or under covenant marriage, either both spouses will have to agree to collude to establish a fault ground or the guilty spouse wishing to exit, likely the more financially independent spouse, will have to bargain with the innocent often less financially solvent spouse. Again, as most women are the less financially stable partner in the marriage, non-breaching women may in some instances profit from a return to fault under covenant marriage.

C. Conflict of Laws Issues

An interesting legal issue raised by covenant marriage is whether the principles of conflicts of laws will enable a couple to evade the fault divorce hurdles of covenant marriage simply by going to a state that does not have covenant marriage. Migration to a divorce mill state was a favorite way to evade the lingering fault divorce regimes present in many states. This worked because in divorce cases, courts have typically applied their own divorce laws to marriages that were entered into in other states.⁹⁶ Divorce proceedings are rather unique in this area because "[i]n all other interstate cases, the forum state applies its own choice of law to determine which state's substantive law should govern the controversy."⁹⁷

In a non-divorce case, if a state court enters a judgment but lacks personal jurisdiction over the defendant, that judgment is void because it violates the Due Process Clause. In divorce cases, so long as the petitioning spouse is domiciled in the rendering state, the divorce decree is valid there and everywhere else. The marriage can be dissolved even if the court has no personal jurisdiction over the defendant spouse.⁹⁸ A modern example of how this works and how it can help spouses to evade a state's more restrictive divorce law is *Perito v. Perito*.⁹⁹ The Perito marriage lasted twenty-five years. They were married in New York and lived there for all of their married life.¹⁰⁰ While still in New York, Ruth Perito separated from her husband and filed for divorce. The New York court dismissed the petition because Ruth did not prove the requisite grounds required by New York di-

95. *See id.*

96. *See Rhonda Wasserman, Divorce and Domicile: Time to Sever the Knot*, 39 WM. & MARY L. REV. 1, 2 (1997).

97. *Id.*

98. *See id.*

99. 756 P.2d 895 (Alaska 1988).

100. *See id.* at 896.

orce law at that time.¹⁰¹ Subsequently, Mrs. Perito contacted lawyers and began looking into the divorce laws of Nevada and Alaska. After being consulted, she flew to Alaska with a friend and, within a few hours of arrival, announced to her friend "that she felt sure this was the place she wanted to be."¹⁰² The next day she filed for divorce in Alaska. There were no child custody matters involved, and Ruth did not ask the Alaska court to determine any property or alimony matters.¹⁰³ Mr. Perito moved to dismiss for lack of jurisdiction and claimed that Mrs. Perito was not an Alaska domiciliary. The Alaska court denied the motion and granted the divorce.

Under Alaska law, "for a divorce uncomplicated by alimony, property division or child custody" the jurisdictional requirements do not contain any explicit residency requirements.¹⁰⁴ According to the Restatement (Second) of Conflict of Laws, "a state has power to exercise judicial jurisdiction to dissolve the marriage of spouses one of whom is domiciled in the state."¹⁰⁵ The requirements of domicile are that a person must be physically present in a place and that he or she "must intend to make that place his home for the time at least."¹⁰⁶ In *Williams v. North Carolina*,¹⁰⁷ the United States Supreme Court held that domicile is an adequate basis for divorce jurisdiction.

State sovereignty has long justified the conflict of laws and the domicile rules present in divorce law. Domestic relations are considered matters of the state where a person is domiciled.¹⁰⁸ It is argued that a state has the most interest in the domestic relations of its domiciliaries. However, prior to the onset of no-fault, divorce law in states diverged so widely that "suitcase divorces" became a widespread practice.¹⁰⁹ Unhappy couples who could not obtain divorces at home began going to states with more permissive divorce laws and obtaining divorces there.¹¹⁰ While many states have restrictive residency requirements before they are willing to divorce an arrival in their state, others like Alaska do not. Even more importantly, while it is possible

101. *See id.* At that time the New York divorce law permitted divorce on the following grounds: (1) Cruel and inhuman treatment; (2) abandonment; (3) confinement of the defendant in prison for three consecutive years; (4) adultery; (5) living apart pursuant to a judgment of separation for one or more years; (6) living apart pursuant to a written agreement for one or more years. *See* N.Y. DOM. REL. LAW § 170 C170:1 (McKinney 1988).

102. *Perito v. Perito*, 756 P.2d 895, 896 (Alaska 1988).

103. *See id.*

104. *See id.* at 897.

105. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 71 (1971).

106. *Id.* §§ 16, 18.

107. 317 U.S. 287, 298-301 (1942)(Williams I).

108. *See* Wasserman, *supra* note 96, at 50.

109. *See* David P. Currie, *Suitcase Divorce in the Conflict of Laws: Simons, Rosenstiel, and Borax*, 34 U. CHI. L. REV. 26 (1966).

110. *See* Wasserman, *supra* note 96, at 13.

for a unilateral divorce to be challenged on jurisdictional grounds,¹¹¹ as in *Perito*, a bilateral divorce cannot be challenged on jurisdictional grounds.¹¹²

The above overview of conflict of laws demonstrates that evading fault divorce laws has in the past been a common practice. There is little that separates the grounds necessary for divorce under covenant marriage from those present in New York at the time that Ruth Perito was seeking a divorce.¹¹³ It is likely that Alaska would treat a domiciliary who had entered into a covenant marriage the same way. The dissolution of the marriage in Alaska, so long as the petitioning spouse had established domicile, would have full faith and credit everywhere, even Louisiana. Further, if one spouse of a covenant marriage were to establish domicile in another state, the other could attempt to thwart the dissolution and challenge jurisdiction, but if one spouse established domicile and the other agreed to the proceeding, then there would be no way to challenge the divorce action on jurisdiction. Under the circumstances in *Perito*, it is unlikely that the foreign court could have enough interest and personal jurisdiction to decide property settlements and child custody issues, but the foreign court could likely dissolve even a covenant marriage.

There is more of a contract nature to covenant marriage than there is to most marriages. A court outside of Louisiana may make a natural analogy to premarital agreements. Covenant marriage could be construed as a state sanctioned premarital agreement, whereby potential spouses are allowed to stipulate the divorce grounds and to other requirements that for them will be necessary to prove before entering or dissolving their marriage. All states recognize premarital agreements between prospective spouses that are designed to keep the parties' property separate.¹¹⁴ When premarital agreements begin to address the parties' respective property and support rights in the event of divorce, most courts will still allow such provisions to be valid, but they do so more hesitantly.¹¹⁵ This stems from the common law view that a premarital contract containing terms anticipating divorce is contrary to public policy.¹¹⁶ The rationale is that such agreements are conducive to divorce. While more and more states have

111. See *Williams v. North Carolina*, 325 U.S. 226 (1945)(Williams II).

112. See *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

113. See *Perito v. Perito*, 756 P.2d 895 (Alaska 1988).

114. See 3 ALEXANDER LINDEY AND LOUIS I. PARLEY, LINDEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 90.1 (1998).

115. See *id.* § 90.11. Marital property disposition in the event of divorce is recognized as a valid premarital agreement provision in the eighteen states that have adopted the Uniform Premarital Agreement Act under section 3(a)3, twenty one states by judicial decision, and four states under statutory authority. See *id.* § 90.11 nn.14-16.

116. See *id.*

moved beyond this thinking in the areas of clauses dealing with alimony and marital property, most states still have a threshold whereby a clause in a prenuptial agreement can still be void because it is found to be against public policy. One example would be a premarital agreement that addressed the issue of the custody of the parties' children upon separation or divorce. Such provisions have generally been found to be violative of public policy because it reflects "an effort to deny the courts the authority to ultimately decide the issue."¹¹⁷ Provisions attempting to bargain away or set the extent of a party's obligation to pay child support¹¹⁸ would be another example of prenuptial agreement terms found to be contrary to public policy.

As divorce has become more common, courts have become more willing to allow parties to contract in advance what will happen in the event of their divorce in the arenas of property division and spousal support. The question remains as to whether any court would recognize an agreement entered into in another state that attempts to stipulate what grounds must be proven in order to dissolve the marriage. States have a strong public policy in favor of regulating the divorce process. If that were not the case, states would not mandate that only a court can legally dissolve a marriage. If a couple could make the grounds for divorce more restrictive through a premarital agreement, then what is to stop them from making the grounds less than "irreconcilable differences?" If child custody and child support issues are overwhelmingly deemed off limits to prospective spouses, it seems logical to assume that most states would find grounds for divorce in that category, too.

One intriguing possibility exists in states that have adopted the Uniform Premarital Agreement Act. In section 3(a)(8), the Act stipulates that "[p]arties to a premarital agreement may contract with respect to any . . . matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty."¹¹⁹ That provision clearly opens the door for a court to allow premarital private ordering of the marital contract up to the point where it violates a state's public policy. This section has not yet been construed in light of a premarital agreement that attempts to alter the state's divorce grounds. However, the language clearly indicates that it would be possible to do so, absent a finding that contracting for only fault-like divorce grounds was against public policy. The Covenant Marriage Act, however misguided some may feel it is, was enacted for the purpose of making marriages more viable. The rhetoric of strengthening marriages could make it difficult for some on the bench to find covenant marriage as violative of public policy. On

117. *Id.* § 90.10.

118. *See, e.g.,* *Rogers v. Yourshaw*, 448 S.E.2d 884, 886-87 (Va. Ct. App. 1994).

119. UNIF. PREMARITAL AGREEMENT ACT § 3(a)(8), 9B U.L.A. 373 (1987).

the other hand, a competing state policy is the state's right to exert control over its domiciliary's marital status. However, it is possible that a state adopting the Uniform Premarital Agreement Act could construe a Louisiana covenant marriage as a premarital contract and find that its provisions are not violative of public policy.

V. CONCLUSION

Covenant marriage is a well-meaning attempt to make marriages stronger, healthier, and more viable. The counseling requirements will go the furthest in achieving this goal. The more prospective spouses know each other and have discussed marital issues, the more likely a successful marriage will ensue. However, mandatory counseling is never as effective as counseling that people truly want to undergo. If parties undergo counseling simply to fulfill a necessary requirement incident to getting a covenant marriage then it will likely not be as effective. Further, if the state of Louisiana really believes in the benefits of counseling, then why not make it mandatory, as some have suggested, in all marriages. This would not be an unconstitutional barrier to marriage, especially if the state would be willing to provide for it financially. If it is truly effective in keeping marriages intact, the state would recover its expenditures by incurring fewer expenses in social welfare resulting from the culture of divorce.

However beneficial the counseling requirements may turn out to be, these benefits are more than offset in the damage caused by a return to fault divorce. Divorce under the fault regime was frequently more similar to a theatrical production than a legal matter. Collusion and migration to avoid restrictive divorce laws proved effective in evading these laws in the past and will do so again.

Finally, trying to save marriages through more stringent divorce laws is a losing proposition. By the time couples reach the stage where divorce is anticipated, delay and larger obstacles to exit from the marriage are unproductive. If the fault regime had one lesson to teach, it was that couples who desire to divorce will do so. Covenant marriage will do nothing to change that proposition.

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