

OPPORTUNING VIRTUE: THE BINDING TIES OF COVENANT MARRIAGE EXAMINED

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If the family trends of recent decades are extended into the future, the result will be not only growing uncertainty within marriage but the gradual elimination of marriage in favor of casual liaisons oriented to adult expressiveness and self-fulfillment. The problem with this scenario is that children will be harmed, adults will be no happier, and the social order could collapse.¹

I. INTRODUCTION

Gene and Gail Michelli have been down this road before.² After thirty years of marriage, Gene filed for divorce, married another woman, and divorced again.³ Three years after their divorce, the couple became the first to marry under Arizona's new covenant marriage law.⁴ "This was what should have been in the first place," commented the bride.⁵ Though a couple remarrying after divorcing one another may not fit the mental picture that proponents of covenant marriage had in mind, the trials and tribulations of the Michelli's stand as a poignant example of why the covenant marriage concept has generated so much interest.

With over half of the nation's yearly marriages ending in divorce,⁶ the search for workable divorce reform transcends political and ideological boundaries. On June 23, 1997, politicians in Louisiana

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¹ DAVID POPENOE, PROMISES TO KEEP: THE DECLINE AND RENEWAL OF MARRIAGE IN AMERICA 248 (1996).

² The Michelli's story was well covered in Arizona. See *Marriage Law Lures Couples: Seminar Explores Covenant Nuptials*, ARIZ. REPUBLIC, Aug. 23, 1998, at B1 and *Divorced Pair Retie Knot Under New Covenant Marriage Law*, ARIZ. DAILY STAR, Aug. 22, 1998, at 6B, for a discussion of how the Michelli's view covenant marriage.

³ See *Divorced Pair Retie Knot Under New Covenant Marriage Law*, ARIZ. DAILY STAR, Aug. 22, 1998, at 6B.

⁴ See *id.*

⁵ *Id.*

⁶ See Joel A. Nichols, Note, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929, 930 (1998) (estimating that "the probability that a marriage taking place today will eventually end in divorce or permanent separation is an astounding sixty percent.").

unanimously enacted a "Covenant Marriage" statute.⁷ Under the two-tiered system created by the statute, couples may enter either a traditional marriage or a covenant marriage. Those who choose to covenant face heightened requirements on both entrance into and exit from marriage.

This article examines the concept of covenant marriage. Part II sketches development of the modern divorce culture and examines the faults of the unilateral no-fault regime. Part III provides a detailed summary of covenant marriage law, focusing on the Arizona and Louisiana statutes. Part IV analyzes the ambiguities and weaknesses of current covenant marriage laws, considering both practical and legal problems. Part V outlines a workable proposal for divorce reform featuring covenant marriage as the sole form of marriage.

II. THE INSTITUTION OF MARRIAGE AND THE EVOLUTION OF MODERN DIVORCE CULTURE

A. Historical Development

Early American laws reflected the commonly held view that the family was the foundation of society and marriage the cornerstone. Divorce was available only when narrow statutory requirements were met.⁸ Demonstration of the commission of an offense against the marriage garnered judicial recognition of grounds for dissolution of the union.⁹ The guilty party was punished; the innocent rewarded.¹⁰ As the social stigma attached to divorce ebbed, the demand for divorce

⁷ The Louisiana covenant marriage law is codified at LA. REV. STAT. ANN. §§ 9:272-:275, :307-:309 (West Supp. 1999).

⁸ See Nicole D. Lindsey, Note, *Marriage and Divorce: Degrees of "I Do," An Analysis of the Ever-Changing Paradigm of Divorce*, 9 U. FLA. J.L. & PUB. POL'Y 265, 267 (1998); Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 609 (1997).

⁹ See J. Herbie DiFonzo, *Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change*, 34 IDAHO L. REV. 1, 9 (1997). Professor DiFonzo describes the nineteenth century view of divorce as "an ethos insisting on rigid boundaries for classifying all human behavior and its legal consequences." *Id.* at 7. Under this system, "[f]ault both heated and illuminated formal divorce policy, and divorce grounds and defenses orbited around the concept of guilt." *Id.* at 9.

¹⁰ See *id.* at 9. Historian William O'Neill observed that "[w]hile slackness and moral relativity seemed everywhere on the increase, the divorce court was one of the few places where the old beliefs still obtained. There was a guilty party and an innocent party. The innocent party was rewarded, the guilty punished, right prevailed over wrong, and the American verities were reaffirmed. Society at large might wink at adultery and assorted other breaches of law, custom, and good taste, but the divorce court did not. In this sense, divorce, though offensive to traditional values, reinforced them all the same." *Id.* at 9-10 (quoting William L. O'Neill, *Divorce as a Moral Issue: A Hundred Years of Controversy*, in "REMEMBER THE LADIES": NEW PERSPECTIVES ON WOMEN IN AMERICAN HISTORY 139 (Carol V.R. George ed., 1975)).

increased.¹¹ Courts faced an ever-growing number of couples whose collusive tales all too often turned the courtroom into a "theater of the absurd."¹² By the 1960s, acceptance of fraud and collusion as methods of sidestepping the fault system was rampant, even in the legal community.¹³ In 1966, California Governor Edmund G. Brown appointed a "Commission on the Family" to seek ways to bring law and practice back into sync.¹⁴ The Governor's Commission concluded that the removal of fault would not only obviate the need for fraud and collusion, it would ultimately lower the divorce rate and reduce "the social and economic evils"¹⁵ flowing therefrom.

No-fault was "portrayed as the modern prescription to 'preserve the family.'"¹⁶ Proponents contended that removing fault would help "reduce the bitterness and hostility surrounding divorce procedures."¹⁷ They hoped to "create a vastly improved system, based firmly in reality, that guaranteed equitable, workable, and fair awards once the evils of fault

¹¹ See *id.* at 25. Beginning in the 1920s, courts faced an avalanche of husbands and wives who demanded that trial judges grant divorces despite the statutory formalities. Judges often obliged. Divorces on the grounds of mental cruelty were granted freely. For example, a 1928 report reveals that one husband was granted a divorce because the "sound of his wife's voice injured his delicate health," and another was allowed to terminate his marriage because his wife "made him get up five or six times a night to look after her cat." *Id.* at 24.

¹² *Id.* at 2. Trial judges treated these "legal fictions" as "page turning, case-disposing best-sellers." *Id.* at 21.

¹³ See Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 93 (1991) (noting that attorneys encouraged client perjury in order to take advantage of mental cruelty provisions and sometimes arranged phony out of state residences to allow application of more lenient state law). "[A]dvocates of no-fault divorce argued that the integrity and respectability of the legal system and all involved with it would be improved if no-fault divorce grounds were adopted because 'sham grounds,' 'sham residence,' 'collusion, perjury and hypocrisy' would disappear." *Id.* See also Bradford, *supra* note 8, at 611 (1997) (noting that the judiciary also "participated in this evasion" by ignoring obvious violations and allowing divorce hearings to become "brief and perfunctory").

¹⁴ See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 18 (1985).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 17. Professor Herma Hill Kay testified before the Governor's Committee that "divorce procedures themselves add to the bitterness . . . by requiring that at least one party to be found guilty of marital fault." *Id.* at 16-17. She contended that structuring a nonadversarial divorce process would allow people to divorce "with the least possible amount of damage to themselves and to their families." *Id.* at 17. As Weitzman noted, "Professor Kay was the first to assert a link between legal rules" and emotional conflicts in divorce. See *id.*

were abolished"¹⁸ In 1969, California formally abandoned the fault system.¹⁹ By 1985, all 50 states had incorporated some form of no-fault.²⁰

B. The Faults of Unilateral No-Fault Considered

It's just too easy. You shouldn't be able to just walk out on your family. I think there has to be some reason—some real ground for someone to be able to divorce. . . . I think no-fault divorce robs me of my right to my marriage and my right to keep my family.²¹

Employing legal solutions to alleviate social problems often leads to unanticipated results. The grandiose expectations of the reformers quickly gave way as flaws in the design of the no-fault system subjected the concept to scathing criticism. Four unintended consequences merit particular attention. First, though the intent of removing fault from divorce proceedings was to make divorce a less complicated and less painful process,²² the ease with which a divorce could be obtained under the new system became its greatest weakness. Under a true no-fault system, divorce is granted where *one* party to the marriage claims "irreconcilable differences."²³ The decision is unilateral. The consent of the other party is not only unnecessary; it is irrelevant. Critics claim that "the no-consent rule encourages—or at least greatly facilitates—divorce" by shifting the power from the party who wants to stay married to the one who wants to get divorced.²⁴ Statistics bear this out. Between 1970 and 1990, the divorce rate jumped thirty-four percent²⁵ and the revolving door marriage phenomenon was created.

The second unforeseen consequence of the removal of fault was the impact of the elimination of all consideration of moral blameworthiness in determining property settlement. According to researcher and legal scholar Lenore Weitzman, the reformers in favor of no-fault "were so preoccupied with the question of fault . . . that few of them thought sufficiently about the consequences of the new system to foresee how its fault-neutral rules might come to disadvantage the economically weaker party."²⁶

¹⁸ *Id.* at 23.

¹⁹ See Lindsey, *supra* note 8, at 267 (noting that the first no-fault law was signed by California Governor Ronald Reagan in 1969).

²⁰ See *id.* at 268.

²¹ WEITZMAN, *supra* note 14, at 20. Weitzman's study included in-depth interviews with recently divorced men and women. Excerpts from those interviews appear frequently throughout *The Divorce Revolution*. *Id.* at xx.

²² See Wardle, *supra* note 13, at 91-97 (discussing the arguments most often raised by early proponents of no-fault).

²³ WEITZMAN, *supra* note 14, at 19.

²⁴ *Id.* at 27.

²⁵ See Lindsey, *supra* note 8, at 269.

²⁶ WEITZMAN, *supra* note 14, at 19.

"Divorce has radically different economic consequences for men and women."²⁷ According to Lenore Weitzman, "divorced men experience an average 42 percent increase in their standard of living in the first year after [a] divorce," while the living standard of newly divorced women plummets by 73 percent.²⁸ The reduction in the standard of living that women experience after divorce is magnified by the fact that women retain custody of the children ninety percent of the time.²⁹ No longer can guilt or innocence be used as tools to fashion equitable divisions of marital assets. No longer can the blameless party count on an award of financial concessions aimed at punishing the spouse who broke the marriage contract. The theory is that divorce should offer a clean break from the failed relationship.³⁰

Such an approach fails to recognize that spouses seldom exit a relationship on equal footing.³¹ Women often forego pursuing career goals to support their husbands or to care for young children.³² Even in instances where temporary support is awarded to allow the former wife time to obtain employment, it is difficult to quickly gain the skills necessary to compete in a job market where women still face disparity in wages and discrimination in available job opportunities.³³ Thus, the no-fault system penalizes women who choose to embrace traditional gender

²⁷ *Id.* at 323.

²⁸ *Id.* While Dr. Weitzman's methods have been questioned, her results are still widely cited. See e.g., Martha M. Ertman, *Commercializing Marriage: A Proposal For Valuing Women's Work Through Premarital Security Agreements*, 77 TEX. L. REV. 17, 29 n.41 (1998); Allen M. Parkman, *Bringing Consistency to the Financial Arrangements at Divorce*, 87 KY. L.J. 51, 93 n.128 (1999); Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 130 n.7 (1998); Rebecca E. Silberbogen, Note, *Does the Dissolution of Covenant Marriages Mirror Common Law England's Subordination of Women?*, 5 WM. & MARY J. WOMEN & L. 207, 226 (1998). Significantly, subsequent studies conducted by Weitzman's detractors continue to reveal a significant gap in the financial status of men and women after divorce. See Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 534 (1996) (finding that the rise in men's standard of living after divorce is ten percent, and the decline in women's standard of living is twenty-seven percent).

²⁹ See Robert M. Gordon, *The Limits of Limits on Divorce*, 107 YALE L.J. 1435, 1440 (1998) (noting children generally "suffer a large drop in their standard of living after divorce"); Lindsey, *supra* note 8, at 270 (contending that "children inevitably suffer from the financial hardships that are imposed on their mothers"); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 33 (1990) (stating that children in their mothers' custody "experience a significant decline in family income from their predivorce status").

³⁰ See Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 846 (1998).

³¹ See generally Cynthia Starnes, *Applications of a Contemporary Partnership Model for Divorce*, 8 BYU J. PUB. L. 107 (1993) (discussing gender bias in the home and workplace and its impact on women).

³² See *id.* at 111.

³³ See *id.*

roles.³⁴ Consider the woman who truly believes that her constant presence and full attention is required to create within her home a haven for her husband and her children. Despite youth and intelligence, she does not pursue professional acclaim, but rather devotes herself to her family. Suppose our hypothetical homemaker, after fifteen years of foregoing all opportunities for personal advancement for the sake of her family, learns that her husband wants to divorce her and marry another. Under the traditional fault system, the "blameworthy" husband would be forced to compensate the innocent wife for the "breach" of his vows. In a no-fault regime, neither the wife nor the children can by legal means prevent his desertion.

Why then would a woman spend her married life acquiring "domestic" skills that would avail her little if the union ends in divorce? Professors Rasmusen and Stake suggest that "[w]ith no assurance that a marriage would continue. . . . [d]evoting time and energy to producing assets useful to the marriage became riskier."³⁵ With homemaking in effect devalued, both spouses focus more time on acquiring individual assets and skills that can survive dissolution and less on working together to build a solid marriage.³⁶

Finally, and perhaps most alarming, is the unanticipated but still devastating emotional and financial impact that no-fault divorce has on children. When families break apart, children suffer. The harm is not limited to the moment of the dissolution.³⁷ According to researcher and psychologist Judith Wallerstein, "[t]he impact of divorce gathers force as they reach young adolescence, when they are often insufficiently supervised and poorly protected"³⁸ Children who live in single-parent homes are more likely to drop out of high school, to participate in criminal activity, and to engage in premarital sex.³⁹ The specter of their parents' failed relationship again rises when, as young adults, the

³⁴ See *id.*

³⁵ Eric Rasmusen & Jeffery Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 459 (1998).

³⁶ See *id.*

³⁷ See Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1555 (1998).

³⁸ *Id.* at 1555-56.

³⁹ See GLENN T. STANTON, WHY MARRIAGE MATTERS: REASONS TO BELIEVE IN MARRIAGE IN POSTMODERN SOCIETY 104-117 (1997). Stanton provides an excellent summary of data describing how children benefit from intact, two-parent families and a compelling description of the havoc caused by the "divorce revolution." See also Scott, *supra* note 29, at 31-32 (noting that "[c]ompared to children in intact families . . . children of divorce exhibited more delinquent and antisocial behavior, used more mental health services, and performed worse in school.").

children of divorce are faced with fears that their own adult relationships will falter.⁴⁰

C. *Where Do We Go From Here?*

[L]aw is most usefully seen not . . . as a system of rules, but as a branch of rhetoric . . . by which community and culture are established, maintained, and transformed.⁴¹

The debate over whether no-fault divorce is the cause of the "divorce revolution" or merely the effect has raged for the better part of a decade. Critics of the no-fault system liken it to a "moral cancer" gnawing at the heart of a sacred social institution. Those opposed to reinstating a traditional fault-based system claim that attempts to return to fault "are nostalgic attempts to recapture what never was."⁴² The truth most likely rests somewhere in the middle. Marriage under the traditional fault-based system hardly resembled an episode of "Leave It to Beaver," but no-fault cannot escape blame for the role it has played in turning a culture of marriage into a culture of divorce. Harvard professor Mary Ann Glendon asserts that the "law . . . tells stories about the culture that helped to shape it and which it in turn helps to shape: stories about who we are, where we came from, and where we are going."⁴³

Despite our discomfort with the notion, the law is a teacher. For too long it has taught that marriage matters only as long as personal satisfaction is derived. Covenant marriage offers an opportunity to reclaim the American family. The remainder of this article will examine the covenant marriage concept and explore the feasibility of establishing covenant marriage as the sole form of marriage in a system designed to place the needs of children and the interests of society before those of the individual.

III. THE COVENANT CONCEPT: CREATING TIES THAT BIND

A. *An Overview of Current Covenant Marriage Laws*

In both Louisiana and Arizona, couples may "opt-out" of the no fault regime by declaring their intent to designate their marriage a covenant marriage. First, the couple must sign a written declaration of their intent to covenant.⁴⁴ Second, the parties must submit an affidavit that they have received premarital counseling from a member of clergy or a

⁴⁰ See Spaht, *supra* note 37, at 1556.

⁴¹ James Boyd White, *Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life*, 52 U. CHI. L. REV. 684, 684 (1985).

⁴² DiFonzo, *supra* note 9, at 60.

⁴³ Spaht, *supra* note 37, at 1561.

⁴⁴ See ARIZ. REV. STAT. ANN. § 25-901(A)(1) (West 1998); LA. REV. STAT. ANN. § 9:272(B) (West Supp. 1998).

secular marriage counselor.⁴⁵ Finally, the parties must submit a notarized attestation from the clergy member or counselor affirming that the parties were counseled as to the nature and purpose of covenant marriage and the legal grounds for its termination.⁴⁶ This section considers the statutory requirements of current covenant marriage laws in detail.

1. The Declaration

By signing the written declaration, the couple acknowledges their understanding that "marriage is a covenant between a man and a woman who agree to live together as husband and wife for as long as they both live."⁴⁷ After asserting that they have "chosen each other carefully,"⁴⁸ the couple affirms that they have "received premarital counseling on the nature, purposes, and responsibilities of marriage."⁴⁹ Both agree to "take all reasonable efforts to preserve [the] marriage, including marital counseling."⁵⁰ Finally, the couple declares that, "[w]ith full knowledge of what this commitment means,"⁵¹ they will be bound by the laws governing covenant marriage and "promise to love, honor and care for one another as husband and wife for the rest of [their] lives."⁵²

2. Premarital Counseling

Counseling sessions may be conducted by either clergy members or secular counselors.⁵³ Three key components characterize the counseling requirement. First, counseling must include a "discussion of the seriousness of covenant marriage."⁵⁴ The counselor should communicate to the couple that covenant marriage is "a commitment for life." Second, the counselor must explain to the couple their duty to take reasonable

⁴⁵ See ARIZ. REV. STAT. ANN. § 25-901(B)(2) (West 1998); LA. REV. STAT. ANN. § 9:273(A)(2)(a) (West 1999).

⁴⁶ See ARIZ. REV. STAT. ANN. § 25-901(C) (West 1998); LA. REV. STAT. ANN. § 9:273(A)(2)(b) (West 1999).

⁴⁷ ARIZ. REV. STAT. ANN. § 25-901(B)(1) (West 1998); LA. REV. STAT. ANN. § 9:273(A)(1) (West 1999).

⁴⁸ ARIZ. REV. STAT. ANN. § 25-901(B)(1); LA. REV. STAT. ANN. § 9:273(A)(1).

⁴⁹ ARIZ. REV. STAT. ANN. § 25-901(B)(1); LA. REV. STAT. ANN. § 9:273(A)(1).

⁵⁰ ARIZ. REV. STAT. ANN. § 25-901(B)(1); LA. REV. STAT. ANN. § 9:273(A)(1).

⁵¹ ARIZ. REV. STAT. ANN. § 25-901(B)(1); LA. REV. STAT. ANN. § 9:273(A)(1).

⁵² ARIZ. REV. STAT. ANN. § 25-901(B)(1); LA. REV. STAT. ANN. § 9:273(A)(1).

⁵³ Compare LA. REV. STAT. ANN. § 9:273(A)(2)(a), with ARIZ. REV. STAT. ANN. § 25-901(B)(2) (West 1998). Specifically, the Louisiana statute allows couples to receive counseling from "a priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect or a marriage counselor" while the more broadly structured Arizona statute allows counseling "from a member of clergy or from a marriage counselor."

⁵⁴ ARIZ. REV. STAT. ANN. § 25-901(B)(2); see also LA. REV. STAT. ANN. § 9:275(C)(1)(b)(i) (West 1999).

steps to preserve their union.⁵⁵ This includes an obligation "to seek marital counseling in times of marital difficulties."⁵⁶ Finally, the counselor must discuss with the couple the grounds for legal termination of a covenant marriage.⁵⁷ In both Louisiana and Arizona, the clergy member or counselor is required to give the couple an informational brochure promulgated by the state explaining the terms and conditions of a covenant marriage.⁵⁸

B. Grounds for Terminating Covenant Marriages

Covenant marriage does not eliminate the option of divorce. Parties to a covenant marriage simply agree to be bound to a more restrictive system of divorce. The system of covenant marriage has been discounted as an unnecessary abandonment of the no-fault system. In actuality, covenant marriage statutes in both Louisiana and Arizona create a system that is a mixture of fault and no-fault.

1. Louisiana Law

Under Louisiana covenant marriage law, couples "living separate and apart continuously without reconciliation for a period of two years"⁵⁹ may obtain a no-fault divorce.⁶⁰ For couples who choose not to divorce, either after the commission of a fault by one of the spouses or after living apart continuously for two years, a separation from bed and board is available.⁶¹ If a couple with no minor children decides to divorce after the separation judgment is obtained, they must live separate and apart continuously for a period of one year before the divorce will be granted.⁶² If there is a minor child, the separate and apart waiting period is increased to one year and six months.⁶³

⁵⁵ See ARIZ. REV. STAT. ANN. § 25-901(B)(2); LA. REV. STAT. ANN. § 9:275(C)(1)(b)(i).

⁵⁶ ARIZ. REV. STAT. ANN. § 25-901(B)(2); LA. REV. STAT. ANN. § 9:275(C)(1)(b)(i).

⁵⁷ See ARIZ. REV. STAT. ANN. § 25-901(B)(2); LA. REV. STAT. ANN. § 9:275(C)(1)(b)(i).

⁵⁸ See ARIZ. REV. STAT. ANN. § 25-906(C) (West 1998); LA. REV. STAT. ANN. § 9:273(A)(2)(b) (West 1999).

⁵⁹ LA. REV. STAT. ANN. § 9:307(A)(5), (B)(5) (West 1999).

⁶⁰ See *id.* Under the Louisiana Civil Code, the required living apart period before a no-fault divorce will be granted is approximately six months. LA. CIV. CODE. ANN. art. 103(1) (West 1993). For a detailed comparison of the covenant marriage provisions and the Louisiana Civil Code, see Jeanne Louise Carriere, "It's Déjà Vu All Over Again": *The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 TUL. L. REV. 1701, 1719-1721 (1998).

⁶¹ See LA. REV. STAT. ANN. § 9:307(B) (West 1999). Separation from bed and board in a covenant marriage does not dissolve the bond of matrimony, since the separated husband and wife are not at liberty to marry again; but it puts an end to their conjugal cohabitation, and to the common concerns, which existed between them. See LA. REV. STAT. ANN. § 9:309(A)(1) (West 1999).

⁶² See LA. REV. STAT. ANN. § 9:307(A)(6)(b) (West 1999).

⁶³ See *id.*

Four substantive fault grounds justify the immediate termination of a covenant marriage. An innocent spouse can unilaterally divorce if the other spouse 1) commits adultery,⁶⁴ 2) commits a felony and is sentenced to death or imprisonment,⁶⁵ 3) abandons the matrimonial domicile for a period of one year and refuses to return,⁶⁶ or 4) physically or sexually abuses the innocent spouse or a child of either spouse.⁶⁷ An additional fault based ground for legal separation exists where habitual intemperance or excesses, cruel treatment, or outrages of a spouse "render living together insupportable."⁶⁸

2. Arizona Law

Though Arizona's grounds for termination of a covenant marriage closely mirror Louisiana's, a number of differences merit attention. First, the Arizona statute allows immediate divorce where "[t]he husband and wife both agree to dissolution of the marriage."⁶⁹ Thus, Arizona allows what is best termed bilateral no-fault divorce.

Where only one spouse wishes to divorce, the spouses must live separate and apart continuously for two years before a no-fault divorce can be obtained.⁷⁰ Second, the Arizona statute substantially expands the protection for spouses in abusive relationships. Fault-based divorce is available where the spouse seeking dissolution, a child of either spouse, or "a relative of either spouse permanently living in the matrimonial domicile"⁷¹ has been physically or sexually abused by the other spouse.⁷² Notably, Arizona has declared that habitual abuse of drugs or alcohol shall constitute a fault-based ground for divorce.⁷³ Intemperance or ill treatment that renders living together insupportable stands as a ground for divorce rather than merely a justification for legal separation.⁷⁴ Finally, though both Arizona and Louisiana consider adultery, imprisonment for commission of a felony, and abandonment and refusal to return to the matrimonial domicile for a period of one year fault-based grounds for dissolution,⁷⁵ Arizona alone allows a spouse to file a petition

⁶⁴ See *id.* § 9:307(A)(1).

⁶⁵ See *id.* § 9:307(A)(2).

⁶⁶ See *id.* § 9:307(A)(3).

⁶⁷ See *id.* § 9:307(A)(4).

⁶⁸ *Id.* § 9:307(B)(6).

⁶⁹ ARIZ. REV. STAT. ANN. § 25-903(8) (West 1999).

⁷⁰ See *id.* § 25-903(5).

⁷¹ *Id.* § 25-903(4).

⁷² See *id.*

⁷³ See *id.* § 25-903(7).

⁷⁴ See *id.* § 25-903(1), (2), (3); LA. REV. STAT. ANN. § 9:307(A)(1), (2), (4) (West 1999).

⁷⁵ See ARIZ. REV. STAT. ANN. § 25-903(1), (2), (3); LA. REV. STAT. ANN. § 9:307(A)(1), (2), (3).

on the ground of abandonment if the other spouse has left the matrimonial domicile and it is expected that the parties will remain apart for the required period.⁷⁶ Though the petition is stayed until the required time has elapsed, filing allows the court to enter and enforce temporary orders while the action is pending.⁷⁷ The same is true of petitions for judgment of separation.⁷⁸

IV. POTENTIAL PROBLEMS AND SUGGESTED SOLUTIONS

A. Regular or Premium: Two Classes of Marriage

Despite a myriad of state promulgated provisions governing marital rights, duties, and dissolution, the state has historically refrained from regulating marriage itself. Provisions governing marriage generally focus on competency to marry.⁷⁹ With the advent of covenant marriage, state reluctance to intervene in a sacred social institution has faded. Covenant marriage creates a two-tiered system of marriage.⁸⁰ Couples must inevitably choose one type of marriage over the other. Detractors of the covenant concept worry that covenant marriage devalues "regular" marriage by "somehow giving more credence to premium marriages."⁸¹ Others worry that the creation of classes of marriage will lead to discrimination on the basis of marital sub-status.⁸² Covenant marriage necessarily signifies a certain commitment between the parties. By default, the assumption becomes that those who choose not to covenant do not share the same degree of commitment. Thus, covenant couples are presumably more stable. Stability is important in the marketplace. Conceivably, insurance companies and employers could confer special benefits on covenant couples.⁸³ The government could "get in on the act, using its tax laws to favor covenant marriages over noncovenant marriages, or providing higher social security benefits for widows of a covenant marriage."⁸⁴ Additionally, if a religious denomination chooses

⁷⁶ See ARIZ. REV. STAT. ANN. § 25-903(3).

⁷⁷ See *id.*

⁷⁸ See *id.* § 25-904(5).

⁷⁹ See William A. Galston, *Divorce American Style*, 124 PUB. INTEREST 12, 21 (1996) (noting that "[i]n most states it is much harder to get a driver's license than a marriage license.").

⁸⁰ See Lindsey, *supra* note 8, at 272.

⁸¹ See "Premium" Option, THE INDIANAPOLIS STAR, Oct. 2, 1998, at A19. In one article, an opponent of covenant marriage claimed "[y]ou're going to have two classes of marriages. Some people will be married and some will have a covenant marriage." Heather Shulick, *New Law Will Lock Women Into Abusive Marriages, Foes Say*, THE TUSCON CITIZEN, June 2, 1998, at 1A.

⁸² See Bartlett, *supra* note 30, at 833.

⁸³ See *id.*

⁸⁴ *Id.* at 833-34.

to marry only couples who agree to covenant, an element of coercion could enter the picture.⁸⁵ Those who are contemplating marriage seldom seriously consider the possibility that their union could end in divorce. Pressure from family and friends to have a "church wedding" could cause a couple to enter a covenant marriage without careful consideration of the eventual consequences.⁸⁶

B. To Marry or Not to Marry: Inadvertently Increasing Cohabitation?

Marriage is more than just a piece of paper. Among other things, it is a social status that is desirable because of the benefits it bestows. Some of the benefits are tangible. Other benefits are more incorporeal. Marriage provides companionship, support, and encouragement. Life's burdens are easier to bear when you and your spouse shoulder the weight together.

The rub is that marriage is not easy. It requires commitment and hard work. Naturally, then, there are those who seek to enjoy the benefits while avoiding the burdens. As social researcher Glen Stanton observed, "[w]hat used to be stigmatized and judged as 'living in sin' has now gained social respectability and is now called cohabitation."⁸⁷

The number of couples setting up housekeeping without the benefit of a marriage license has increased a dramatic 700 percent since 1970.⁸⁸ Yet "[o]ver 90 percent of all cohabiters report that they plan to marry someone, if not their current partner, at some point in their lives."⁸⁹ Contrary to popular opinion, however, cohabitation is a poor "test" for marital compatibility. Rather, cohabitation is "related to lower levels of marital interaction, higher levels of marital disagreement, and marital instability."⁹⁰ Those who cohabit before marriage have a substantially higher divorce rate than those who do not.⁹¹ Further, those who cohabit are more likely to face domestic violence and alcoholism.⁹²

The question seems to be whether making it harder to marry and to divorce would exacerbate the problem of cohabitation. Clearly, cohabitation is not directly related to how difficult it is to marry. Marriage licenses are inexpensive and competency requirements minimal. Nor can the rate of cohabitation be linked to current difficulty

⁸⁵ See *id.* at 833.

⁸⁶ See *id.*

⁸⁷ STANTON, *supra* note 39, at 22.

⁸⁸ See *id.* at 56.

⁸⁹ *Id.* at 57.

⁹⁰ *Id.* at 58.

⁹¹ See *id.* at 58-59 (presenting a synopsis of studies finding a correlation between premarital cohabitation and subsequent marital instability).

⁹² See *id.* at 59-64 (discussing the connection cohabitation and increased incidences of substance abuse and domestic violence).

in obtaining a divorce. Divorce is easier to get today than ever before in our history. Why then the shocking increase in the incidence of cohabitation? Perhaps the answer is that a generation of children raised in "broken homes" are now choosing to avoid the mistakes of their parents by shunning the institution of marriage. As one judge asserted, "[t]he problem of the family . . . is indeed the problem of the human race."⁹³ This is so because the family is not only the most "fundamental institution of humanity," it is also "the great conserving agency in human society, preserving and transmitting" our beliefs, customs, and ideals "from generation to generation"⁹⁴ How better to decrease cohabitation in the future than to strengthen families in the present?

C. The Counseling Requirement: An Exercise in Ambiguity

Although the concept of educating couples on the rights and responsibilities of marriage has been widely acclaimed,⁹⁵ the counseling provisions in current covenant marriage statutes are glaringly deficient. This ambiguity lessens the impact of the counseling requirement and renders a good idea ineffective.

1. Premarital Counseling

In theory, premarital counseling is designed to remind couples of the seriousness of the relationship which they are about to undertake. The notion that such counseling can actually reduce divorce rates has gained popularity in recent years.⁹⁶ At least 17 states have included some form of premarital counseling in reform packages designed to strengthen marriage and deter divorce.

In May, 1998, Florida passed the Marriage Preparation and Preservation Act.⁹⁷ The Florida Act imposes a waiting period on couples who wish to obtain a marriage license unless they complete a four-hour marriage preparation course.⁹⁸ The course includes, in part, a review of the rights and responsibilities of the parties to each other and to any children of the parties, conflict management, communication skills, financial responsibilities, children and parenting responsibilities, and a

⁹³ Bourne v. Bourne, 185 P. 489, 546 (1919) (Thomas, J., dissenting).

⁹⁴ *Id.*

⁹⁵ See Spaht, *supra* note 37, at 1572 (predicting that the counseling requirement will strengthen marriage through education). *But see* Carriere, *supra* note 60, at 1705-1717 (describing the counseling requirement as a "magic bullet" unable to effect in reality what it promises in theory).

⁹⁶ See Nichols, *supra* note 6, at 940-41 (noting that recent polls show that "sixty-four percent [of Americans] think potential spouses should be required to take a marriage-education course prior to receiving a marriage license.").

⁹⁷ See H.B. 1019, 1998 Reg. Sess. (Fla. 1998).

⁹⁸ See FLA. STAT. ANN. § 741.04(b)(3) (West 1998).

discussion of typical problems faced during marriage and solutions to those difficulties.⁹⁹ The course can be conducted by any official representative of a religious institution or by qualified secular counselors.¹⁰⁰ The Florida Act authorizes the Family Law Section of the Florida Bar to prepare a handbook explaining Florida law relating to the rights and responsibilities of the parties to each other and their children.¹⁰¹ The handbooks, along with information on relationship skill-building classes, are available from the clerk of the circuit court upon application for a marriage license.¹⁰²

The specificity of the Florida program stands in glaring contrast with the minimal description of counseling requirements in current covenant marriage law. Neither Louisiana nor Arizona offer any indication of how long premarital counseling should last. In addition, current covenant laws describe what should be discussed in the counseling sessions in sweeping generalities. A "discussion of the seriousness of covenant marriage"¹⁰³ could be many things to many people, particularly when so few restrictions are placed on who can provide marriage counseling. The Louisiana version authorizes "a priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect or a marriage counselor"¹⁰⁴ to conduct premarital counseling. The Arizona statute offers even less guidance. Couples may receive counseling "from a member of the clergy or from a marriage counselor."¹⁰⁵ Once again, no definition of premarital counseling is provided and no restrictions are placed on who may claim the title of "marriage counselor."¹⁰⁶

The quandary faced by the drafters of the covenant provisions is evident. How carefully one must tread when the line between church and state is stretched so thin. Many religious denominations already provide premarital counseling to the faithful. Prescribing to the church the content of its instruction is inherently problematic. Members of the Roman Catholic community have refused to endorse covenant marriage for parishioners because the state requirement of discussing the grounds

⁹⁹ See *id.* § 741.0305(2)(a)-(e).

¹⁰⁰ See *id.* § 741.0305(3)(a)(1)-(6).

¹⁰¹ *Id.* § 741.0306(1).

¹⁰² See *id.* § 741.0306(2).

¹⁰³ ARIZ. REV. STAT. ANN. § 25-901(B)(2) (West 1998); see also LA. REV. STAT. ANN. § 9:275(C)(1)(b)(i) (West 1998).

¹⁰⁴ LA. REV. STAT. ANN. § 9:273(2)(b) (West 1999).

¹⁰⁵ ARIZ. REV. STAT. ANN. § 25-901(B)(2).

¹⁰⁶ See John Shalett, Letter to the Editor, TIMES-PICAYUNE (New Orleans), Aug. 16, 1997, at B6. The Louisiana Association for Marriage and Family Therapy plans to introduce legislation in 1999 aimed at specifically setting forth the qualifications needed to claim the title of "marriage counselor." *Id.*

for divorce violates the tenets of their faith.¹⁰⁷ Conversely, allowing the clergy or even secular counselors to explain the legalities of state legislation presents another set of concerns.¹⁰⁸ The meanings of "adultery," "habitual intemperance," and "desertion" are debated even within the legal profession. How then can nonlawyers be expected to adequately explain these terms? Will these counselors inadvertently subject themselves to liability if they offer inaccurate explanations?

2. Counseling in Times of Marital Difficulty

The requirement that couples "take all reasonable efforts"¹⁰⁹ to preserve their union up to and "including marriage counseling"¹¹⁰ begs the question of enforceability. If the declaration is viewed as between the individual and the state rather than as between the two parties to the covenant marriage, the court could compel marriage counseling. When two adults are willing to sit down and discuss problems within their relationship with a counselor, statistics show that the chances of marital success increase.¹¹¹ There is, however, less evidence that involuntary participation in counseling can produce the same result.¹¹² If the declaration is regarded as an enforceable obligation between the parties, a court of equity could order specific performance. Once again, coercing an unwilling spouse to attend marriage counseling is not likely to result in reconciliation. Awarding damages for breach is certainly an option, but one that is unlikely to further the legislative goal of deterring divorce. Further, the statute is silent as to whether counseling is required in those situations in which one spouse commits an offense against the marriage.¹¹³ Requiring a spouse to remain within a marriage

¹⁰⁷ See Bruce Nolan, *Bishops Back Off Covenant Marriage*, TIMES-PICAYUNE (New Orleans), Oct. 30, 1997, at A1.

¹⁰⁸ See Carriere, *supra* note 59, at 1717.

¹⁰⁹ ARIZ. REV. STAT. ANN. § 25-901(B)(1) (West 1998); LA. REV. STAT. ANN. § 9:273(A)(1) (West 1998).

¹¹⁰ ARIZ. REV. STAT. ANN. § 25-901(B)(1); LA. REV. STAT. ANN. § 9:273(A)(1).

¹¹¹ See Bonnie Miller Rubin, *Training to Tie the Knot*, CHI. TRIB., July 6, 1997, at A01 (claiming that early results in several programs designed to decrease divorce through extensive counseling before marriage indeed showed a decline in the counseled groups).

¹¹² Coercive marital counseling for couples seeking divorce has been attempted before. In the 1950s, California allowed one spouse to compel the other to attend a "conciliation hearing" for the purpose of trying to achieve reconciliation. The program was a failure. See HERBIE DIFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 133-37 (1996). New Jersey implemented a similar program with similarly disappointing results. The failure rate was 97.3 percent. See *id.* at 136.

¹¹³ See Carriere, *supra* note 60, at 1716-17 (contending that requiring a battered spouse to stay in a marriage long enough to attend counseling is more likely to risk lives than to save marriages).

with a partner who has inflicted sexual, physical, or emotional abuse poses serious concerns.

V. A FOCUS ON STRENGTHENING MARRIAGE

Though the first year of its existence has been anything but a honeymoon, the concept of covenant marriage has taken the realm of family law by storm. No fewer than 18 states have considered similar legislation.¹¹⁴ Before enacting carbon copies of existing legislation, however, other states should carefully consider implementing a *pure* covenant marriage system.

A. One System of Marriage.

The creation of "classes" of marriage is unwarranted. The apparent rationale behind structuring a two-tiered system is the preservation of "choice." By allowing couples to decide whether to enter a covenant marriage or a regular marriage, the state avoids dictating virtue. This reasoning has two flaws. It assumes that both parties will have an equal voice in deciding what type of marriage to enter. Pressure from family and friends, lack of education, or coercion by a prospective spouse could easily cause a party to enter a particular type of marriage without full appreciation of the potential consequences. Such reasoning also presumes that one type of marriage will not be preferred over the other. If this presumption fails, the danger is that discrimination on the basis of marital sub-status will proliferate. The better solution would be to combine features of current covenant marriage legislation with other innovative reform proposals to create a single system of marriage designed to strengthen families.

1. Bilateral No-Fault

A pure covenant marriage system need not involve a return to a strictly fault-based system. Bilateral no-fault offers a number of advantages. First, it protects those in situations similar to that of the hypothetical homemaker discussed in Part II. One spouse would not be

¹¹⁴ Alabama, Arizona, California, Georgia, Indiana, Kansas, Louisiana, Minnesota, Mississippi, Missouri, Nebraska, Ohio, Oklahoma, South Carolina, Tennessee, Virginia, Washington, and West Virginia. See Melissa Lawton, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471, n.5 (1998) (S. 606, Reg. Sess. (Ala. 1998); H. 2658, 43rd Leg., 2d Reg. Sess. (Ariz. 1998); S. 1377, Reg. Sess. (Cal. 1997); H. 249, 144th Gen. Ass., Reg. Sess. (Ga. 1997); H. 1052, 110th Gen. Ass., 2d Reg. Sess. (Ind. 1998); H. 2839, 77th Leg., Reg. Sess. (Kan. 1998); H. 756, Reg. Sess. (1997 La.); S. 2935, 80th Reg. Sess. (Minn. 1998); H. 1645, Reg. Sess. (Miss. 1998); H. 1864, 89th Gen. Ass., 2d Reg. Sess. (Mo. 1998); L.H. 1214, 95th Leg., 2d Reg. Sess. (Neb. 1998); H. 567, 122nd Gen. Ass., Reg. Sess. (Ohio 1997); H. 2208, 46th Leg., 2d Sess. (Okla. 1998); S. 961, Gen. Ass., 112th Reg. Sess. (S.C. 1998); H. 2101, 100th Gen. Ass. (Tenn. 1998); H. 1056, Reg. Sess. (Va. 1998); S. 6135, 55th Leg. (Wash. 1998); H. 4562, 73rd Leg., 2d Reg. Sess. (W. Va. 1998)).

able to terminate a marriage over the objections of the other. Second, bilateral no-fault obviates the need for collusion. Parties who agree to terminate their covenant marriage are able to do so without having to jump through the hoops of proving fault. Finally, bilateral no-fault reduces the cost of litigation and the degree of acrimony in situations where the parties agree that the marriage cannot be saved.

2. Expanded Fault Grounds

Detractors of the covenant concept often cite the narrow grounds available in fault based system as a basis of opposition.¹¹⁵ One particular area of concern is that the weaker partner, most often the woman, will be trapped in an abusive marriage.¹¹⁶ By making physical or sexual abuse a basis for immediate divorce, current covenant statutes stand as proof that drafters of covenant marriage legislation are not limited to the narrow divorce grounds of the past. Indeed, the grounds for dissolution under current covenant marriage legislation are more liberal than those of many states. Never before have physical and sexual abuse, emotional abuse, and alcohol abuse been recognized as grounds for immediate divorce.¹¹⁷

B. Suggested Solutions

With covenant marriage as the only system of marriage, the lack of specificity in the current provisions is easily remedied. Three simple steps would dramatically strengthen the counseling requirement. First, clear standards for qualified marriage counselors should be developed. Counseling should be provided only by professional counselors or religious officials. Second, more detailed guidance on the subject matter covered in counseling sessions should be provided. Not only should "the rights and responsibilities" of covenant marriage be discussed, but also practical concerns such as parenting skills, conflict resolution, and financial responsibility. Pre-marital counseling should not be limited to a "discussion" of the rights and duties involved in covenant marriage. Additionally, the grounds for dissolution should be excluded from any discussion in order to minimize the potential for unauthorized practice of law. States desiring to provide this information could include the information in a brochure promulgated by the Attorney General. As a practical matter, minimum time limits for counseling sessions should be imposed to clarify exactly what constitutes a "discussion." Finally, the

¹¹⁵ See, e.g. Barbara Dafoe Whitehead, *Divorce, California Style*, 18 CAL. LAW 40 (1997) (arguing that a fault-based system is likely to make divorce more adversarial and marriage less attractive).

¹¹⁶ See Carriere, *supra* note 60, at 1714-16; see also Bradford, *supra* note 8, at 634.

¹¹⁷ See ARIZ. REV. STAT. ANN. § 25-903(4) (West 1999); LA. REV. STAT. ANN. § 9:307(A)(4) (West 1998).

requirement of pre-divorce counseling should be removed. Couples on the brink of dissolution are not likely to benefit from forced participation in counseling. If a state chooses to retain pre-divorce counseling, an exception should be granted when one of the spouses commits an offense against the marriage. To do otherwise would be to place a spouse in an abusive relationship in danger.

VI. CONCLUSION

The unfortunate reality that not all marriages succeed should not deter attempts to strengthen families. What the covenant marriage concept offers is not a nostalgic return to the problems of the past, but rather an opportunity to strengthen marriage through increased emphasis on the serious nature of a commitment to marry.