

# COVENANT MARRIAGE: LEGISLATING FAMILY VALUES

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## INTRODUCTION

Hardly a social problem exists that has not been attributed to the breakdown of the American family, and hardly has there been a time in American history when this has not been true. Today, a decline in “family values” is blamed for crime, drug use, low educational achievement, poverty, and probably in some circles, for the weather. The solution to these problems, the theory goes, is to save the family, and the way to save the family is to make it harder to get divorced.

In some states, conservative lawmakers are charging to the rescue. They propose a concept called “covenant marriage,” a sort of “marriage deluxe” that would be slightly harder to enter and much harder to exit than a “regular” marriage. Their goal is to reduce the divorce rate by preventing bad marriages before they begin and by restricting divorce once a couple is married. In July 1997, Louisiana became the first state to pass a covenant marriage bill.<sup>1</sup> This Note assesses the likely effectiveness of such a measure. It concludes that marriages are better made in the human heart than in the statehouse halls.

Part I of this Note reviews the evolution of American divorce law to provide an historical context for the current movement to reform those laws. As one product of this new reform movement, the covenant marriage proposal itself is described in detail. In an effort to evaluate whether new restrictions on divorce will improve social conditions, the current, less restrictive scheme of no-fault divorce is analyzed to determine whether it has been responsible for adverse social consequences. Specifically, this Note considers the impact of no-fault divorce laws on the well-being of children and spouses, on the post-divorce finances of women, and on the divorce rate. A brief attempt is made to explore the factors that contribute to successful marriages. Against this backdrop, covenant marriage legislation is inspected to determine whether it will succeed in achieving its social objectives. Finally, this Note recommends alternative approaches.

## I. HISTORY AND EVOLUTION OF DIVORCE LAW

During the Colonial period of American history, the family was an integral part of a hierarchically organized, interdependent society, and the family owed duties and obligations to the community.<sup>2</sup> In order for men to fulfill their duty to maintain a well-governed home, they were vested with control over the

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1. Act of July 15, 1997, 1997 La. Acts 1380 (codified at LA. REV. STAT. ANN. §§ 9:224-25, 234, 245, 272-75, 307-09 (West Supp. 1998)).

2. See MICHAEL GROSSBERG, GOVERNING THE HEARTH 4 (1985).

household's inhabitants and property.<sup>3</sup> Women and children were subordinate and dependent.<sup>4</sup> Under the law, husbands and wives were treated as one person, and the husband assumed all of the wife's legal rights.<sup>5</sup> Divorce, where available, required an act of the legislature, and even divorce from bed and board (a form of legal separation) was rare.<sup>6</sup> This does not mean, however, that marriages always remained intact. The most common solutions to marital breakdown were adultery and desertion.<sup>7</sup>

Unlike the Old World, however, America offered abundant land, commercial opportunities, and demographic patterns which began to effect changes in the concept of family.<sup>8</sup> Individuals resisted community and family demands that restricted their personal choices.<sup>9</sup> Women gained more social and economic freedom<sup>10</sup> and their legal rights increased, as represented by the availability of divorce in some colonies.<sup>11</sup>

In the Post-Revolutionary era, the family evolved from a public to a private institution.<sup>12</sup> The law began to regard the family as a separate, self-regulating body composed of individuals with their own rights and identities.<sup>13</sup> Affection, not status, became the basis for marriage,<sup>14</sup> which was viewed as contractual in nature, arising from the consent of both parties and capable of being dissolved.<sup>15</sup> Gender roles within the family became specialized; husbands were responsible for supporting the family, wives for maintaining the home.<sup>16</sup>

Reflecting the more emotional and intimate nature of marriage, the Nineteenth Century brought a steady rise in the number of divorces, increasing at a rate of more than seventy percent per year by the end of the century.<sup>17</sup> In 1867, 9937 divorces were granted in the United States; by 1900, 55,000 couples divorced each year.<sup>18</sup> Restrictive divorce laws failed to stem the tide.<sup>19</sup> Reformers spoke of a "crisis in the family," and "critics warned that divorce and desertion, male licentiousness, and women's rights threatened the very fabric of the republic. . . . An overemphasis on personal welfare and private satisfaction

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3. *See id.* at 5.

4. *See id.*

5. *See id.* at 25.

6. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 204-05 (1985).

7. *See id.* at 204.

8. *See* GROSSBERG, *supra* note 2, at 5.

9. *See id.* at 5-6.

10. *See id.* at 5.

11. *See id.* at 25.

12. *See id.* at 6.

13. *See id.* at 26.

14. *See id.* at 7.

15. *See id.* at 6-7, 19-20.

16. *See id.* at 7-9.

17. *See id.* at 238, 250-51.

18. *See* FRIEDMAN, *supra* note 6, at 500.

19. *See* GROSSBERG, *supra* note 2, at 250.

was, they held, a menace to social cohesion because it fostered excessive individualism and self-indulgence.”<sup>20</sup>

During the period between the Revolution and the end of the Nineteenth Century, courtroom divorce gradually replaced legislative divorce, first in the northern states and later in the South.<sup>21</sup> Under the new laws, divorce was an adversarial process in which one spouse had to prove that the other was at fault, usually for adultery, desertion, cruelty, or drunkenness.<sup>22</sup> Over two-thirds of all divorce actions were filed by wives.<sup>23</sup>

Although the divorce statutes were strict, between the mid-Nineteenth and mid-Twentieth Centuries, the law and practice of divorce diverged.<sup>24</sup> Couples managed to obtain “consensual” divorces, although the statutes allowed no such thing.<sup>25</sup> The primary mechanisms of consensual divorce were collusion and perjury.<sup>26</sup> In New York, for example, where adultery was the only allowable ground for divorce, “divorce rings” flourished.<sup>27</sup> Enterprising entrepreneurs manufactured adultery for couples in the market for divorce by staging compromising hotel room scenes, complete with “actresses” who would appear in court and “testify they knew the husband in the case, blush, cry, and then leave the rest to the judge.”<sup>28</sup> In states that allowed more relaxed grounds for divorce, such as abandonment and cruelty, these were by far the most popular grounds, and most of these divorces were uncontested.<sup>29</sup> By 1959, cruelty was the ground in half of this country’s divorces, and desertion accounted for another twenty-five percent.<sup>30</sup> Still another option was to travel to “divorce mills”—states popular among freedom-seeking visitors for their permissive divorce laws.<sup>31</sup>

In 1969, California enacted the nation’s first no-fault divorce law, recognizing divorce as the result of factual marital breakdown.<sup>32</sup> California’s new no-fault ground for divorce was “irreconcilable differences, which have caused the irremediable breakdown of the marriage.”<sup>33</sup> The first version of the Uniform Marriage and Divorce Act, promulgated in 1970, also provided for no-

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20. *Id.* at 10-11.

21. *See* FRIEDMAN, *supra* note 6, at 205-06.

22. *See* GROSSBERG, *supra* note 2, at 251.

23. *See id.*

24. *See* Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 659 (1984).

25. *See id.* at 653, 659.

26. *See id.* at 659.

27. *Id.* at 659-60.

28. *Id.* at 659.

29. *See id.* at 660-61.

30. *See id.* at 661.

31. *See id.*

32. Family Law Act, ch. 1608, § 8, 1969 Cal. Stat. 3314 (codified as amended in scattered sections of CAL. FAM. CODE).

33. Family Law Act, ch. 1608, § 8, 1969 Cal. Stat. 3324 (codified as amended at CAL. FAM. CODE § 2310 (West 1994)).

fault divorce.<sup>34</sup> By 1985, all fifty states had enacted some form of no-fault divorce laws.<sup>35</sup> The primary goal of these laws was to eliminate a showing of fault as a requirement for divorce, thereby reducing the adversarial practices that fault had fostered.<sup>36</sup> Other purposes for abolishing fault grounds included eliminating collusion and perjury—which compromised the integrity of the legal system—closing the gap between the law as written and the law as applied, and reflecting changes in conceptions of marital breakdown.<sup>37</sup> No-fault divorce laws were passed, not to change divorce radically, but to bring the law into step with current practice.<sup>38</sup>

## II. THE “NEW” DIVORCE REFORM MOVEMENT

Divorce law critics loudly and frequently attack the grounds for divorce. Widespread dissatisfaction with the accomplishments of divorce law and with divorce policy form the context of this criticism. It is asserted by many that divorces are far too numerous in our society, that they undermine the foundations of family life, that they generate instability throughout society, and that they leave an ever-increasing proportion of American children without the security and affection of a united family, thereby producing juvenile delinquency, truancy, and a variety of psychological ills.<sup>39</sup>

These words could have been plucked from the pages of a current periodical. Instead, they were written in 1971 and describe the deep discontent that then existed regarding the country’s fault-based divorce laws and high rate of divorce.<sup>40</sup> The legal reforms born of this discontent resulted in the current system of no-fault divorce.

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34. UNIF. MARRIAGE AND DIVORCE ACT §303 (amended 1973), 9A U.L.A. 147 (1987).

35. See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 54 (1987). See, e.g., ALA. CODE § 30-2-1 (1989); CONN. GEN. STAT. ANN. § 46b-40 (West 1995); GA. CODE ANN. § 19-5-3 (1991); IDAHO CODE §§ 32-603, 32-616 (1996); IND. CODE ANN. § 31-15-2-3 (West Supp. 1998); IOWA CODE ANN. § 598.17 (West 1996 & Supp. 1998); ME. REV. STAT. ANN. tit. 19-A, § 902 (West 1998); MASS. GEN. LAWS ANN. ch. 208, §§ 1A, 1B (West 1998); MICH. COMP. LAWS ANN. § 552.6 (West 1988); MINN. STAT. ANN. § 518.06 (West 1990); MISS. CODE ANN. § 93-5-2 (1994 & Supp. 1998); N.H. REV. STAT. ANN. § 458:7-a (1992); N.D. CENT. CODE § 14-05-03, 14-05-09.1 (1997); OHIO REV. CODE ANN. § 3105.01 (Anderson 1996); OR. REV. STAT. § 107.025 (1996); 23 PA. CONS. STAT. ANN. § 3301 (West 1991); R.I. GEN. LAWS § 15-5-3.1 (1996); S.D. CODIFIED LAWS § 25-4-2 (Michie 1992).

36. See Kay, *supra* note 35, at 4-5, 46.

37. See Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 93-96 (1991).

38. See *id.* at 97.

39. Homer H. Clark, Jr., *Divorce Policy and Divorce Reform*, 42 U. COLO. L. REV. 403, 403 (1971).

40. *Id.*

Today, a new movement is underway to reduce the number of divorces. In this movement, no-fault divorce is the culprit. Modern reformists are fueling a backlash against no-fault divorce and spawning proposals to toughen states' divorce laws.<sup>41</sup>

Proponents of restrictive divorce laws blame no-fault divorce primarily for three conditions: the availability of "unilateral" divorce, the rise in the divorce rates, and the high social costs exacted by divorce. First, they object to the practice of unilateral divorce (divorce at the request of one spouse, without the consent of the other), which they equate with no-fault divorce.<sup>42</sup> In fact, unilateral no-fault divorce is not available in some states.<sup>43</sup> Even so, this criticism is curious. Fault-based divorce laws, to which the critics of no-fault divorce seek to return, did not permit consensual divorce.<sup>44</sup> Rather, the statutes provided for unilateral divorce *only*, with an innocent spouse obtaining a divorce from a guilty spouse.<sup>45</sup> "The mere mention of permitting divorce by consent evoke[d] strong resistance, not only from adherents of the traditional notions that divorce should be awarded to the innocent spouse alone, but also from the reformers."<sup>46</sup> Couples desiring a consensual divorce, but lacking any of the necessary grounds, contrived to circumvent the laws and manufacture grounds.<sup>47</sup> In a confused twist of logic, today's reformists, who would permit divorce only by mutual consent (if then), and who loathe the concept of unilateral divorce, are seeking to return to a system where unilateral divorce was the only sanctioned course.

A more basic question is whether unilateral divorce is improper at all.

Even in those statistically rare cases in which one party seeks a divorce and the other resists, it is difficult to see what evidence a court could rely upon to hold that the marriage had not broken down. Marriage is a relationship between two people, and if one of those people is

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41. See, e.g., MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE* (1996); Charles S. Clark, *Is It Time to Crack Down on Easy Divorces?*, 6 CQ RESEARCHER 409 (1996); William A. Galston, *Braking Divorce*, AM. ENTERPRISE, May/June 1996, at 36; Laura Gatland, *Putting the Blame on No-Fault*, A.B.A. J., April 1997, at 50; Herma Hill Kay, 'Family Values' Embrace Fault in Divorce, NAT'L L.J., May 1, 1995, at A21; Wardle, *supra* note 37.

42. See Wardle, *supra* note 37, at 107.

43. See ALASKA STAT. § 25.24.200 (Michie 1996); ARIZ. REV. STAT. ANN. § 25-316 (West 1991); COLO. REV. STAT. ANN. § 14-10-110 (West 1997); CONN. GEN. STAT. ANN. § 46b-51 (West 1995); HAW. REV. STAT. ANN. § 580-42 (Michie 1997); 750 ILL. COMP. STAT. ANN. 5/401 (West 1993); MISS. CODE ANN. § 93-5-2 (1994); MO. ANN. STAT. § 452.320 (West 1997); OHIO REV. CODE ANN. § 3105.01 (Anderson 1996); 23 PA. CONS. STAT. ANN. § 3301 (West 1991); TENN. CODE ANN. § 36-4-103 (1996); WASH. REV. CODE § 26.09.030 (West 1997); W. VA. CODE § 48-2-4 (1996); WIS. STAT. § 767.12 (1993).

44. See Friedman, *supra* note 24, at 653.

45. See Kay, *supra* note 35, at 28.

46. Clark, *supra* note 39, at 407.

47. See Friedman, *supra* note 24, at 659.

determined that it shall not continue, this would seem to be plain evidence that the relationship had broken down.<sup>48</sup>

Another argument against prohibiting unilateral divorce is the principle that no marriage should be maintained without the consent of both spouses, just as no marriage can be created without the consent of both bride and groom.<sup>49</sup>

The other two major conditions for which critics blame the current divorce laws are that the laws have caused an increase in the divorce rate and that the laws have resulted in unacceptably high social costs. Reformers urge that divorce must be made more difficult because of the sizable costs that it exacts, financially and psychologically, on women and children.<sup>50</sup> Each of these concerns is addressed in detail in later sections of this Note.<sup>51</sup>

### III. COVENANT MARRIAGE

Proposals to reform no-fault divorce laws have been introduced in a majority of states.<sup>52</sup> One version of these proposals is the "covenant marriage." Covenant marriage legislation is intended to counteract no-fault divorce's perceived effect on the divorce rate and on children by allowing couples to choose a stricter form of marriage.<sup>53</sup> Some variety of covenant marriage legislation has been considered

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48. Clark, *supra* note 39, at 406.

49. See Joseph Goldstein & Max Gitter, *On Abolition of Grounds for Divorce: A Model Statute & Commentary*, 3 FAM. L.Q. 75, 86 (1968).

50. See, e.g., Wardle, *supra* note 37, at 113-16.

51. See *infra* Part IV.

52. See, e.g., H.R. 1179, 61st Gen. Assembly, 1st Reg. Sess. (Colo. 1997); H.B. 249, 144th Gen. Assembly, 1997-98 Reg. Sess. (Ga. 1997); H.B. 2839, 77th Leg., 1998 Reg. Sess. (Kan. 1998); H.B. 1168, 181st Gen. Ct., 1997 Reg. Sess. (Mass. 1997); H.B. 5991, 89th Leg., 1997 Reg. Sess. (Mich. 1997); H.B. 573, 55th Reg. Sess. (Mont. 1997); A.B. 2547, 207th Leg., 1st Ann. Sess. (N.J. 1996); S. 1182, 43d Leg., 1st Reg. Sess. (N.M. 1997); H.B. 2208, 46th Leg. Sess., 2d Sess. (Okla. 1997); S.B. 1122, 69th Leg. Assembly, Reg. Sess. (Or. 1997); S.B. 840, 181st Gen. Assembly, 1997-98 Reg. Sess. (Pa. 1997); H.B. 1697, 100th Gen. Assembly (Tenn. 1997); S. 120, 52d Leg. (Utah 1997); H.B. 472, 65th Sess. (Vt. 1997); H.B. 1056, 1998 Sess. (Va. 1998). See also *infra* notes 54-74 (citing state legislation regarding covenant marriage).

53. See, e.g., *Hearing on House Bill No. 756 Before the Civil Law and Procedure Committee*, 1997 Reg. Sess. (La. 1997) [hereinafter *Hearing*]; Catherine Candisky, *Lawmakers Propose Vows to Tie Knot a Little Tighter*, COLUMBUS DISPATCH, Aug. 22, 1997, at 4C; Sara Shipley, *Marriage Bill Weakened by Senate Panel: No-Fault Divorce OK with 3-Year Separation*, NEW ORLEANS TIMES-PICAYUNE, June 11, 1997, at A6.

in twenty states (Alabama,<sup>54</sup> Alaska,<sup>55</sup> Arizona,<sup>56</sup> California,<sup>57</sup> Georgia,<sup>58</sup> Indiana,<sup>59</sup> Kansas,<sup>60</sup> Louisiana,<sup>61</sup> Michigan,<sup>62</sup> Minnesota,<sup>63</sup> Mississippi,<sup>64</sup> Missouri,<sup>65</sup> Nebraska,<sup>66</sup> Ohio,<sup>67</sup> Oklahoma,<sup>68</sup> South Carolina,<sup>69</sup> Tennessee,<sup>70</sup> Virginia,<sup>71</sup> Washington,<sup>72</sup> and West Virginia<sup>73</sup>). In July 1997, Louisiana became the first state to allow couples to opt for a covenant marriage.<sup>74</sup>

The Louisiana law requires couples who choose a covenant marriage to undergo premarital counseling and to include a declaration of their intent to enter into a covenant marriage with their application for a marriage license.<sup>75</sup> The bases for dissolving a covenant marriage mirror fault-based grounds for divorce. Under a covenant marriage, a “non-breaching” spouse may be granted a divorce only if the other spouse has committed one of the following specific acts: (1) adultery; (2) commission of a felony and sentence to death or imprisonment at hard labor; (3) abandonment for at least one year; (4) physical or sexual abuse

54. H.B. 44, 1998 Reg. Sess. (Ala. 1998); H.B. 30, 1998 Reg. Sess. (Ala. 1998); S.B. 606, 1998 Reg. Sess. (Ala. 1998).

55. H.B. 390, 20th Leg., 2d Sess. (Alaska 1997); S.B. 318, 20th Leg., 2d Sess. (Alaska 1997).

56. H.B. 2658, 43d Leg., 2d Reg. Sess. (Ariz. 1998); S.B. 1133, 43d Leg., 2d Reg. Sess. (Ariz. 1998).

57. S.B. 2, 1997-98 Reg. Sess. (Cal. 1997); S.B. 1377, 1997-98 Reg. Sess. (Cal. 1997).

58. H.B. 1138, 144th Gen. Assembly, 1997-98 Reg. Sess. (Ga. 1997); S.B. 440, 144th Gen. Assembly, 1997-98 Reg. Sess. (Ga. 1997).

59. H.B. 1049, 110th Gen. Assembly, 1st Reg. Sess. (Ind. 1997); H.B. 1052, 110th Gen. Assembly, 2d Reg. Sess. (Ind. 1998).

60. H.B. 2839, 77th Leg., 1998 Reg. Sess. (Kan. 1997).

61. H.B. 756, 1997 Reg. Sess. (La. 1997).

62. H.B. 5990, 89th Leg., 1998 Reg. Sess. (Mich. 1997); H.B. 5991, 89th Leg., 1998 Reg. Sess. (Mich. 1997).

63. S.F. 2760, 80th Reg. Sess. (Minn. 1997); S.F. 2935, 80th Reg. Sess. (Minn. 1997).

64. H.B. 1201, 1998 Reg. Sess. (Miss. 1998); H.B. 1222, 1998 Reg. Sess. (Miss. 1998); H.B. 1645, 1998 Reg. Sess. (Miss. 1998); S. 2910, 1998 Reg. Sess. (Miss. 1998).

65. H.B. 1864, 89th Gen. Assembly, 2d Reg. Sess. (Mo. 1998).

66. L.B. 1214, 95th Leg., 2d Reg. Sess. (Neb. 1997).

67. H.B. 567, 122d Gen. Assembly, 1997-98 Reg. Sess. (Ohio 1997).

68. H.B. 2208, 46th Leg. Sess., 2d Sess. (Okla. 1997); S.B. 1115, 46th Leg. Sess., 2d Sess. (Okla. 1997).

69. S.B. 870, 112th Gen. Assembly (S.C. 1997); S.B. 961, 112th Gen. Assembly (S.C. 1997).

70. H.B. 2101, 100th Gen. Assembly, 1998 Reg. Sess. (Tenn. 1997).

71. H.B.J. Res. 266, 1998 Sess. (Va. 1998); H.B. 1056, 1998 Sess. (Va. 1998); H.B. 1159, 1998 Sess. (Va. 1998).

72. S.B. 6135, 55th Leg., 1998 Reg. Sess. (Wash. 1997).

73. H.B. 4562, 73d Leg., 2d Reg. Sess. (W. Va. 1998).

74. Act of July 15, 1997, 1997 La. Acts 1380 (codified at LA. REV. STAT. ANN. §§ 9:224-25, 234, 245, 272-75, 307-09 (West Supp. 1998)). Arizona has now become the second state to pass a covenant marriage bill. Act of May 21, 1998, 1998 ARIZ. SESS. LAWS 135.

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

of the spouse or a child of one of the spouses; or (5) continuous physical separation of at least two years.<sup>76</sup> Divorce also may be granted following a one-year legal separation if there are no minor children of the marriage or if the ground for the separation was abuse; the minimum separation period is eighteen months if there are minor children.<sup>77</sup> However, legal separation itself is available only upon a showing of one of the grounds required for divorce or "habitual intemperance of the other spouse, or excesses, cruel treatment, or outrages of the other spouse, if such habitual intemperance, or such ill-treatment is of such a nature as to render their living together insupportable."<sup>78</sup> Regardless of the ground, couples must undergo counseling before obtaining a divorce or legal separation.<sup>79</sup>

In order to gain passage, the Louisiana law was weakened in several respects during the legislative process. As originally drafted, physical or sexual abuse would not have been grounds for divorce, but only for legal separation.<sup>80</sup> The grounds for legal separation also were expanded to include habitual intemperance or excesses, cruel treatment, or outrages.<sup>81</sup> The state Attorney General's Office was required to develop a pamphlet for couples, explaining the distinctions between covenant marriage and regular marriage.<sup>82</sup> Perhaps most significantly, the bill was amended to allow couples to divorce after living apart continuously for two years—essentially no-fault divorce with a waiting period.<sup>83</sup>

The covenant marriage law in Louisiana, like similar efforts in other states, is the product of a political movement involving conservative Christian groups. The bill's author, State Representative Tony Perkins, holds degrees from the Reverend Jerry Falwell's Liberty University and is a longtime Christian and a member of the Promise Keepers, an evangelical men's movement.<sup>84</sup> All of those who appeared in support of the bill in a Louisiana House committee and who identified an affiliation with a particular group were members of Christian religious organizations.<sup>85</sup> Some see the law as legislating Biblical grounds for divorce.<sup>86</sup> The reaction of Louisiana's religious institutions, therefore, has been quite surprising. Initially, it appeared that Louisiana's churches would

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76. *See id.* § 9:307.

77. *See id.*

78. *Id.*

79. *See id.*

80. *See* H.B. 756, 1997 Reg. Sess. (La. 1997).

81. *See* Bruce Nolan, *Creating a More Perfect Union? La.'s "Covenant Marriage" Debated*, NEW ORLEANS TIMES-PICAYUNE, June 29, 1997, at A1.

82. *See* Shipley, *supra* note 53, at A6.

83. *See* Nolan, *supra* note 81, at A1.

84. *See* Cheryl Wetzstein, *Legislative Pioneer Credits Power of Prayer: Says He "Reaped Without Sowing,"* WASH. TIMES, Oct. 9, 1997, at A2.

85. *See* Hearing, *supra* note 53.

86. *See* Kevin Sack, *Louisiana Approves Measure to Tighten Marriage Bonds*, N.Y. TIMES, June 24, 1997, at A1.



encourage, if not require, couples to choose covenant marriage.<sup>87</sup> Indeed, the state's Southern Baptist churches generally have been supportive.<sup>88</sup> Catholic, Episcopal, Jewish, and Methodist leaders, however, have been reserved.<sup>89</sup> Louisiana's Catholic bishops, for example, chose not to endorse covenant marriage because of the requirement that premarital counseling include an explanation of the law's higher standards for divorce, a subject that the Catholic Church will not explore.<sup>90</sup>

Proponents of covenant marriage stress that their proposals simply provide couples with a choice between "regular" marriage and a more committed form.<sup>91</sup> The practical nature of this choice has yet to be determined. During the debate over the covenant marriage bill in Louisiana, some predicted that real "choice" would be nonexistent. Couples would be shamed into choosing covenant marriage for fear of appearing uncommitted to their mate, or the more restrictive covenant marriages would be chosen in a haze of idealistic premarital bliss.<sup>92</sup> In fact, few couples have chosen covenant marriages since the law went into effect.<sup>93</sup> In the first month in which covenant marriage licenses were available, only twenty-six covenant marriage licenses were issued, out of approximately 3000 total marriage licenses.<sup>94</sup> The discussion of choice, however, avoids the obvious: Couples have choice without covenant marriage legislation. Couples already may, and do, make choices about their level of commitment to their marriages, just as couples make choices about having children or buying a home. No authorizing statute is required.

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87. See Nolan, *supra* note 81, at A6.

88. See Janet McConnaughey, *Covenant Marriages Slow-Going in State*, NEW ORLEANS TIMES-PICAYUNE, Oct. 19, 1997, at A4; Bruce Nolan, *Bishops Back Off Covenant Marriage*, NEW ORLEANS TIMES-PICAYUNE, Oct. 30, 1997, at A1 [hereinafter *Bishops Back Off Covenant Marriage*]; Nolan, *supra* note 81, at A1.

89. See *Bishops Back Off Covenant Marriage*, *supra* note 88, at A1.

90. See *id.*

91. See, e.g., Amitai Etzioni, *Marriage With No Easy Outs*, N.Y. TIMES, Aug. 13, 1997, at A23.

92. See, e.g., Margaret Carlson, *Till Depositions Do Us Part*, TIME, July 7, 1997, at 21; Nolan, *supra* note 81, at A1; Editorial, *Cracking Down on Divorces*, TULSA WORLD, Aug. 23, 1997, at A15.

93. See Julie Kay, *Covenant Couples Few: Only 5 Licenses Obtained in Baton Rouge*, BATON ROUGE ADVOC., Oct. 25, 1997, at 1C; Victoria Loe, *Covenant Marriages Get Mixed Reception: Many Couples Find More-Binding Nuptials Confusing*, DALLAS MORNING NEWS, Sept. 14, 1997, at 43A; Janet McConnaughey, *Few Seeking Licenses Under New Covenant Marriage Law*, BATON ROUGE ADVOC., Aug. 24, 1997, at 3B; *New Form of Marriage Not That Popular*, CHARLESTON GAZETTE & DAILY MAIL, Oct. 15, 1997, at 3D.

94. See *New Form of Marriage Not That Popular*, *supra* note 93, at 3D.

## IV. THE IMPACT OF NO-FAULT DIVORCE

Covenant marriage is proposed to reduce the harm caused by divorce, and in particular, by no-fault divorce. The targeted “harms” include the effects of divorce on children and spouses, the relationship between no-fault divorce and the financial status of women, and the impact of no-fault divorce on the divorce rate.

A. *On Children*

Scholars differ about the precise effects of divorce on children, but the weight of the evidence suggests that children suffer the consequences of their parents’ estrangement. Covenant marriage proponents’ loudest cry is for the need to protect children from this harm by restricting access to divorce.

In 1989, Judith Wallerstein and Sandra Blakeslee published their landmark book, *Second Chances*, in which they followed sixty divorced families in California over a period of fifteen years.<sup>95</sup> In their book, Wallerstein and Blakeslee chronicled in gripping detail and for the first time the traumatic effects of divorce on children, both at the time of divorce and throughout later life. They concluded, “[d]ivorce is a wrenching experience for many adults and almost all children. It is almost always more devastating for children than for their parents.”<sup>96</sup> The effects were felt by all age groups. Preschool children suffered problems with separation; had trouble settling down or sleeping; resumed earlier behaviors such as thumb-sucking, bedwetting, or attachment to security objects; and became cranky, sad, and withdrawn.<sup>97</sup> Children aged five through eight experienced feelings of loss, rejection, guilt, and loyalty conflicts, and many suffered declines in school performance.<sup>98</sup> Nine- to twelve-year-olds felt anger, grief, anxiety, and loneliness, and sometimes exhibited somatic symptoms, delinquent behavior, and drops in school performance.<sup>99</sup> Adolescents were at particular risk, dealing with rejection and anxiety resulting from the collapse of their family structure just at the time that they are exploring their own sense of identity.<sup>100</sup>

Wallerstein and Blakeslee’s study has been criticized for its lack of a control group and for its failure to consider the psychological adjustment of the children in the study prior to their parents’ divorce.<sup>101</sup> However, other studies also have found that divorce has harmful effects on children. Children of divorce have an increased risk of disruptive disorders, anxiety disorders, and attention deficit

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95. JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES* (1989).

96. *Id.* at 297.

97. *See id.* at 282-83.

98. *See id.* at 283.

99. *See id.* at 284.

100. *See id.* at 284-85.

101. *See, e.g.,* Barbara Ehrenreich, *In Defense of Splitting Up: The Growing Antidivorce Movement is Blind to the Costs of Bad Marriages*, *TIME*, Apr. 8, 1996, at 80; Katha Pollitt, *What’s Right About Divorce*, *N.Y. TIMES*, June 27, 1997, at A29.

hyperactivity disorders compared to children from intact families, regardless of the child's pre-divorce temperament or adjustment.<sup>102</sup> Preschool children exposed to parental separation are more vulnerable to disruptive behavior problems and mood disorders, and children exposed to parental separation after age ten show increased risk of substance abuse.<sup>103</sup> Divorce affects children's self-esteem,<sup>104</sup> and young adult children of divorced parents experience more problems with submission and overcontrol.<sup>105</sup> In addition, the probability of attending college is lower for children from disrupted families than for those whose parents remain together.<sup>106</sup> Some of the behavior problems observed in children of divorce appear to be linked to a decline in economic circumstances.<sup>107</sup>

Some researchers have discovered that it is other factors in a child's life, rather than the divorce itself, that increases the risk of psychological problems. As Wallerstein and Blakeslee pointed out:

Divorce is not an event that stands alone in children's or adults' experience. It is a continuum that begins in the unhappy marriage and extends through the separation, the divorce, and any remarriages and second divorces. Divorce is not the culprit; it may be no more than one of the many experiences that occur in this broad continuum.<sup>108</sup>

This body of research suggests that many children's problems previously associated with divorce actually are "present many years before the marital disruption"<sup>109</sup> and that "exposure to these conditions may compromise children's economic, social, and psychological well-being in later life whether or not a separation takes place."<sup>110</sup> According to one leading study:

[T]he evidence suggests that much of the effect of divorce on children can be predicted by conditions that existed well before the separation

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102. See Stephanie Kasen et al., *A Multiple-Risk Interaction Model: Effects of Temperament and Divorce on Psychiatric Disorders in Children*, 24 J. ABNORMAL CHILD PSYCHOL. 121, 140-42 (1996).

103. See David M. Fergusson et al., *Parental Separation, Adolescent Psychopathology, and Problem Behaviors*, 33 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 1122, 1129 (1994).

104. See Melissa K. Bynum & Mark W. Durm, *Children of Divorce and its Effect on Their Self-Esteem*, 79 PSYCHOL. REP. 447, 449 (1996).

105. See Robert Bolgar et al., *Childhood Antecedents of Interpersonal Problems in Young Adult Children of Divorce*, 34 J. AM. ACAD. CHILD & ADOLESCENT PSYCHIATRY 143 (1995).

106. See Mike Powers, *The Hidden Costs of Divorce*, 25 HUM. ECOLOGY F. 4 (1997).

107. See Donna Ruane Morrison & Andrew J. Cherlin, *The Divorce Process and Young Children's Well-Being: A Prospective Analysis*, 57 J. MARRIAGE & FAM. 800, 811 (1995).

108. WALLERSTEIN & BLAKESLEE, *supra* note 95, at 297.

109. Paul R. Amato & Alan Booth, *A Prospective Study of Divorce and Parent-Child Relationships*, 58 J. MARRIAGE & FAM. 356, 363-64 (1996).

110. Frank F. Furstenberg, Jr. & Julien O. Teitler, *Reconsidering the Effects of Marital Disruption: What Happens to Children of Divorce in Early Adulthood?*, 15 J. FAM. ISSUES 173, 187 (1994).

occurred. . . . [T]hose concerned with the effects of divorce on children should consider reorienting their thinking. At least as much attention needs to be paid to the processes that occur in troubled, intact families as to the trauma that children suffer after their parents separate.<sup>111</sup>

These studies warn that “failure to take into account the family processes and individual characteristics that lead up to marital dissolution may misrepresent or at least overstate the cost of divorce to children.”<sup>112</sup>

The quality of the parents’ marriage deserves particular attention. Several studies have determined that marital quality and parental conflict, not divorce, influence children’s adjustment.<sup>113</sup> One such study found that if conflict between parents is relatively low, children are worse off in early adulthood if their parents divorce, but if conflict between parents is high, children are better off if their parents divorced than if they remained married.<sup>114</sup>

While these studies focus on the precise cause of the social or emotional difficulties children of divorce experienced, a sizable body of scholarship reveals few or no differences between children whose parents have divorced and children of intact families. Divorce has been found to have negligible socio-emotional effects on adolescents,<sup>115</sup> teens from divorced families have been found to be just as well-adjusted as teens from intact families,<sup>116</sup> and young adults from divorced and intact families have been found to exhibit few significant differences.<sup>117</sup> One study found that marital disruption increased boys’ behavioral problems but had no effect on girls’ behavioral problems.<sup>118</sup> Regarding later adult relationships, young adults indicate a desire for and strong commitment to marriage, regardless of their parents’ marital status,<sup>119</sup> and adult children from divorced and intact

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111. Andrew J. Cherlin et al., *Longitudinal Studies of Effects of Divorce on Children in Great Britain and the United States*, 252 SCI. 1386, 1388 (1991).

112. Furstenberg & Teitler, *supra* note 110, at 188.

113. See Amato & Booth, *supra* note 109, at 358; Teresa M. Cooney & Jane Kurz, *Mental Health Outcomes Following Recent Parental Divorce: The Case of Young Adult Offspring*, 17 J. FAM. ISSUES 495, 509 (1996); Fergusson et al., *supra* note 103, at 1129-30; Jean M. Muransky & Darlene DeMarie-Dreblow, *Differences Between High School Students from Intact and Divorced Families*, 23 J. DIVORCE & REMARRIAGE 187, 193-94 (1995); Karen Westervelt & Brian Vandenberg, *Parental Divorce and Intimate Relationships of Young Adults*, 80 PSYCHOL. REP. 923, 926 (1997).

114. See Paul R. Amato et al., *Parental Divorce, Marital Conflict, and Offspring Well-Being During Early Adulthood*, 73 SOC. FORCES 895 (1995).

115. See Ketty P. Gonzalez et al., *Adolescents from Divorced and Intact Families*, 23 J. DIVORCE & REMARRIAGE 165, 172-73 (1995).

116. See Muransky & DeMarie-Dreblow, *supra* note 113, at 194.

117. See Julie J. Evans & Bernard L. Bloom, *Effects of Parental Divorce Among College Undergraduates*, 26 J. DIVORCE & REMARRIAGE 69, 85 (1996).

118. See Morrison & Cherlin, *supra* note 107, at 810-11.

119. See Cathy Landis-Kleine et al., *Attitudes Toward Marriage and Divorce Held by Young Adults*, 23 J. DIVORCE & REMARRIAGE 63, 70 (1995).

families show no difference in their own marital quality.<sup>120</sup>

### *B. On Spouses*

Divorce is commonly associated with various forms of psychological and physical distress, leaving the impression that divorced people are unhappier and unhealthier than their married counterparts. For instance, according to William Galston, University of Maryland professor and former assistant to President Clinton for domestic policy, divorced men are twice as likely to die from heart disease, stroke, hypertension, and cancer as married men.<sup>121</sup> A divorced woman's risk of dying from cancer is two to three times higher than the risk for a married woman.<sup>122</sup>

Research, however, reveals a subtler relationship: It is social attachment, not marital status, that affects a person's well-being.<sup>123</sup> The presence or absence of a partner does have an impact on distress, but the presence or absence of a marriage does not.<sup>124</sup> Similarly, it is the lack of social and economic support that produces the negative consequences of divorce on individuals, not the fact of divorce itself.<sup>125</sup> Finally,

[a]lthough social attachments are associated with low depression levels, on average, negative social attachments are worse than none. People who report that their relationships are unhappy, that they often consider leaving their spouse or partner, and that they would like to change many aspects of their relationship have higher distress levels than people without partners. It is better to have no relationship than to be in a bad relationship.<sup>126</sup>

### *C. On the Financial Status of Women*

Divorce exacts a serious economic toll on women and children, but no-fault divorce laws do not exacerbate the problem. In a pioneering study, Lenore Weitzman found that in the first year after divorce, men experience an average of a forty-two percent increase in their standard of living, while women experience a seventy-three percent decline.<sup>127</sup> This study launched a critical evaluation of the nation's no-fault divorce laws. The reasons that Weitzman cited for this disparity included the inadequacy of financial awards granted to

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120. See Pamela S. Webster et al., *Effects of Childhood Family Background on Adult Marital Quality and Perceived Stability*, 101 AM J. SOC. 404, 426 (1995).

121. William A. Galston, *Divorce American Style*, PUB. INTEREST, Summer 1996, at 12.

122. See *id.*

123. See Catherine E. Ross, *Reconceptualizing Marital Status as a Continuum of Social Attachment*, 57 J. MARRIAGE & FAM. 129, 137 (1995).

124. See *id.*

125. See *id.* at 138.

126. *Id.* at 139.

127. LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 323 (1985).

women at divorce, the greater demands placed on women's limited resources after divorce, and the discrepancy between former husbands' and wives' earning power.<sup>128</sup>

However, Richard Peterson, of the Social Science Research Council, has shown that Weitzman's results were in error,<sup>129</sup> as even Weitzman now admits.<sup>130</sup> Peterson's analysis indicates 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.<sup>131</sup> This, of course, still represents a significant gap in the financial status of men and women after divorce, but Peterson asserts that the introduction of no-fault divorce did not increase the gender gap.<sup>132</sup> Other studies similarly have shown that no-fault divorce laws have little impact on the economic circumstances of women after divorce<sup>133</sup> and that fault-based divorce laws do not protect divorced women against the economic hardship of divorce.<sup>134</sup> Despite the lower standard of living that women face after divorce, throughout American history women have filed the majority of divorce actions.<sup>135</sup>

#### D. On the Divorce Rate

There is no clear evidence that no-fault divorce has had any effect on the divorce rate in this country. One of the concerns most frequently cited in support of covenant marriage proposals is the need to take action to reduce the nation's high divorce rate.<sup>136</sup> According to this view, the divorce rate has increased as a result of no-fault divorce, so rolling back no-fault divorce laws will stem the tide in the divorce rate.

Divorces in America began increasing in the Nineteenth Century.<sup>137</sup> By the first half of this century, the divorce rate was relatively stable, ranging between

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128. *Id.* at 340-43.

129. Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 534 (1996).

130. Lenore J. Weitzman, *The Economic Consequences of Divorce Are Still Unequal: Comment on Peterson*, 61 AM. SOC. REV. 537, 538 (1996).

131. Peterson, *supra* note 129, at 534.

132. Richard R. Peterson, *Statistical Errors, Faulty Conclusions, Misguided Policy: Reply to Weitzman*, 61 AM. SOC. REV. 539, 540 (1996).

133. See Herbert Jacob, *Another Look at No-Fault Divorce and the Post-Divorce Finances of Women*, 23 LAW & SOC'Y REV. 95, 111 (1989).

134. See Kay, *supra* note 35, at 68-70.

135. See Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 70-75 (1976).

136. See, e.g., Ashton Applewhite, *Would Louisiana's "Covenant Marriage" Be a Good Idea for America?*, INSIGHT MAG., Oct. 6, 1997, at 25; Duren Cheek, *"Covenant Marriage" May Soon Be Option*, TENNESSEAN, Oct. 9, 1997, at 1A; Mary Beth Lane, *"Covenant Marriage" Bill Testimony Marked by Tears*, PLAIN DEALER, Oct. 16, 1997, at 5B; Ted Roelofs, *Plan Aims to Help Marriages*, GRAND RAPIDS PRESS, Oct. 6, 1997, at A1.

137. See *supra* notes 17-18 and accompanying text.

2.1 and 2.6 divorces per thousand population.<sup>138</sup> The trend that troubles policy-makers is the steady rise in the divorce rate that began in 1967.<sup>139</sup> Between 1967 and 1981, the divorce rate more than doubled, growing from 2.6 per thousand population in 1967 to 5.3 per thousand population in 1981.<sup>140</sup>

There is much debate about why this increase occurred. Some, including those who seek to promote covenant marriage, argue that the growth in the divorce rate was the result of no-fault divorce. Others cite different factors, such as women's entrance into the workforce, which granted women greater social and economic independence, and cultural change, such as increased individualism and greater expectations of marriage. As support for these sociological explanations for the increase in the divorce rate, many point to the fact that this latest rise in divorce began before California enacted the first no-fault divorce law.

Researchers have attempted to demonstrate empirically whether no-fault divorce laws affected the divorce rate. The results are inconclusive. Most studies have found no effect,<sup>141</sup> while some have found a limited effect,<sup>142</sup> and some have found a significant positive effect.<sup>143</sup> Perhaps the most conclusive proof is time. Since 1981, the divorce rate in America has been declining, down to 4.6 divorces per thousand population in 1994, the lowest rate since 1974.<sup>144</sup>

#### V. WHY MARRIAGES LAST

If one desires to focus attention on reducing the harmful effects of divorce, one must attempt to uncover what makes some marriages successful. Although to some, "success" simply may mean years of marriage, here the term will be expanded to encompass happiness in marriage. The secret formula remains elusive, but certain ingredients appear to be important.

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138. See NAT'L CENTER FOR HEALTH STAT., MONTHLY VITAL STAT. REP., *Annual Summary of Births, Marriages, Divorces, and Deaths: United States, 1994*, Oct. 23, 1995, at 4.

139. See *id.*

140. See *id.*

141. See, e.g., GARY S. BECKER, A TREATISE ON THE FAMILY 333-34 (1991); David Lester, *Trends in Divorce and Marriage Around the World*, 25 J. DIVORCE & REMARRIAGE 169, 170 (1996); H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437, 452 (1986).

142. See, e.g., Thomas B. Marvell, *Divorce Rates and the Fault Requirement*, 23 L. & SOC'Y REV. 543, 563-64 (1989); Martin Zelder, *The Economic Analysis of the Effect of No-Fault Divorce on the Divorce Rate*, 16 HARV. J.L. & PUB. POL'Y 241, 256-57 (1993).

143. See, e.g., Michael P. Kidd, *The Impact of Legislation on Divorce: A Hazard Function Approach*, 27 APPLIED ECON. 125 (1995); Paul A. Nakonezny et al., *The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity*, 57 J. MARRIAGE & FAM. 477, 485-87 (1995).

144. See NAT'L CENTER FOR HEALTH STAT., *supra* note 138, at 4; NAT'L CENTER FOR HEALTH STAT., MONTHLY VITAL STAT. REP., *Advance Report of Final Divorce Statistics, 1989 and 1990*, March 22, 1995, at 9.

Since completing their compelling study of divorced couples and their children,<sup>145</sup> Wallerstein and Blakeslee have tackled a different subject in their recent book *The Good Marriage*.<sup>146</sup> As the title suggests, the authors interviewed fifty couples in an attempt to discover common attributes of successful marriages.<sup>147</sup> As a result of their research, Wallerstein and Blakeslee identify nine tasks that couples must address in order to build and maintain a happy marriage. Describing these tasks as building blocks, the authors observe that “[i]f the issues represented by each psychological task are not addressed, the marriage is likely to fail, whether the couple divorces or remains legally married.”<sup>148</sup> The nine tasks described by Wallerstein and Blakeslee are: (1) complete the transition into adulthood by detaching from the family of origin (or in a second marriage, from the former spouse), committing emotionally to the new partner and relationship, and building new connections with extended families;<sup>149</sup> (2) build togetherness and unity while carving out areas of autonomy;<sup>150</sup> (3) maintain a balance between the responsibilities of parenthood and nurturing the adults’ relationship;<sup>151</sup> (4) manage challenge and adversity in ways that strengthen rather than weaken the relationship;<sup>152</sup> (5) make the relationship a safe place for expressing conflict, disagreement, and anger;<sup>153</sup> (6) maintain a pleasurable and fulfilling sexual relationship;<sup>154</sup> (7) include laughter and humor;<sup>155</sup> (8) provide emotional nurturance and encouragement;<sup>156</sup> and (9) draw on the images and joy of the early relationship and combine those with a realistic perspective of the present.<sup>157</sup> Another study, consisting of fifty-seven couples who had been married between twenty-five and forty-six years, found similar answers to the question of what makes marriages thrive.<sup>158</sup>

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145. See WALLERSTEIN & BLAKESLEE, *supra* note 95.

146. JUDITH WALLERSTEIN & SANDRA BLAKESLEE, *THE GOOD MARRIAGE* (1995).

147. *Id.* at 8-11.

148. *Id.* at 331.

149. *Id.*

150. *Id.*

151. *Id.* at 331-32.

152. *Id.* at 332.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. See Florence Kaslow & James A. Robison, *Long-Term Satisfying Marriages: Perceptions of Contributing Factors*, 24 AM. J. FAM. THERAPY 153, 165-67 (1996). This study described the essential ingredients of a successful marriage as including: commitment to the marriage and the spouse; respect for and responsibility to the spouse; fidelity, integrity, loyalty, and an expectation of reciprocity; trust, mutual support, and accountability; love, sense of belonging, and personal development; good communication skills; flexibility, cooperation, and good problem-solving skills; equitable power distribution, shared leadership, and joint decision-making; compromise and creativity in handling differences; shared values or spirituality; and fun and friendship. *Id.*



Other research has looked at the impact of specific factors on marital quality. A sampling of that research confirms that daily behaviors and exchanges between spouses,<sup>159</sup> spouses' conflict resolution styles,<sup>160</sup> health problems,<sup>161</sup> and socio-economics,<sup>162</sup> among other factors, all may influence marital satisfaction. Interestingly, attitudes toward divorce do not seem related to marital disruption.<sup>163</sup>

## VI. ANALYSIS AND RECOMMENDATIONS

To analyze the potential effectiveness of the new covenant marriage proposals, it is important to identify the specific goals which the proposals seek to achieve. These goals include: lowering the divorce rate, returning to fault grounds for divorce, requiring a waiting period before a no-fault divorce can be granted, requiring counseling, and improving the economics for women and children. The following analysis addresses the likely impact of covenant marriage on each of these goals, and suggests other recommendations for achieving them.

### A. Goal: Lower the Divorce Rate

If covenant marriage is proposed as a means simply to bring down the rate of divorce in America by rolling back no-fault divorce, the proponents of covenant marriage have missed the mark. The evidence that no-fault divorce has had any effect on the divorce rate is, at best, inconclusive and suggests that no-fault divorce laws were not the cause of the latest rise in the divorce rate observed from the late 1960s through the early 1980s.<sup>164</sup> In fact, the trend is not limited to the United States. "[I]n all Western countries where divorce is permitted, divorce rates have risen steadily over the [past hundred years], have fluctuated following each of the world wars, and have accelerated from sometime in the 1960s or early 1970s until the early 1980s."<sup>165</sup> Furthermore, in recent years, divorce rates in this country have been decreasing on their own, suggesting that legislative intervention, even if effective, is unnecessary.<sup>166</sup>

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159. See Patti L. Johnson & K. Daniel O'Leary, *Behavioral Components of Marital Satisfaction: An Individualized Assessment Approach*, 64 J. CONSULTING & CLINICAL PSYCHOL. 417, 420-21 (1996).

160. See Lawrence A. Kurdek, *Predicting Change in Marital Satisfaction from Husbands' and Wives' Conflict Resolution Styles*, 57 J. MARRIAGE & FAM. 153, 161 (1995).

161. See Alan Booth & David R. Johnson, *Declining Health and Marital Quality*, 56 J. MARRIAGE & FAM. 218, 222 (1994).

162. See Jessie M. Tzeng & Robert D. Mare, *Labor Market and Socioeconomic Effects on Marital Stability*, 24 SOC. SCI. RES. 329, 348-49 (1995).

163. See Kristin G. Esterberg et al., *Transition to Divorce: A Life-Course Approach to Women's Marital Duration and Dissolution*, 35 SOC. Q. 289, 302-03 (1994).

164. See *supra* notes 141-42 and accompanying text.

165. RODERICK PHILLIPS, *PUTTING ASUNDER* 584 (1988).

166. See *supra* note 141 and accompanying text.

Divorce is a complicated function of many socioeconomic and cultural factors. In the final paragraph of his book on the history of divorce over the last thousand years of Western culture, Roderick Phillips concludes:

[M]arriage stability, marriage breakdown, and divorce cannot be understood in isolation from their social context. It is fundamentally misleading and pointless to interpret the increase in marriage breakdown and divorce as evidence of the decline of matrimonial commitment or domestic morality. Marriage is integral to broad social, economic, demographic, and cultural processes, and it is entirely futile to expect marriage to remain constant or to have a consistent social meaning while social structures, economic relationships, demographic patterns, and cultural configurations have undergone the massive changes of the past centuries. If this book has shown anything, it is that divorce and marriage breakdown have their place in the history of Western society. Yet although we can isolate them as themes for particular study, they cannot be analyzed or understood without reference to the many broader facets of historical change.<sup>167</sup>

Several recent historical conditions may contribute to divorce in today's society. The most obvious and frequently cited factor in the latter half of the Twentieth Century is the dramatic entrance of women, and married women in particular, into the labor market.<sup>168</sup> This factor alone has wrought enormous change in the concept of marriage and in the marital relationship. Employment can raise women's self-esteem, economic independence, and sense of alternatives outside of marriage. Employment of both spouses also creates pressure and stress within the family. Traditional gender roles, in which the husband was the breadwinner and the wife was responsible for maintaining the home and caring for the children, are utterly shattered.<sup>169</sup> During the same time that the family structure was responding to these massive changes, individuals' expectations of emotional fulfillment from marriage increased.<sup>170</sup>

Changing the law to make divorce more difficult to obtain will not address any of these cultural challenges to marriage. As history has shown, restricting access to divorce as a means to reduce the divorce rate may be no more than an empty exercise. "[P]revailing customs and peoples' immediate wants can totally thwart and not just partly circumvent laws enacting morality."<sup>171</sup> While attitudes toward divorce have changed in the last several decades,<sup>172</sup> an individual's attitude toward divorce does not make him or her more or less likely to

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167. PHILLIPS, *supra* note 165, at 640.

168. *See, e.g., id.* at 620-22; Tzeng & Mare, *supra* note 162, at 348-49.

169. *See* PHILLIPS, *supra* note 165, at 620-22; Esterberg et al., *supra* note 163, at 302-03; Kay, *supra* note 35, at 21; Tzeng & Mare, *supra* note 162, at 349.

170. *See* PHILLIPS, *supra* note 165, at 623-24.

171. Marvell, *supra* note 142, at 565.

172. *See* PHILLIPS, *supra* note 165, at 624-27.

divorce.<sup>173</sup> Furthermore, current divorce rhetoric does couples an injustice. The “easy” divorce is lamented, resulting in proposals to make divorce more difficult. For the vast majority of couples, there is no such thing as an easy divorce, no matter what the controlling law. “The moment when it first becomes apparent that one’s marriage was a mistake is the beginning of probably the longest, darkest period in the human lifetime.”<sup>174</sup>

*B. Goal: Return to Fault Grounds for Divorce*

Under Louisiana’s new covenant marriage law, divorce may be obtained by an “innocent” spouse if the other spouse has committed acts of adultery, felony, abandonment, or physical or sexual abuse.<sup>175</sup> These are similar to the grounds found in divorce statutes during the 1960s.<sup>176</sup> The reintroduction of fault-based grounds into the legal scheme of divorce is especially troubling. Such a suggestion belies either a lack of understanding or a conscious disregard of history. First, history has shown that even under a fault-based system of divorce, divorce rates rose.<sup>177</sup> Second, the recent transition to no-fault divorce should serve as a reminder that it was the serious and increasingly unacceptable shortcomings of fault-based divorce that led to the development of no-fault divorce in the first place.<sup>178</sup> Third, the requirement of proof of fault in a divorce proceeding by an “innocent” spouse against a “guilty” spouse reflects a characterization of spousal relationships that was outmoded thirty years ago and is hardly recognizable today. In a 1964 article describing the need to replace fault grounds in divorce, a University of Colorado law professor observed,

[t]he matrimonial offenses which are listed as grounds for divorce are not usually the basic psychological causes of marital failure, but more often are either symptoms of that failure, or are pretexts for escaping from the problems of marriage. Thus, the offense alleged should be seen as only one symptom of a larger problem—the overall disintegration of the marriage. The responsibility for the breakdown of the marriage is frequently shared by both spouses; hence, the present legal theory that one spouse is guilty and the other innocent is unrealistic.<sup>179</sup>

Perhaps the most striking indictment of a return to fault grounds for divorce comes from the fact that many of the most outspoken and harshest critics of divorce and its consequences oppose a return to fault. Barbara Dafoe Whitehead, who gained popularity with conservatives for her *Atlantic Monthly* article entitled

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173. See Esterberg et al., *supra* note 163, at 302.

174. Nora Johnson, *A Marriage on the Rocks*, ATLANTIC MONTHLY, July 1962, at 48.

175. LA. REV. STAT. ANN. § 9:307 (West. Supp. 1998).

176. See Friedman, *supra* note 24, at 661.

177. See *supra* notes 17-31 and accompanying text.

178. See *supra* notes 36-38 and accompanying text.

179. Clark, *supra* note 39, at 405.

*Dan Quayle Was Right*<sup>180</sup> and who also has authored a highly critical book entitled *The Divorce Culture*,<sup>181</sup> argues that ending no-fault divorce will only add to the damage of divorce.<sup>182</sup> A return to fault-based grounds for divorce will increase the costs of divorce actions, draining the pool of marital assets available to women and children, and will intensify the pain for children as their parents attribute blame for their breakup.<sup>183</sup> Whitehead concludes that “[n]o-fault laws didn’t create the divorce culture. The divorce rate began to go up nearly a decade before states adopted them. Repealing the no-fault system isn’t the way to bring it back down.”<sup>184</sup> Wallerstein and Blakeslee, in their book on the long-term consequences of divorce on former spouses and children, wrote:

Our findings do not support those who would turn back the clock. As family issues are flung to the center of our political arena, nostalgic voices from the right argue for a return to a time when divorce was difficult to obtain. But they do not offer solutions to the serious problems that have contributed to the rising divorce rate in the first place. . . . Like it or not, we are witnessing family changes which are an integral part of the wider changes in our society.<sup>185</sup>

In a recent interview on the subject of covenant marriage and making divorce more difficult, Wallerstein said, “I’m a little worried. In America we tend to rush into things without thinking what their unintended consequences may be. . . . If you make divorce very difficult, you may get higher abandonment. You might get children even less protected economically.”<sup>186</sup> In another interview, she observed, “I think we have no idea how this is going to affect children, and divorces in situations where parents declare in a public forum what their accusations are against each other will cause a great deal of pain.”<sup>187</sup>

In an article published, perhaps prophetically, in the *Louisiana Law Review*, a law professor and advocate of divorce law reform warned “[t]he unprecedented nature of many of the phenomena facing the family law reformer today means that we cannot simply plug in legal devices which worked well in an earlier time and under different conditions.”<sup>188</sup> Even Lenore Weitzman, who severely criticizes no-fault divorce for causing economic harm to women and children, does not advocate a return to fault.

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180. Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY, Apr. 1993, at 47.

181. BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* (1997).

182. Barbara Dafoe Whitehead, *Should Breaking Up Be Harder to Do? No-Fault Divorce Statutes Should Not Be Repealed*, L.A. DAILY J., Jan. 17, 1997, at 6.

183. *See id.*

184. *Id.*

185. WALLERSTEIN & BLAKESLEE, *supra* note 95, at 305.

186. Mary Ann Hogan, *The Good Marriage?*, MOTHER JONES, July-Aug. 1995, at 18.

187. Julie Irwin, *Ohio Bill Would Raise Bar for Divorce*, CINCINNATI ENQUIRER, Aug. 20, 1997, at A1.

188. Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1555 (1984).

We do not have to abandon the nonadversarial aims of the no-fault reforms to accomplish these goals. Nor do we have to return to the charade of the fault-based traditional system. The reformers correctly diagnosed many of the problems in the traditional system and correctly prescribed remedies to alleviate them. . . . This research has shown that the no-fault reforms have generally had a positive effect on the divorce process . . . .<sup>189</sup>

Finally, the American people are ambivalent about changing divorce laws. In a recent *Time/CNN* poll, fifty percent of those surveyed said that it should be harder for married couples to get a divorce, yet fifty-nine percent said that the government should not make it harder for people to get a divorce.<sup>190</sup>

Rather than attempting to make divorce more difficult, in a yearning for some ideal family of an imaginary past, policy-makers should focus on the cultural and socioeconomic realities that contribute to divorce today. A thorough analysis of these subjects is beyond the scope of this Note, but several areas merit attention. Spouses should be given support for coping with new gender roles and new models of distribution of labor within the household. Economic and educational opportunities should be available to both spouses to provide adequate financial support for the family. Accessible and affordable child care must be available for working parents. Finally, workplace demands and personnel policies should enable spouses to invest in and nurture satisfying marital and family relationships.

*C. Goal: Require a Waiting Period Before a No-Fault Divorce  
Can Be Granted*

States should proceed cautiously when considering longer waiting periods preceding divorce. Although it was not included in the original version of the bill, the covenant marriage law passed in Louisiana allows a couple to obtain a divorce from a covenant marriage “after living separate and apart continuously without reconciliation for a period of two years.”<sup>191</sup> Under the traditional marriage law in Louisiana, a couple may divorce after a six-month separation.<sup>192</sup> Prior to the transition to no-fault divorce, several states’ divorce laws allowed divorce after lengthy separations.<sup>193</sup> Many of these states reduced the waiting period when no-fault laws were passed.<sup>194</sup>

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189. WEITZMAN, *supra* note 127, at 366, 382.

190. See Walter Kirn, *The Ties That Bind*, TIME MAG., Aug. 18, 1997, at 49.

191. LA. REV. STAT. ANN. § 9:307 (West Supp. 1998).

192. LA. CIV. CODE ANN. art. 102, 103 (West 1993 & Supp. 1998).

193. See Kay, *supra* note 35, at 6; Marvell, *supra* note 142, at 544; Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 52-68 (1966).

194. See Marvell, *supra* note 142, at 552-54. See, e.g., MD. CODE ANN., FAM. LAW § 7-103 (1991); N.C. GEN. STAT. § 50-6 (1996); S.C. CODE ANN. § 20-3-10 (Law. Co-op. 1985); VT. STAT. ANN. tit. 15, § 551 (1989); VA. CODE ANN. § 20-91 (Michie 1995).

One researcher found that states that shortened the separation period required to obtain a divorce experienced a rise in their divorce rates.<sup>195</sup> From this, he inferred that “longer waiting periods might reduce the number of divorces in a state . . . .”<sup>196</sup> However, he was careful to point out that it was not clear whether this effect might be the result of longer waiting periods prompting more reconciliations or more out-of-state divorces.<sup>197</sup>

The theory behind an extensive waiting period is that it gives couples a chance to “cool off,” think carefully about whether they truly want to terminate their marriage, engage in counseling, or attempt reconciliation. Couples can, of course, voluntarily take the time to do all of these things before filing for divorce. State-mandated separation periods can create risks. For instance, some couples may have no interest in taking time to reconsider their decision to divorce, resulting in a new era of migratory divorce.

More devastating is the potential impact of mandatory waiting periods on women and children. Already economically disadvantaged by divorce, women and children may now be faced with enduring a lengthy separation period during which they would not have the benefit of property division or child support payments available upon divorce. Resort to the old familiar devices of abandonment, collusion, and perjury to demonstrate “fault” is inevitable.<sup>198</sup>

Ironically, the statutory separation requirement itself may thwart reconciliation. Since the statute requires that the couple live apart “continuously without reconciliation”<sup>199</sup> for two years, couples who wish to preserve their option to divorce may be discouraged from attempting to resume cohabitation or marital relations.

#### *D. Goal: Require Counseling*

Louisiana’s covenant marriage law, like covenant marriage bills in other states, requires couples to participate in premarital counseling before getting a marriage license and requires them to seek counseling again before being granted a divorce. *Chicago Tribune* columnist Clarence Page echoes the reaction of many people in declaring the requirement of premarital counseling, “the best part of the bill.”<sup>200</sup> In the *Time/CNN* poll on Americans’ attitudes toward divorce, sixty-four percent of respondents said that couples should be required to take a marriage education course before they can get a marriage license.<sup>201</sup>

Increasing the availability of premarital counseling or marriage education programs holds promise for strengthening marriage relationships. Even this

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195. Marvell, *supra* note 142, at 563-65.

196. *Id.* at 564.

197. *Id.*

198. See *supra* notes 24-30 and accompanying text.

199. LA. REV. STAT. ANN. § 9:307 (West Supp. 1998).

200. Clarence Page, *Happily Ever After? Fix Marriages Before They Start*, CHI. TRIB., Aug. 20, 1997, at 19.

201. See Kirn, *supra* note 190, at 49.

course, however, should be approached with sobriety. Counseling and education programs are not all created equal, and even the best program or therapist cannot reach an unreceptive audience. As Barbara Dafoe Whitehead acknowledged in a recent interview, “[i]t’s impossible to get them to contemplate troubles, adversity, conflict, especially if it’s their first marriage and they are fairly young. It’s not a teachable moment.”<sup>202</sup> One can imagine the “covenant marriage counseling” shops that might spring up to provide couples with quick, easy counseling sessions, complete with the required signed and notarized attestation, on their way to the clerk of the court’s office for their marriage license. Under those circumstances, the requirement would have little effect. In fact, there is data that shows that premarital counseling does not affect marital outcomes.<sup>203</sup> This study, however, did not distinguish among different types of counseling programs, and the authors themselves cautioned, “the present data do not demonstrate that premarital programs are generally unhelpful; indeed, it is quite likely that some of the couples in these studies participated in highly effective premarital programs.”<sup>204</sup>

Research suggests that professionals should focus on several key factors which have been shown to affect marital quality and stability.<sup>205</sup> Several comprehensive premarital assessment questionnaires are now available and in use by counselors and educators to assist in evaluating couples’ fitness for marriage and in preparing couples for the challenges ahead.<sup>206</sup>

For supporters of premarital counseling, the question of whether counseling should be mandated by the state is still open to debate. For instance, what is the

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202. Ellen Goodman, Editorial, *On the Highway of Love, Louisiana Will Road-Test Two Marriage Choices: Regular or High-Test?*, BOSTON GLOBE, Aug. 10, 1997, at D7.

203. See Kieran T. Sullivan & Thomas N. Bradbury, *Are Premarital Prevention Programs Reaching Couples at Risk for Marital Dysfunction?*, 65 J. CONSULTING & CLINICAL PSYCHOL. 24, 29 (1997).

204. *Id.*

205. See Jeffrey H. Larson & Thomas B. Holman, *Premarital Predictors of Marital Quality and Stability*, 43 FAM. RELATIONS 228, 234-37 (1994). The first area is to focus on assessing each partner’s individual traits and behaviors related to later marital quality and stability, including: emotional health, self-esteem, neurotic behaviors, sociability, and dysfunctional relationship beliefs; conventionality; and physical health. The second area is to assess homogamy, interpersonal similarity, and interactional processes, including: similarity of race, socioeconomic status, religion, intelligence, age, and absolute status; similarity of values, attitudes, beliefs, and sex role orientations; and interactional processes. The third area is to assess background and contextual factors, including family of origin, sociocultural factors, and current contextual factors, such as: parental marital stability, parental mental illness, family dysfunction, and support from family for marriage; age at marriage, educational level, socioeconomic status, income, occupation, and race; seeking support from friends; and external pressures, including societal stressors such as economic booms, recessions, war, and job or career pressures, and internal pressures such as parental intimidation or overinvolvement. *Id.* at 235-36.

206. See Jeffrey H. Larson et al., *A Review of Comprehensive Questionnaires Used in Premarital Education and Counseling*, 44 FAM. RELATIONS 245 (1995).

consequence if a couple cannot afford the required counseling? Fortunately, a number of programs have been developed voluntarily and are being offered to couples around the country.<sup>207</sup> These programs involve clergy, schools, courts, and other members of the community in seeking to help couples strengthen marriages.<sup>208</sup> A study of one program, PREP: The Prevention and Relationship Enhancement Program, disclosed a lower rate of separation and divorce for couples who had used the program.<sup>209</sup>

Community marriage policies are an exciting example of this trend. Championed by Michael McManus, nationally syndicated columnist and president and co-chairman of the Marriage Savers Institute, community marriage policies involve agreements among churches of all denominations to work together to strengthen marriage. McManus believes that, "it is possible to push down the divorce rate. A number of things do work at every stage of the marital cycle."<sup>210</sup> Under a community marriage policy, churches require couples to undergo four months of marriage preparation, including the completion of a premarital inventory, before being married in the church. According to McManus, ten percent of couples decide to break their engagement upon seeing the results of their premarital inventory.<sup>211</sup> These couples' scores typically are within the same range as those of couples whose marriages end in divorce.<sup>212</sup> For couples who go forward with their plans, the church's commitment does not end with the wedding ceremony. In each church, couples with successful marriages are trained to mentor others.<sup>213</sup>

The first community marriage policy was adopted in Modesto, California in 1986.<sup>214</sup> Today, community marriage policies are in force in seventy-two communities around the country.<sup>215</sup> McManus claims that Modesto's divorce rate has declined by forty percent, resulting in 1000 fewer divorces each year.<sup>216</sup> In Peoria, Illinois, divorces declined from 1210 divorces in 1991 to 985 in 1996, and Albany, Georgia, and Montgomery, Alabama, each have experienced declines of approximately eleven percent.<sup>217</sup> While churches have been the primary focus of community marriage policies (as McManus points out, seventy-four percent of couples are married in churches), judges and other local officials

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207. See Elizabeth Gleick, *Should This Marriage Be Saved?*, TIME, Feb. 27, 1995, at 48; Hara Estroff Marano, *Rescuing Marriages Before They Begin*, N.Y. TIMES, May 28, 1997, at B9.

208. See Marano, *supra* note 207, at B9.

209. See Scott M. Stanley et al., *Strengthening Marriages and Preventing Divorce: New Directions in Prevention Research*, 44 FAM. RELATIONS 392, 395 (1995).

210. Telephone Interview with Michael J. McManus, President and Co-Chairman, Marriage Savers Institute (Nov. 2, 1997).

211. *Id.*

212. *Id.*

213. *Id.*

214. See *id.*

215. See *id.*

216. *Id.*

217. See *id.*



are becoming involved in some communities.<sup>218</sup> The American Bar Association's Family Law Section has developed a ten-week marriage education course for junior and senior high school students. Called PARTNERS, the curriculum teaches essential relationship skills and gives students a realistic view of the challenges of marriage before they marry.<sup>219</sup>

There is also an incentive for businesses to get involved. Marital distress results in decreased productivity and increased absenteeism among employees.<sup>220</sup> Employer-sponsored marriage education, counseling, or intervention programs are a cost-effective means of enhancing employees' personal well-being while increasing business profits.<sup>221</sup>

Counseling also is important at the other end of the marital spectrum, when couples are contemplating or preparing for divorce. In this situation, counseling is emphasized not so much as an attempt to repair the marriage, although that certainly should be encouraged for couples who desire it, but as a critical means of dealing with the negative effects of divorce on children.<sup>222</sup>

"Every aspect of the children's lives can be made easier by the parents' attitudes at the time of the crisis as well as later," proclaim Wallerstein and Blakeslee.<sup>223</sup>

At a minimum, the variety of supports and services for divorcing families needs to be expanded in scope and over time. These families need education at the time of the divorce about the special problems created by their decision. They need help in making decisions about living arrangements, visiting schedules, and sole or joint custody. And they need help in implementing these decisions over many years—and in modifying them as the children grow and the family changes. Divorcing families need universally available mediation services. They also need specialized counseling over the long haul in those cases where the children are at clear risk, where the parents are still locked in bitter disputes, and where there has been family violence.<sup>224</sup>

In particular, parents should be counseled against interfering in their son's or daughter's relationship with the other parent.<sup>225</sup> The children themselves should be offered professional support and guidance, either in the community or through school-based support services.<sup>226</sup>

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218. *See id.*

219. FAMILY LAW SECTION, AMERICAN BAR ASSOCIATION, PARTNERS FOR STUDENTS: A CURRICULUM ADJUNCT TO TEACH FAMILY LAW AND RELATIONSHIP SKILLS.

220. *See* Melinda S. Forthofer et al., *Associations Between Marital Distress and Work Loss in a National Sample*, 58 J. MARRIAGE & FAM. 597, 600, 602 (1996).

221. *See id.* at 604.

222. *See supra* Part IV.A.

223. WALLERSTEIN & BLAKESLEE, *supra* note 95, at 285.

224. *Id.* at 306.

225. *See* Bolgar et al., *supra* note 105, at 142.

226. *See* Kasen et al., *supra* note 102, at 143.

*E. Goal: Improve the Economics for Women and Children*

Covenant marriage legislation does nothing to address the financial status of women and children. The legislation makes no revisions in the determination of property division, child support, or spousal support. The goal of covenant marriage is to improve the standard of living of women and children by keeping them in the same household with their husbands and fathers. But when divorce occurs, women and children will still suffer financially.<sup>227</sup> Covenant marriage legislation may increase the financial burden by requiring costly litigation to establish fault or by subjecting families to a prolonged waiting period before a divorce can be granted.<sup>228</sup>

Lenore Weitzman may have overstated the gender gap between husbands and wives and their post-divorce finances, but a gender gap still exists.<sup>229</sup> No-fault divorce did not create this circumstance,<sup>230</sup> so the solution does not lie in a return to fault grounds for divorce. Weitzman suggests several responses, tailored toward the particular circumstances of the divorcing wives and their children.

First, child support awards should be designed to equalize the standards of living between the custodial and non-custodial households, should include automatic cost-of-living adjustments, and must be enforced. The custodial parent of minor children should be allowed to maintain the family home, and college-age dependent children should be provided with support to complete their education. Glendon argues for a "children-first principle," in which the first priority for distribution of family property upon divorce would be to secure the welfare of the couple's children.<sup>231</sup> Weitzman also suggests clear standards for custody awards so that custody is not used as a bargaining chip in financial negotiations.<sup>232</sup> Second, according to Weitzman, long-married older housewives should be entitled to permanent support at a level sufficient to maintain the same standard of living as their former husbands.<sup>233</sup> Third, custodial parents should be given the family home, support aimed at maintaining the same standard of living as their former spouse, and generous resources in the years immediately following divorce to allow them to invest in education, training, and career counseling to maximize their long-term employment prospects.<sup>234</sup> Fourth, middle-aged women who have foregone career opportunities in order to raise children should be awarded an equal share of the marital partnership, including the husband's career assets and enhanced earning capacity; training, counseling, and education if necessary to begin, resume, or upgrade employment; and

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227. *See supra* Part IV.C.

228. *See supra* notes 181, 184 and accompanying text; discussion at Part VI.C.

229. *See supra* Part IV.C.

230. *See supra* notes 132-35 and accompanying text.

231. Glendon, *supra* note 188, at 1559.

232. WEITZMAN, *supra* note 127, at 379-80.

233. *Id.* at 380-81.

234. *See id.* at 381.

compensation for lost career opportunities.<sup>235</sup> This latter element is emphasized in another recent treatise on the economics of divorce, in which it is suggested that courts should recognize the decrease in value of the human capital of the spouse who invests directly in the other's career or in the assets of the marriage.<sup>236</sup>

#### CONCLUSION

Those who talk most about the blessings of marriage and the constancy of its vows are the very people who declare that if the chain were broken and the prisoners left free to choose, the whole social fabric would fly asunder. You cannot have the argument both ways. If the prisoner is happy, why lock him in? If he is not, why pretend that he is?<sup>237</sup>

Covenant marriage legislation will fail at its intended purpose, because legal restrictions on divorce do not create healthier families. In an historical refrain, divorce reformers again are decrying the high divorce rate and seeking to rewrite the states' divorce laws in order to save the family.<sup>238</sup> Covenant marriage, whose primary feature is a limitation on the grounds for divorce, is one current initiative.<sup>239</sup> Covenant marriage is not a new approach to the problem; it is merely the ghost of a system that was declared dead three decades ago.<sup>240</sup> Covenant marriage's reinstatement of fault grounds for divorce will return the divorce process to a system of perjury, collusion, and abandonment<sup>241</sup> without addressing the underlying causes or effects of marital breakdown.<sup>242</sup> History has taught that divorce laws in America have little impact on the rate of divorce<sup>243</sup> and that more restrictive divorce laws do not keep couples together when they want to be apart.<sup>244</sup> Social changes impact divorce laws; divorce laws do not effect social change.<sup>245</sup>

There are alternatives, however, if policy-makers are serious about addressing the negative consequences of marital breakdown. Premarital counseling and marital education could encourage couples to consider the challenges of marriage, potentially preventing troubled marriages before they begin.<sup>246</sup> However, legislatively mandated premarital counseling may not be the

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235. *See id.* at 381-82.

236. *See* ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? 41-42 (1992).

237. GEORGE BERNARD SHAW, MAN AND SUPERMAN, act III.

238. *See supra* Part II., notes 17-20 and accompanying text.

239. *See supra* Part III.

240. *See supra* notes 32-38, 175-79 and accompanying text.

241. *See supra* notes 24-31 and accompanying text.

242. *See supra* Part VI.B.

243. *See supra* Parts IV.D., VI.A.

244. *See supra* notes 6-7, 24-31 and accompanying text.

245. *See supra* Parts V.D., VI.A., notes 8-11, 17-19 and accompanying text.

246. *See supra* notes 200-19 and accompanying text.

answer. Premarital counseling is likely to be most effective for couples who are motivated by a genuine, sincere desire to explore their readiness for marriage. Counseling perceived as simply one more legal requirement to be completed before the wedding ceremony may have little impact. Religious organizations, schools, family law practitioners, political leaders, government organizations, friends and family can use their influence to encourage couples to engage in voluntary premarital counseling or education before the flowers are ordered and the invitations are mailed.<sup>247</sup> These same people and institutions should encourage married couples contemplating divorce to seek counseling for the sake of their children.<sup>248</sup>

State legislators should review and amend laws governing financial support upon divorce.<sup>249</sup> Where the effect of current law is to disadvantage children economically because of their parents' decision to divorce, statutes should be revised and child support orders enforced.

Covenant marriage is good public relations but bad public policy. Making divorce more difficult will not make marriage stronger or the divorce rate lower, as history has already shown. Returning to fault-based divorce will provide a quick reminder of why that system was abandoned a generation ago. Those who are serious about addressing the problems of marital disruption should focus their attention on the institutions that influence couples' personal choices, both at the time of marriage and at the time of divorce, and on the support we provide for children when their parents cannot live together anymore.

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247. *See supra* notes 207-21 and accompanying text.

248. *See supra* notes 222-27 and accompanying text.

249. *See supra* Parts IV.C. and VI.E.