

COVENANT MARRIAGE: AN UNNECESSARY SECOND ATTEMPT AT FAULT-BASED DIVORCE

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As America struggles with determining what exactly a marriage is and who should be allowed to enter one, some conservatives have reacted by attempting to recapture the days of restrictive divorce laws through legislation such as Louisiana’s Covenant Marriage Act.¹ Supporters of this Act and others like it have blamed the modern era of liberal no-fault for the increase in the number of divorces, the rising crime rate, the decline of the institution of marriage, and many other societal ills. In order to counteract these evils, restrictive divorce laws focus on the basic unit of society, the family. They hope to return to the good ole days by saving the family, “and the way to save the family is to make it harder to get divorced.”² In their attempt to ensure that marriage remains as traditional and conservative as possible—i.e., as far away from same-sex marriage as they can get—advocates of covenant marriage state lofty goals that they fail to meet. Instead of improving the lives of couples and their children, covenant marriage only serves to make traditional marriages seem inferior.

1. LA. REV. STAT. ANN. § 9:273 (2008).

2. Amy L. Stewart, *Covenant Marriage: Legislating Family Values*, 32 IND. L. REV. 509 (1999).

I. HISTORY OF DIVORCE IN AMERICA

The first marriages in the American colonies were decidedly nonreligious and were performed by magistrates. During a 1635 trip to England, colonial magistrate Edward Winslow was questioned by Archbishop Laud as to his right to perform marriage ceremonies. Winslow defended himself, saying that “marriage was a civil thing and he found nowhere in the Word of God that it was tied to the ministry.”³ Almost as soon as marriages began in America, divorces followed. Despite incomplete records, around forty Massachusetts divorce cases have been found for 1639 to 1692. In early America, the legal grounds for divorce somewhat mirrored biblical grounds for divorce, and divorce was a legislative affair in many states for many years. As is the case now, state law governed marriage and divorce, so requirements for divorce and what exactly was considered fault varied by state. Despite narrow grounds for divorce,⁴ about 390 Connecticut couples divorced between 1738 and 1788.⁵

Even this early in our history, people expressed dissatisfaction with fault-based divorce. An anonymous Philadelphia author of an *Essay on Marriage* argued that God could not want couples to sacrifice their happiness, saying that more liberal divorce laws “would decrease suicides, prevent cruelty in marriage and encourage loving care, prevent fraud in courtship, save parents from irreparable sorrow at their children’s unsuitable marriages, keep bachelors from avoiding marriage and practicing vice, and provide husbands for girls who could then become virtuous wives.”⁶ While liberal divorce laws were not the magical cure-all that the author imagined, the U.S. gradually moved towards making it easier for people to end unhappy marriages.

In the 20th century, the “divorce movement” was related to the increasing financial independence of women.⁷ Women worked outside the home in unprecedented numbers during the World Wars, and although they were displaced when the men returned home from World War I, this new escape from the home and increase in financial autonomy gave some hope for emancipation from bad marriages. Although “[t]he statistical improvement in women’s economic condition did not appear to warrant the change in attitude,” post-World War I women “increasingly believed

3. NELSON MANFRED BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 35 (Macmillan 1962) (quoting WILLIAM BRADFORD, *OF PLYMOUTH PLANTATION: 1620* ¶1647 86 (Samuel E. Morison ed., Alfred A. Knopf 1952)).

4. “[A]dultery, fraudulent contract, willful desertion for three years . . . or seven years’ absence.” *Id.* at 38.

5. *Id.* at 39.

6. *An Essay on Marriage; or, The Lawfulness of Divorce in Certain Cases Considered* (1788), quoted in BLAKE, *supra* note 3, at 48 ¶49.

7. J. HERBIE DiFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA* 17 (Univ. Press of Virginia 1997).

themselves liberated from the financial fiefdom which had constrained their mothers' marriages."⁸ Through this work, women also began to see men as coworkers and competition, found that they were quite good at some of the work they performed (even equal to men!), and questioned the male role of breadwinner and head of the household.⁹ The woman could "refuse to be subordinated to, or exploited by, her husband."¹⁰ She was exposed to new ideas and new people outside the home, and her world expanded beyond her front yard and her family. As Benjamin P. Chass wrote in *Current History*, women saw that "the hand that rocked the cradle could rock the world."¹¹ Sigmund Freud's work stressed the importance of sexual expression and satisfaction.¹² The social stigma of divorce lessened as divorce became more common, and "[t]he loosened grip of formal religious morality allowed divorce to ease away from public opprobrium."¹³ Women were able to consider marriage a nice idea but not a necessity or a life-long trap. With all of these factors combining, "divorce [was] a growing female institution."¹⁴

In the 1960s and 70s, states began to shift away from fault-based divorce.¹⁵ Divorce in America was increasing, as the prolonged clinging to fault and "[r]estrictive divorce laws failed to stem the tide."¹⁶ The fault system could not lessen the desire for divorce, and Americans could find a way to obtain one despite the efforts of the legislators. Ironically, not only had the fault system "failed to preserve the nuclear family, it had become the engine of transformation into the post-World War II age of divorce."¹⁷

The advent of "therapeutic" or no-fault divorces was predicted to cause the destruction of marriage as an institution.¹⁸ California was the first to allow no-fault divorce, and by 1985 almost every state had no-fault provisions in their divorce laws.¹⁹ Louisiana was slow in adopting no-fault

8. *Id.*

9. *Id.* at 18.

10. *Id.* at 20.

11. *Id.* at 18 (quoting Benjamin P. Chass, *Alarming Increase in Divorce*, 22 CURRENT HISTORY, Aug. 1925, at 789-92).

12. *Id.* at 22-23.

13. *Id.* at 23.

14. *Id.* at 22. Often, though, couples would have to cooperate to get a divorce. In New York, for example, the only grounds for divorce were adultery and perjury. A couple who desired a divorce might arrange for the husband to be caught in a hotel with another woman. They would then perjure during the divorce trial. *Id.* at 89.

15. Stewart, *supra* note 2, at 511-12.

16. *Id.* at 509-10.

17. DiFONZO, *supra* note 7, at 112.

18. As Aldous Huxley said in the 1946 foreword to *Brave New World*, "There are already certain American cities in which the number of divorces is equal to the number of marriages. In a few years, no doubt, marriage licenses will be sold like dog licenses, good for a period of twelve months, with no law against changing dogs or keeping more than one animal at a time." Like many good writers, he was given to hyperbole. ALDOUS HUXLEY, *BRAVE NEW WORLD XXV* (Vintage Canada 2007) (1932).

19. Daniel W. Olivas, *Tennessee Considers Adopting the Louisiana Covenant Marriage Act: A Law Waiting to be Ignored*, 71 TENN. L. REV. 769, 772 (2004).

divorce. Divorce was not even allowed in the state until 1827, and it was only allowed then for felony, adultery, or separation for 2 years after a judgment of separation from bed and board had been entered. In 1916, Louisiana enacted its only grounds for no-fault divorce—living apart for 7 years.²⁰ In the 1980s, relying on “empirical evidence indicating that no-fault schemes do not promote divorce,”²¹ Louisiana began to move toward a modern no-fault divorce system. One of the new legislation’s major goals was to make divorce less emotionally and economically traumatic by reducing “‘emotional investment and litigation costs.’”²² The changes were enacted in 1990.

II. LOUISIANA ACT OVERVIEW

Not surprisingly, “[t]he covenant marriage law in Louisiana, like similar efforts in other states, is the product of a political movement involving conservative Christian groups.”²³ In 1997, covenant marriage was established in Louisiana through Act 1380, or the “Covenant Marriage Act.”²⁴ Louisiana was the first state to recognize covenant marriages. The Act defines a covenant marriage as “a marriage entered into by one male and one female who understand and agree that the marriage between them is a lifelong relationship.”²⁵ Unlike in a “standard” or “traditional” marriage, couples to a covenant marriage participate in mandatory premarital counseling,²⁶ have a legal obligation to take reasonable steps to preserve the marriage if difficulties arise,²⁷ and have limited grounds for divorce (adultery, conviction of a felony, abandonment for one year, physical or sexual abuse of a spouse or a child of one of the spouses, or two years of living separate, or living apart for one year after a judgment of separation from bed and board is signed).²⁸ A separation from bed and board can be obtained on the grounds of adultery, felony, abandonment for one year, physical or sexual abuse of a spouse or a child of one of the spouses, living separate and apart for two years, or “[o]n account of habitual intemperance of the other spouse, or excesses, cruel treatment, or outrages of the other spouse, if such habitual intemperance, or such ill-treatment is of

20. *Id.* at 773.

21. *Id.* at 774 (citing Kenneth Rigby, *Report and Recommendation of the Louisiana State Law Institute to the House Civil Law and Procedure Committee of the Louisiana Legislature Relative to the Reinstatement of Fault as a Prerequisite to a Divorce*, 62 LA. L. REV. 561, 575 (2002) (citation omitted)).

22. *Id.* (quoting Kenneth Rigby & Katherine Shaw Spaht, *Louisiana’s New Divorce Legislation: Background and Commentary*, 54 LA. L. REV. 19, 21 (1993)).

23. Stewart, *supra* note 2, at 516.

24. 1997 La. Acts 1380.

25. LA. REV. STAT. ANN. § 9:272(A) (2008).

26. *Id.*

27. LA. REV. STAT. ANN. § 9:273 (2008).

28. LA. REV. STAT. ANN. § 9:307(A) (2008).

such a nature as to render their living together insupportable.”²⁹ The requirements for divorce vary depending on whether the couple has minor children. The statute provides, in part, that a spouse to a covenant marriage may obtain a judgment of divorce only upon proof of the following:

If there is a minor child or children of the marriage, the spouses have been living separate and apart continuously without reconciliation for a period of one year and six months from the date the judgment of separation from bed and board was signed; however, if abuse of a child of the marriage or a child of one of the spouses is the basis for which the judgment of separation from bed and board was obtained, then a judgment of divorce may be obtained if the spouses have been living separate and apart continuously without reconciliation for a period of one year from the date the judgment of separation from bed and board was signed.³⁰

The couple also affirms that they have “disclosed to one another everything which could adversely affect the decision to enter into this marriage.”³¹ Mutual consent of the spouses will not alter or end the covenant marriage.³² In effect, the couple is opting out of Louisiana’s system of no-fault divorce by choosing a covenant marriage. Couples who already have a traditional marriage may “upgrade” to a covenant marriage.³³

The “harms” covenant marriage is intended to target 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.”³⁴ The Act fails to meet these specific goals and others, and actually works against them in some instances.

III. THE EFFECTS OF DIVORCE ON CHILDREN AND SPOUSES, OR “WON’T SOMEBODY PLEASE THINK OF THE CHILDREN?!”³⁵

Covenant marriage was designed to lessen the effects of divorce on children and spouses, but it is not an effective way to reduce the harm done to children and spouses and in fact may make them worse. While the counseling and higher hurdles to divorce may in fact lessen the number of divorces obtained, this does not mean the marriages that remain intact are in the best interest of the couple or their children. Children benefit from the support and stability a two-parent household affords, but the authors of the Act imply that the presence of a man is required in order to raise a well-adjusted child, and women cannot be trusted to rear children on their

29. LA. REV. STAT. ANN. § 9:307(B)(6) (2008).

30. LA. REV. STAT. ANN. § 9:307(A)(6)(b) (2008).

31. LA. REV. STAT. ANN. § 9:273(A)(1) (2008).

32. LA. REV. STAT. ANN. § 9:272(C) (2008).

33. LA. REV. STAT. ANN. § 9:275 (2008).

34. Stewart, *supra* note 2, at 518.

35. See, e.g., *The Simpsons: Much Apu about Nothing* (FOX Television Broadcast May 5, 1996).

own. A couple might divorce as amicably as possible under a traditional divorce, but the requirement of fault under covenant marriage will cause the children to watch their parents hurl blame at each other in order to end the marriage. Or perhaps they will cooperate like in the “hotel perjury” cases in New York and conspire to have one couple caught committing fault.³⁶ The children will suffer less, but they will have learned an important lesson about using collusion and fraud to circumvent wedding vows. After studying the effects of divorce on American and British children, one author advised that “those 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.”³⁷

Covenant marriage was also designed to protect the interests of the spouse who does not wish to divorce. Divorce is certainly traumatic for an unwilling party, but is it proper to force a person to stay in a marriage against his or her will? Assuming that the nonfiling spouse is actually totally innocent in the matter, would he or she really want to force the spouse to continue the marriage, knowing that it is now loveless and unwanted? It is more likely that divorce will be used as a bargaining tool for the innocent spouse. Because only the innocent spouse can bring a divorce action under the Act,³⁸ the spouse might drag out counseling or refuse to bring the action in an attempt to get a more favorable alimony or child support agreement or simply out of spite. The Act assumes that women are the helpless or innocent victims of divorce and must be protected, and that it is impossible to be happier single than in a marriage. Surely, it implies, married women must be dependent on the marriage for their happiness and emotional well-being. But actually, “[i]t is social attachment, not marital status, that affects a person’s well-being . . . [and] the lack of social and economic support that produces the negative consequences of divorce on individuals”³⁹

The Covenant Marriage Act is unneeded and ineffective because it is ignored by the masses. One of the goals of covenant marriage is to reduce divorce, but couples who choose covenant marriage could be considered a self-selecting group. Covenant couples are typically “conservative Christian couples who are already morally opposed to divorce unless for fault-based reasons”⁴⁰ The arguments for the self-selective nature are mostly common sense:

36. DIFONZO, *supra* note 7, at 89.

37. 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).

38. See LA. REV. STAT. ANN. § 9:272(A) (2008).

39. Stewart, *supra* note 2, at 521 (citing Catherine E. Ross, *Reconceptualizing Marital Status as a Continuum of Social Attachment*, 57 J. MARRIAGE & FAM. 129, 137(38) (1995)) (footnotes omitted).

40. Olivas, *supra* note 19, at 770.

In contrast to couples in standard marriages, covenant couples tend to be more politically conservative, more religious, more likely to receive marriage counseling, and less likely to have lived together before marriage. In addition, covenant couples enjoy more approval and family support in the marriage, the women often take the lead in the selection of the covenant, the couples have a more traditional view of gender roles, and covenant partners are less likely to have children prior to their marriage.⁴¹

With covenant marriages accounting for only two to three percent of new marriages in Louisiana,⁴² it is impossible for the divorce rate to be significantly impacted by the Act. The Act is touted by some conservatives as a cure for the increasing divorce rate, but “[f]or the wider public—those who [are] not members of the conservative Christian group—covenant marriage [is] a bad arrangement that remain[s] largely ignored.”⁴³

Supporters of covenant marriage and other 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.”⁴⁴ In contrast, some see covenant marriage as an attempt to return to a system that America has already deemed a failure.⁴⁵ Divorce rates have been decreasing in recent years, which suggests that intervention by the legislature is unnecessary.⁴⁶ In fact, the Act is a return to the divorce system Louisiana had from 1962 to 1980, a time when, “[g]enerally consistent with the national trend, the state’s divorce rate . . . experienced its sharpest rise.”⁴⁷

During the debate over the bill, “some predicted that real ‘choice’ [between covenant marriage or traditional marriage] 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.”⁴⁸ The availability of choice for couples could vary based on location and denomination, especially because “some Baptist ministers refuse to perform anything but a covenant marriage.”⁴⁹ The couple may choose a covenant

41. *Id.* at 782 (footnotes omitted).

42. Katherine Shaw Spaht, *Revolution and Counter-Revolution: The Future of Marriage in the Law*, 49 *LOY. L. REV.* 1, 15 (2003).

43. Olivas, *supra* note 19, at 770.

44. Stewart, *supra* note 2, at 513.

45. *Id.* at 512, 525-26.

46. *Id.* at 525-26.

47. Olivas, *supra* note 19, at 781.

48. Stewart, *supra* note 2, at 517.

49. Cynthia M. VanSickle, *A Return to the Anti-Feminist Past of Divorce Law: The Implications of the Covenant or Marriage Laws as Applied to Women*, 6 *J.L. SOC'Y* 154, 163 (2005).

marriage simply to be able to marry in a particular church or to satisfy their family or a particular religious official. Even if this is not the case, is this Act necessary to afford couples with choice? In reality, “[c]ouples 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.”⁵⁰

There is also doubt as to whether an unmarried couple should be allowed to enter into such a restrictive marriage. Unmarried couples are often living in a state of bliss and are not likely to consider the likelihood that their marriage, like most other marriages, will end in divorce. The couple cannot know before the marriage even begins whether their marriage “can, should, or will last forever. As such, the notion of a covenant marriage is the codification of a fictitious, naïve, and wishful notion.”⁵¹ This concern is not as severe for an already married couple that wishes to “upgrade” their traditional marriage to a covenant marriage.

Should a couple be trapped in a restrictive marriage indefinitely because of an uninformed, naïve decision before the marriage even began? Despite the romantic and “holier than thou” attitude provided, “[a]t best, a covenant marriage is an expression of optimism or hope in a marriage’s future strength, and this can only be determined by the test of time.”⁵²

IV. COVENANT MARRIAGE AND WOMEN

Divorce is almost always traumatic for all parties involved, but women and children have traditionally borne the worst of this burden. Even when both parents work, women are still usually primarily responsible for child care. Because of this, many women put their careers on the backburner while raising children. Having been out of the job market for a while or having stayed in the market but slowed the climb up the career ladder, many women have less work experience than men and in turn hold lower positions and earn less money. During and after a divorce, a woman is likely to face more financial hardship than a man. Covenant marriage may exacerbate this problem as “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.”⁵³ The financial strain of divorce from a covenant marriage will be felt by both parties, as the extra effort required will “increase the financial burden by requiring costly litigation to establish fault or by sub-

50. Stewart, *supra* note 2, at 517.

51. VanSickle, *supra* note 49, at 161.

52. *Id.* at 167.

53. Stewart, *supra* note 2, at 530.

jecting families to a prolonged waiting period before a divorce can be granted.”⁵⁴ Even though women tend to fare worse than men financially under both fault and no-fault divorce:

[T]he change from fault to no-fault forced women to become better educated, more marketable, and consequently, more financially independent. To revert to a traditional, fault-based divorce system would encourage women to resume traditional gender roles, which emphasize the financial dependence of women on their spouses. Furthermore, it also stands to reason that any financial hardship or dependence incurred by a woman in marriage and divorce would also be felt by the children of the marriage.⁵⁵

Because women, like men, will be disadvantaged if they are the spouse that commits fault in the marriage, the Act—and the fault system in general—“only favors women if they are truly innocent parties.”⁵⁶

Women and children are also more likely to be the victims of violence in the home. Abuse occurs in both religious and nonreligious families, but “the triumvirate of family violence (domestic violence, child physical abuse, and child sexual abuse) is more likely to occur in insular, patriarchal communities in which women have little power or influence.”⁵⁷ Also in these communities, the attitude towards the woman’s role in the family tends to differ from the mainstream, and consequently the reaction towards this abuse is different. Unfortunately, because the man is seen to be the head of the house and can rule his family as he chooses, “the victims of the violence receive little support for exiting the relationship from community members and religious leaders.”⁵⁸ This is not meant to imply that religiousness is necessarily linked to domestic violence, but while church attendance and the like do not predict a tendency towards violence, a study has shown that people with “‘high levels of extrinsic religiosity’” were more prone to child abuse than people with a lower level.⁵⁹

The Act assumes that women are victims who need to be protected from men or are totally economically dependent on them. Like children, women need to be “taken care of by men and the law, and marriage af-

54. *Id.* at 534.

55. Nicole D. Lindsey, *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, 280 (1998).

56. Olivas, *supra* note 19, at 782.

57. Robin Fretwell Wilson, *The Overlooked Costs of Religious Deference*, 64 WASH. & LEE L. REV. 1363, 1369 (2007).

58. *Id.* at 1370.

59. *Id.* at 1372 (2007) (quoting Christopher W. Dyslin & Cynthia J. Thomsen, *Religiosity and Risk of Perpetrating Child Physical Abuse: An Empirical Investigation*, 33 J. PSYCHOL. & THEOLOGY 291, 296 (2005) (finding that conservative Protestant religious affiliation is not related to physical child abuse, but that extrinsic religiosity among conservative Protestants is linked to child abuse risk)).

fords that veil of protection.”⁶⁰ While it is true that no-fault divorce allows husbands to leave their wives relatively easily, wives have the same option. With unilateral divorce, a spouse does not have to wait for adultery, abuse, or desertion to occur in order to end the marriage. She (or he) is allowed to initiate the divorce on her own terms whenever she chooses. Opponents of covenant marriage wonder why we would “wish to revert to an archaic divorce form founded upon gender inequity—a form that subordinates women by casting them into the role of victim.”⁶¹ The fault-based divorce system requires a spouse to take the position of victim in order to obtain a divorce, a position society traditionally tends to encourage women to fill. Through its paternalistic assumption that the state must save women from men, “covenant marriage laws are anti-feminist in their conception and application. Indeed, they are infantilizing to women and cast them into a place of perpetual subordination.”⁶² In an ironic twist, “[s]tudies show that fault-based divorced [sic] systems like that enacted via Louisiana’s Covenant Marriage Act actually result in taking away the very rights and equality that they attempt to convey to women.”⁶³ Covenant marriage not only fails to protect or empower women, it actually harms them.

V. COUNSELING

A. In General

There is little doubt that requiring counseling before a couple marries could help to ward off problems. The couple might decide that marriage is not the right choice (which would prevent a future divorce), or they might be forced to confront some difficult questions that they had not considered before. This would mean that the couple would enter the marriage more informed and with a better understanding of the problems that they might face in the years to come. Problems arise, however, with the Act’s limited requirements for counselors. The Act allows premarital counseling from “a priest, minister, rabbi, clerk of the Religious Society of Friends, any clergyman of any religious sect, or a professional marriage counselor”⁶⁴—none of whom would probably be expected to know about the legal subtleties of the Act. In fact, the Act does not require the counselors to discuss the legal aspects of the Act, only to give the couple a pamphlet entitled “Covenant Marriage Act,” which was developed by the office of the attorney general.⁶⁵ Some counselors who do not believe that divorce is a

60. VanSickle, *supra* note 49, at 170.

61. *Id.* at 158.

62. *Id.* at 160.

63. *Id.* at 159.

64. LA. REV. STAT. ANN. § 9:273(2)(a) (2008).

65. *Id.*

morally or religiously acceptable choice may overlook the heightened requirements for divorce altogether. The biggest problem is that “marriage counselor” is not defined in the Act or elsewhere in Louisiana statutes,⁶⁶ and Louisiana “places no restrictions on who may qualify to act as a ‘marriage counselor’; at present, Louisiana does not require one to have a license to assume that title.”⁶⁷ It is alarming that unlicensed “counselors,” who have received no training and have no required topics of discussion, are able to sign an affidavit saying the couples they have counseled are informed enough to enter a marriage with strict hurdles to divorce.

The financial burden of counseling could also be a problem. Fortunately, many churches or nonreligious organizations offer free counseling, but what happens if the couple cannot afford counseling either before or during the marriage? By requiring counseling (which can be very expensive) and also making divorce more costly, is covenant marriage only practical for the wealthy couple?⁶⁸ Should the state imply that a certain form of marriage is superior and then make it practical only for the wealthy?

Another problem with the counseling requirement, more so for the requirement for counseling when marital difficulties arise than for the premarital counseling, is the futility of such an endeavor if one or both parties are set on ending the marriage. Counseling will be pointless if one (or both) of the individuals does not want to participate, so the motivation to require unwilling participation is questionable. The Act does not address whether good faith is required by the statute for participation in counseling. This forced counseling may prolong the pain and embarrassment for the spouse who wishes to seek the counseling and will almost surely be a useless exercise. The problem would be worse if one of the spouses was being forced to confront an abusive spouse in therapy.⁶⁹ Even if physical abuse was not present, which would be grounds for divorce under the Act, if one spouse is emotionally dominant or abusive in the relationship the subordinate spouse might be afraid to enter counseling or find the spouse so domineering or manipulative in counseling that it is an exercise in futility or even worsens the situation.

66. Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 87 (1998).

67. 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, 1708 (1998).

68. Although divorce rates tend to rise during economic downturns, the severity of the recent economic downturn has resulted in a lowered divorce rate. This was also observed during the Great Depression, and suggests that at a certain point in recessions, couples have to put divorce on hold because it is not economically feasible. Alex Johnson, *Wanting to Divorce, but Unable to Afford It*, <http://www.msnbc.msn.com/id/27808110/?gt1=43001> (last visited May 13, 2010).

69. The Act waives the counseling requirement only for *physical* or *sexual* abuse. See LA. REV. STAT. ANN. § 9:307(D) (2008).

One final problem with counseling requirement is the fact that often-times therapists are geared towards seeking the happiness of the individuals involved even at the expense of marriage.⁷⁰ Such therapists may be too concerned with the individual, not with the marriage, and may actively advocate divorce.⁷¹ Might the Act's counseling requirement actually undermine its own purpose if the couple attends a pro-divorce marriage counselor?

B. Religious Counseling

The Act specifically identifies religious leaders as approved counselors for the mandatory pre-marriage counseling, and the author hoped that religious counselors would “focus on preserving the marriage rather than the individual spouse’s psyche.”⁷² The decision to enter into marriage is an extremely important—and personal—decision. When entering into an even more restrictive marriage, the best interests of each individual should be considered, and it is possible that “the heavy weight of moral influence by religious counselors will not serve the function of an independent, objective influence in the covenant marriage decision.”⁷³ This is the Act’s opponents’ reply to the supporters’ distrust of secular counselors. Religious counselors might downplay dangerous situations in order to focus on preserving the marriage. Many “[w]estern religions, particularly Christianity, traditionally are predicated upon a fundamental belief in the necessity of female submission to male dominance.”⁷⁴ Consider that Paul, “perhaps the most misogynist of the saints,”⁷⁵ wrote:

Wives, submit to your husbands as to the Lord. For the husband is the head of the wife as Christ is the head of the church, his body, of which he is the Savior. Now as the church submits to Christ, so also wives should submit to their husbands in everything.⁷⁶

Because the husband should be able to discipline and control his family as he chooses, “[r]eligious groups often acquiesce in or, worse, con-

70. See William J. Doherty, *How Therapists Threaten Marriage*, RESPONSIVE CMTY., Summer 1997, at 31.

71. Spaht, *supra* note 66, at 10001.

72. Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1573 (1998).

73. Chauncey E. Brummer, *The Shackles of Covenant Marriage: Who Holds the Keys to Wedlock?*, 25 U. ARK. LITTLE ROCK L. REV. 261, 294 (2003).

74. VanSickle, *supra* note 49, at 163.

75. *Id.* at 164.

76. *Ephesians* 5:22-24 (New International Version). Also consider the traditional wedding vows from THE BOOK OF COMMON PRAYER; the wife vows “to love, cherish, and to obey.” THE CHURCH OF ENG., THE BOOK OF COMMON PRAYER (n.p. n.d.) 366. The word “obey” is omitted from the husband’s vows. *Id.* at 365.

done family violence within the community.”⁷⁷ This attitude towards domestic violence is the product of several factors:

This tolerance of family violence stems both from sharply-contested readings of religious texts and from the belief that “the marriage must be maintained.” The emphasis on family privacy, family reputation, and family solidarity makes maintenance of the marriage and family unit of paramount importance, as a result of which “abusiveness almost becomes invisible.”⁷⁸

So much for protecting women and children when “[p]reserving the marriage is of such great importance that physical violence is seen by some members as ‘preferable to divorce.’”⁷⁹

While these quotes specifically refer to Muslim and Islamic domestic violence, the tendency for religious counselors to place the marriage above the individual also applies to Christianity. This is even admitted by the advocates of the Act, who hoped that religious counselors would focus on the marriage rather than the individual. Shockingly, “[a] 1988 survey of conservative Protestant pastors found that 92% of respondents would ‘never advise a woman to divorce an abuser.’ These same religious leaders felt that ‘the victim’s lack of submissive behavior was in part responsible for the violence.’”⁸⁰ The sentiment has not improved much in more recent years, as a “2000 study of 158 Christian religious leaders found that many believed ‘marriage must be saved at all costs’—even when domestic violence occurs—and that a realistic solution was ‘forgiving and forgetting the abuse.’”⁸¹ This is scary. It makes sense that couples who choose covenant marriage would belong to these conservative denominations, would embrace their teachings strongly, and would choose their religious leaders for the counseling required by the Act. The combination of a greater likelihood of domestic abuse with a tendency for the community and religious counselors to be dismissive of this abuse could make covenant marriage a deadly choice for some couples. The state’s function is to protect against victimization, not shelter it, and divorce law is an important aspect of this.⁸² Religious deference cannot be used as this shelter. Ideally, “[t]he

77. Wilson, *supra* note 57, at 1373.

78. *Id.* at 1375-76 (quoting Ruksana Ayyub, *Domestic Violence in the South Asian Muslim Immigrant Population in the United States*, 9 J. SOC. DISTRESS & HOMELESS 237, 243 (2000)) (alteration in original) (footnotes omitted).

79. *Id.* at 1376 (quoting S. Douki et al., *Violence Against Women in Arab and Islamic Countries*, 6 ARCHIVES WOMEN’S MENTAL HEALTH 165, 169 (2003)).

80. *Id.* at 1377 (quoting Colleen Shannon-Lewy & Valerie T. Dull, *The Response of Christian Clergy to Domestic Violence: Help or Hinderance?* 10 AGGRESSION & VIOLENT BEHAV. 647, 651 (2005)) (footnotes omitted).

81. *Id.* at 1376-77 (quoting Shannon-Lewy & Dull, *supra* note 80, at 649 (2005)).

82. *Id.* at 1378.

law of marriage and divorce empowers spouses to exit relationships on equitable terms without harsh sanctions that some religious norms would impose. As a result, the state must empower women to exit abusive relationships when they are victims of violence themselves or believe their children are being victimized.”⁸³ The Act waives the counseling requirement for situations involving physical or sexual abuse, but this does not include emotional abuse, and couples who enter covenant marriages may be reluctant to charge their spouse with abuse of any type if it is generally accepted within their religious community.

VI. MIGRATORY DIVORCES

Couples who are dissatisfied with their covenant marriage and wish to avoid the extra counseling, costs, and time required to obtain a divorce may resort to migratory divorces. Migratory divorce has been a problem in American family law for decades,⁸⁴ but with almost all states allowing no-fault divorce, it is no longer an attraction for most couples. Even before individual states switched to no-fault divorces, couples evaded strict divorce laws by “forum shopping.”⁸⁵ A person who wished to get divorced but could not due to his or her home state’s fault-based divorce laws would travel to another state, set up residency, and obtain a divorce. As long as proper procedures were followed, the divorce would be recognized in the home state because of the Full Faith and Credit Clause. Divorce became a type of tourist attraction in some states, as states with a short time requirement for domicile lured in many out-of-state divorce seekers. For wealthy divorce-seekers “desirous of privacy or a vacation, a trip to Nevada could provide both a diversion and a divorce, particularly after the development of its casinos.”⁸⁶ Nevada was one of the first major havens for divorce seekers. Its success in generating income by attracting divorce seekers was so impressive that other states and counties offered competing inducements to tourists, and many lawyers relocated their practices to take advantage of these more liberal divorce laws.⁸⁷ Florida was one of Nevada’s top competitors for divorce tourism.⁸⁸ In addition to a short residency requirement, Florida began to get “away from the question of personal or intentional guilt,” in essence moving towards no-fault divorce.⁸⁹ In suits where both parties desired the divorce, Alabama became the state of

83. *Id.*

84. BLAKE, *supra* note 3, *passim*.

85. Migratory divorces are not a modern phenomenon. In the mid-1700s, New Yorkers, frustrated with the rigid divorce laws of their state, would establish temporary residences in other states to obtain divorces; however, the time required to establish residency was much longer than today. *Id.* at 116-117.

86. DiFONZO, *supra* note 7, at 68.

87. BLAKE, *supra* note 3, at 152-153.

88. *Id.* at 167.

89. *Id.* at 168 (internal quotation omitted).

choice in the 1950s. A party could have a divorce within a matter of days.⁹⁰

By returning to a fault-based system through covenant marriage, Louisiana may see a rise in couples who leave the state in order to obtain a divorce. The Act does not address this issue, and there have been no cases on whether other states must follow the Act's requirements in order to divorce a covenant couple outside of Louisiana. It seems that covenant marriage is a step backward for Louisiana, and many of the problems that accompany fault-based divorce, including migratory divorce, may return.

VII. KATHERINE SHAW SPAHT: THE VOICE BEHIND THE ACT

Katherine Spaht, a law professor and former vice chancellor at Louisiana State University, prepared the original Louisiana House Bill 756 and testified during hearings before the House Committee on Civil Law and Procedure and the Senate Committee on Judiciary in favor of the legislation. In her article *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*⁹¹ she discusses the motivations behind the Act, the foremost being "the children." She implies that parents have a duty to their children to suffer through an unhappy marriage⁹² and says that, despite various studies that conclude otherwise, it is divorce, not marital conflict, that does the most harm to the children.⁹³ She then goes on to rant about the evils of cohabitation.⁹⁴ Almost as disturbing is her shameless admission that the

less obvious objective of the legislation, which is reflected in who may perform the mandatory premarital counseling, is to revitalize and reinvigorate the "community" known as the church. Reinvigoration results from inviting religion back 'into the public square'

90. *Id.* at 169-70. No length of residence was required if the Court had jurisdiction over both parties. If either party was a resident, the courts "would assume jurisdiction to grant divorce either for or against him, provided the other party submitted to the jurisdiction of the court by making a general appearance." The court had great discretion in determining whether a party was a resident. *Id.* at 169.

91. Spaht, *supra* note 66, at 63-74.

92. "Spending one-third of one's life living in a marriage that is less than satisfactory in order to benefit children—children that parents elected to bring into the world—is not an unreasonable expectation." *Id.* at 67 (1998) (quoting PAUL A. AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* 238 (1997)).

93. *Id.* at 67. For one of the studies Spaht disagrees with, see AMATO & BOOTH, *supra* note 92, at 218-21 (1997) (finding that children of divorce whose parents' marriage contained high levels of conflict actually did better when their parents divorced) cited in Alan J. Hawkins, *Will Legislation to Encourage Premarital Education Strengthen Marriage and Reduce Divorce?* 9 J. L. & FAM. STUD. 79, 83 (2007).

94. Spaht, *supra* note 66, at 68-69, 110-11.

for the purpose of performing a function for which religion is uniquely qualified—preserving marriage.⁹⁵

Separation of church and state is one of the principles central to our system of government.⁹⁶ She further tries to ram religion down the throats of Louisiana citizens by saying that this desire to promote religion is the reason why the counseling requirements are so vague. She says “the legislation is careful not to ‘dictate’ the content of the counseling beyond its basic contours” because many religious organizations already have premarital counseling programs in place.⁹⁷ She argues that “criticism of the premarital counseling component of the legislation as ‘shallow’ and lacking in rigorous content and time specifications fails to recognize that the ‘omission’ was calculated to avoid serious objections from those issued an invitation to assist in preserving marriages.”⁹⁸ I do not think that the risk of upsetting preexisting religious-counseling programs should be the justification for failing to ensure that premarital counseling is adequate and thorough. She says that this is acceptable because “[t]here has never been a clear separation between church and state in matters of celebration of marriage.”⁹⁹ As I noted before, early marriages in America were secular, and just because marriage usually has religious elements does not mean that the state should further entwine church and state. Maybe now is the time to permanently disentangle them. The religious undertones of the Act are frightening because when the Act was originally introduced, it only contained two grounds for immediate divorce—adultery and abandonment for one year.¹⁰⁰ Spaht and her supporting legislators did not think that serious problems such as drug addiction, conviction of a felony, or physical, sexual, or emotional abuse of a spouse or child were important enough to warrant immediate divorce. It is fortunate that other legislators tweaked the Act, but it further supports my belief that this legislation was a house of cards built on a foundation of sand.

Several years after the Act passed, Spaht published an article attempting to explain why covenant marriage had not caught on in Louisiana.¹⁰¹ She blamed *Lawrence v. Texas*¹⁰² and *Goodridge v. Department of Public*

95. *Id.* at 75 (footnote omitted).

96. This doctrine of separation of church and state has been recognized by the Supreme Court. *See, e.g.,* *Presbyterian Church in U.S. v. Mary Elizabeth Blue Hill Mem'l Presbyterian Church*, 393 U.S. 440 (1969).

97. Spaht, *supra* note 66, at 76077 (footnote omitted) (emphasis in original).

98. *Id.* at 77.

99. *Id.* at 86.

100. *Id.* at 123.

101. Katherine Shaw Spaht, *Covenant Marriage Seven Years Later: Its As Yet Unfulfilled Promise* 65 LA. L. REV. 605 (2005).

102. 539 U.S. 558 (2003) (declaring Texas's sodomy statute unconstitutional).

*Health*¹⁰³ for “sucking out” the “air and the vigor . . . of the nascent national discussion of marriage”¹⁰⁴ and states that marriage is now “threatened by the problem of the usurpation of democracy by the United States Supreme Court.”¹⁰⁵ Homosexual marriage—or even same-sex civil unions—will lead to the death of marriage. She cites Scandinavia and the Netherlands as proof of the marriage-killing tendencies of same-sex marriage.¹⁰⁶ She then blames the clergy’s and marriage license clerks’ lack of enthusiasm and support of covenant marriage for its failure¹⁰⁷ before moving on to chide the state of Louisiana for not launching a pro-covenant marriage mass media campaign.¹⁰⁸ She has gone beyond a legislative promotion of Christian values and suppression of gay marriage to suggesting that the government also use the media to spoon feed religion to the masses.

VIII. LEGISLATING MORALS AND AVOIDING GAY MARRIAGE

Covenant marriage is a not-so-subtle attempt to legislate morals and mix church and state, and it could easily be seen as a conservative backlash against the increasing extension of rights to homosexuals. By authorizing this “super marriage,” the state is implying that covenant marriages are somehow superior to traditional marriages, and this makes the latter seem less valid. A couple may see the existence of covenant marriage as the state’s way of deeming a traditional marriage as an uncommitted or inferior form of marriage. It also implies that the traditional vows are no longer enough to show commitment. But the traditional wedding vows, just as the covenant vows, indicate a desire for a lifelong commitment. In a way, “[p]arties to a covenant marriage move beyond ‘I do; I mean it’ to ‘I really do; I really, really, mean it.’”¹⁰⁹

Covenant marriage is an attempt at “legislating Biblical grounds for divorce.”¹¹⁰ Again, the state is validating conservative Christian values by placing them in a position of respect and superiority. The conservative view that a marriage is between one male and one female is further strengthened by the Act. Soon, the legislature may have to confront the question of what to do when homosexual marriages are allowed in the state. Will the language of the Act be changed to accommodate same-sex couples, or will the Act remain as is, continuing to promote the idea that marriage on

103. 798 N.E.2d 941 (Mass. 2003) (regarding Massachusetts’s ban on same-sex marriage).

104. Spaht, *supra* note 101, at 606.

105. *Id.* at 627.

106. *Id.* at 609¶12.

107. *Id.* at 616¶19.

108. *Id.* at 619.

109. VanSickle, *supra* note 49, at 161.

110. Stewart, *supra* note 2, at 516.

conservative Christian grounds is the superior type of marriage? If a return to fault-based marriage is truly in everyone's best interest as the Act's sponsors claim, it should be available to all couples.

Opponents of covenant marriage also see it as "state enforcement of religious vows."¹¹¹ The promotion of religion was not a hidden goal of the Act; it was openly stated. One of the stated purposes of the Act was to "reinvigorate the 'community' known as the church" by "inviting religion back 'into the public square.'"¹¹² Conservatives often argue that marriage is and has always been a religious matter in America, and that justifies restricting marriage to situations that fit religious—most often Christian—norms. However, as discussed earlier, marriages in our country have not always involved the church. Even if marriage is traditionally a religious ceremony, nonreligious couples should not be forced to fit into what a certain religion regards as the proper form of marriage. As it openly promotes religion, covenant marriage is an unnecessary entanglement of church and state.

IX. A MORE EFFECTIVE OPTION

If legislators want to save the family by lowering divorce rates, covenant marriage is not the proper avenue. Covenant marriage is a very small percentage of new marriages in Louisiana.¹¹³ Add to that the facts that those who "upgrade" their existing traditional marriages to covenant marriages make up the largest number of covenant marriage couples and that covenant marriages attract couples who are less likely in the first place to divorce, and it is clear that it will never have much impact on the state's divorce rate. The failure of the Covenant Marriage Act is its focus on hurdles to dissolving the marriage. As discussed above, there are many reasons that a state should not encourage couples to stay in a harmful or unhappy marriage. It is obvious that the bill's proponents were too focused on the religious aspects of marriage and divorce, with a desperate attempt to declare that divorce is only the best option in rare cases, and not on the importance of building a strong foundation before marriage. In order to make a real impact on the divorce rate, the focus should be on preventative measures such as creating hurdles to marriage and providing incentives to stay married, not demonizing and creating barriers to divorce.

The premarital counseling requirement is a step in the right direction, but it does not go far enough. The ideal option would be to require premarital counseling before *any* marriage, but there would likely be constitutional issues with such a requirement. Since this is not feasible, the best

111. Brummer, *supra* note 73, at 294.

112. Spaht, *supra* note 66, at 75.

113. Spaht, *supra* note 42, at 51.

option would be to encourage premarital counseling by subsidizing the cost of those services. This would cost money, but what better way to show that the state is really concerned about building lasting marriages than to make a monetary investment in starting those marriages off on the right foot. This sends a message to the public that marriage is important to society and to the State, and it should not be entered into lightly or without preparation. The subsidies would also help couples who might otherwise have to rely on the (often free) counseling services offered by their clergyman. This would give couples the option of receiving counseling from a professional marriage counselor, who is likely to be more qualified due to licensing requirements and also more likely to focus on the nonreligious aspects of marriage. A similar option that is already being used in some states would be to offer a discount on the marriage license fee for couples who participate in formal premarital education.¹¹⁴ Alan J. Hawkins, Professor of Family Life at Brigham Young University, has addressed the cost effectiveness of premarital education.¹¹⁵ He compares the money lost by offering a marriage license fee discount to the costs of divorce including increased child support enforcement costs, and Medicaid expenses, Temporary Assistance to Needy Families.¹¹⁶ Even using conservative estimations of savings, he concludes that “legislation to promote premarital education is likely to produce significant and early cost savings even with only modest increases in the proportion of couples seeking premarital education” and advocates that legislatures subsidize the cost of this counseling for low-income couples since they have a higher risk for divorce but may not have enough resources to afford premarital counseling.¹¹⁷

Another shortfall of the Act’s counseling requirement is that it only states that couples must be counseled about “the nature and purposes of marriage and the responsibilities thereto.”¹¹⁸ The counselor’s affidavit attests that their counseling includes “a discussion of the seriousness of covenant marriage, communication of the fact that a covenant marriage is a commitment for life, a discussion of the obligation to seek marital counseling in times of marital difficulties” and that the couple received the attorney general’s informational pamphlet on covenant marriage.¹¹⁹ This requirement is horribly vague and far too general. Besides not requiring a full explanation of the legal ramifications of a covenant marriage, as discussed above, the Act does not require that the counselor address any specific subjects. Sources vary on what the most common causes of divorce

114. Florida, Maryland, Minnesota, Oklahoma, and Tennessee currently have statutes that provide this discount. Hawkins, *supra* note 93, at 79-80.

115. *Id.*

116. *Id.* at 82, 93-95.

117. *Id.* at 95.

118. LA. REV. STAT. ANN. § 9:272(A) (2008).

119. LA. REV. STAT. ANN. § 9:273(A)(2)(a) (2008).

are, but the umbrella they all seem to fall under is “lack of communication.”¹²⁰ If couples engaged in a frank discussion about issues that commonly arise in marriages before the marriage actually began, they would have a better chance of determining whether their priorities and needs were compatible. If not, they might decide not to marry or work to compromise. The legislature should create a list of topics that must be discussed during the premarital counseling instead of leaving it up to the counselor’s discretion. Certain counselors, especially religious counselors, might have assumptions about certain topics and think that no discussion is necessary. A Catholic priest, for example, might assume that children are desired and that they will be raised as Catholics. By requiring that certain subjects be broached, faulty assumptions will be avoided and counseling will be more effective and thorough. Possible topics might include each person’s priorities and expectations of the marriage, religion’s role in the marriage, whether children are desired, and if so, how they will be raised, financial concerns, developing effective communication skills, and sexual issues. The couple and the counselor should have to indicate on the affidavit that all the required topics were covered in the course of counseling.

Studies have shown that premarital counseling is effective in preventing divorce. After studying a group of newlywed couples in Louisiana for the first five years of marriage, the period with the highest risk for divorce,¹²¹ researchers found that couples who had premarital counseling had a substantially lower rate of separation and divorce, even taking into account other factors that might affect the likelihood of divorce.¹²² A study showed that premarital counseling and education was associated with a 31% decline in the chance of divorce.¹²³ Scott M. Stanley, who studies the benefits of premarital education, lists four main benefits to premarital counseling: it slows couples down on their rush to the altar and fosters deliberation; it sends a message that “marriage as an institution matters, and how their marriage turns out depends on their own attitudes and actions,” not fate and romance; it alters couples to sources of help if they have problems later; and it can lower the risk of marital distress or di-

120. See, e.g., Maxwell Payne, *The Most Frequent Cause of Divorce*, http://www.associatedcontent.com/article/311828/the_most_frequent_cause_of_divorce.html?cat=41 (last visited May 13, 2010) (breaking down the causes of divorce into four main groups: financial problems, infidelity, sexual problems, and major life changes).

121. ROSE M. KREIDER & JASON M. FIELDS, U.S. CENSUS BUREAU, *NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996-18* (2002), available at <http://www.census.gov/prod/2002pubs/p70-80.pdf>.

122. Laura Sanchez et al., *Can Covenant Marriage Foster Marital Stability Among Low-Income, Fragile Newlyweds?* 20–21 (Sept. 2003) available at <http://www.npc.umich.edu/news/events/past/SanchezNock.pdf>.

123. Scott M. Stanley et al., *Premarital Education, Marital Quality, and Marital Stability: Findings From a Large, Random Household Survey*, 20 J. FAM. PSYCHOL. 117, 117 (2006).

orce.¹²⁴ Another problem with the Act is the lack of training required of premarital counselors. There should have to be some sort of certification or licensing process for counselors, including—and especially—religious ones. This process should include a requirement that the counselors demonstrate an understanding of the legal aspects of the covenant marriage so they in turn can explain it to the couples they counsel. More stringent requirements for counselors would also help ensure that the couples are receiving correct information from qualified, knowledgeable counselors, and counselors who are unwilling to undergo additional training required to counsel couples who are contemplating marriage probably shouldn't be counseling them in the first place.

A more drastic change would be to do away with the obstacles to divorce that the Act contains. If there is a more thorough premarital counseling requirement, couples will have already worked through some of their issues and incompatible couples are less likely to enter marriage. The divorce provisions in the Act do nothing more than keep already miserable couples stuck in their marriage longer and incur more legal and counseling fees. Couples who are determined on getting divorce will still find a way, and I do not see how observing their parents jump hoops to get divorce—or worse, stay in an unhealthy or abusive relationship because the obstacles are too daunting—will benefit the children of the marriage. Instead, the state could provide incentives to stay married, such as tax breaks that increase for each year of marriage. Those incentives would not be enough to persuade unhappy people to stay married, but it would be a reminder that the state values their lifelong commitment, and it might attract couples who are put off by covenant marriage's strict divorce requirements. I think it is more important to give subtle encouragement to lay a good foundation before marriage and to work together to stay married than to penalize couples whose marriage is not working by making it harder to divorce.

Finally, a more superficial change I would suggest is to abandon the term "covenant marriage." The name itself seems hyper-religious and cultish, and it probably scares nonreligious or less religious couples away. Something like "counseled" or "informed" marriage might be more appealing.

CONCLUSION

The Covenant Marriage Act fails and will continue to fail to meet its goals of protecting women and children and lowering the divorce rates. Marriage is a deeply personal and intimate decision, and the government's ability to strengthen marriages is limited, as it should be. Stated in a more

124. Scott M. Stanley, *Making a Case for Premarital Education*, 50 FAM. REL. 272, 274 (2001).

romantic way, “marriages are better made in the human heart than in the statehouse halls.”¹²⁵ In its efforts to protect women and children from the horribleness of men, it actually strips away the advances divorce law has made and reverts to a failed system that kept women and children locked in unhappy homes, dependent on the marriage for economic stability. It is an obvious attempt to legislate morals and promote religion. That couples can choose whether to enter a covenant marriage does not erase the fact that the Louisiana legislature has placed religious marriage on a pedestal, something that flies in the face of the separation of church and state. The people of Louisiana have shown their dissatisfaction with the statute by overwhelmingly choosing traditional marriage over covenant marriage. Instead of fashioning unnecessary boutique legislation that appeals to only a small percentage of their citizens in an attempt to alienate homosexuals, legislators should focus on more important issues that affect more people. The same goals the legislature is hoping to accomplish could be made through efforts that encourage building a stronger foundation before marriage rather than by restricting the availability of divorce.

Kimberly Diane White

125. Stewart, *supra* note 2, at 509.