

LOUISIANA'S COVENANT MARRIAGE: A LAW WITHOUT BITE?

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I. Introduction

This Note will examine the Covenant Marriage Act, recently enacted as Louisiana statute H.B. 756, Reg. Sess. (La. 1997) which provides for a second type of marriage union for Louisiana couples, the covenant marriage.¹ The Act was signed into law on July 15, 1997 with little press, fanfare or difficulty.² Moreover, Louisiana's Governor signed it willingly.³ Covenant Marriage is a type of marriage offered to couples who wish to marry in Louisiana. Couples now have a choice when they marry: The usual contemporary marriage with the standard vows, or the Covenant Marriage which requires premarital counseling, additional vows, and signing the Covenant Marriage

¹ Covenant Marriage Act, 1997 La. Sess. Law Serv. Act 1380(H.B. 756) (West), Part VII (hereinafter CMA).

agreement, limiting the grounds for divorce.⁴ The additional vows reiterate that the couple swears to live together for as long as they both shall live.⁵

Part II will review the history of for-cause and no-fault dissolutions of marriage, including why our society changed from a for-cause to a no-fault system.⁶ Part III will explore the Louisiana statute⁷ in depth, the reasoning behind the change in the Louisiana law, the legal and societal ramifications, as well as the legislative history.

Part IV will examine the question of whether marriage is a legal contract and the interaction between contract law and the covenant marriage. Early in the development of U.S. marriage law, courts examined the viability of marriage as a

² The Act was approved by the Louisiana House (37 yeas and 1 nay) and Senate (28 yeas and 9 nays). Louisiana Document Services, Louisiana Legislature, Detail Listing from first to last step, Sep. 11, 1997.

³ Terry Carter, *A Stealth Anti-Divorce Weapon*, 9 ABA JRNL. 28 (1997).

⁴ Covenant Marriage Act, 1997 La. Sess. Law. Serv. 1380 (West), Part VII, § 307 A.

⁵ Covenant Marriage Act § 273 A.(1) para. 2.

⁶ (Utilizing the thesis of Professor Carl E. Schneider, Professor at the University of Michigan School of Law) Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

⁷ Covenant Marriage Act, 1997 La. Sess. Law. Serv. 1380 (West), Part VII.

legal contract.⁸ Because the covenant marriage is a type of contract, the consequences of upholding a covenant marriage as a true contract will be investigated.

Part V will examine choice of law issues, focusing on which state's law Connecticut should apply in the event a Connecticut court has to dissolve a Covenant Marriage. A review of Connecticut's residency requirements and the waiting period that is necessary to secure a divorce will be reviewed. Past Supreme Court cases⁹ dealing with jurisdictional issues, full faith and credit issues, and the constitutionality of a state's residency requirements for divorce will also be analyzed.

Part VI will address concerns of the proponents and opponents of Covenant Marriage. Their concerns will be

⁸ *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888).

⁹ *Williams v. North Carolina*, 317 U.S. 287 (1942), (divorce judgment obtained in a sister state is entitled to full faith and credit). *Sosna v. Iowa*, 419 U.S. 343 (1975), (one year residency requirement for divorce is not unconstitutional). *Sherrer v. Sherrer*, 334 U.S. 343 (1975), (appearance by spouse in contested divorce suit afforded spouse due process of law). *Esenwein v. Pennsylvania*, 334 U.S. 343 (1945), (Pennsylvania courts under a duty to accord prima facie validity to Nevada divorce decree).

outlined and reviewed to determine if they are viable.

Because a couple who opts for Covenant Marriage can secure a divorce after two years of living apart¹⁰, a major concern of the opponents appears to be unfounded.

This section will also address the following questions: Will covenant marriage really alter the status quo as proponents of the legislation presume? Will the divorce rate in Louisiana plummet? Will couples truly benefit from premarital counseling and the other requirements of the covenant marriage? In addition, questions about whether couples will be coerced into this new type of marriage will be examined.

Part VII will conclude this Note. Because this legislation was passed on July 15, 1997,¹¹ no case law has developed as yet. In lieu of an examination of case law, this Note will rely in part, on interviews with experts in

¹⁰ Covenant Marriage Act § 307 B. (5).

the field of Louisiana family law and secondary sources. Until people choose the Covenant Marriage, and until (inevitably) some of these marriages fail, it is still unclear exactly what effect the Covenant Marriage will have on the people of Louisiana. However, recent statistics show that Louisiana couples are not racing to marry under Louisiana's new law. "The early evidence is that few people are taking up the "Covenant Marriage option."¹² 'In the month after the law took effect Aug. 15, Louisiana officials statewide issued only 26 covenant marriage licenses out of about 3,000.'¹³

Despite the seemingly poor response to Louisiana's Covenant Marriage Act, approximately ten other states have proposed legislation to reform no-fault divorce law, so it

¹¹ Covenant Marriage Act, 1997 La. Sess. Law. Serv. 1380 (West), Part VII.

¹² Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, page 31 n. 75 (January 12, 1998).

¹³ Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, page 31 n.75 (January 18, 1998) *quoting* Bruce Nolan, "Bishops Back Off Covenant Marriage," THE TIMES-PICAYUNE, Oct. 30, 1997.

will be more difficult for their citizens to obtain a divorce.¹⁴ In addition eleven states are considering premarital counseling in order to get a marriage license.¹⁵ Part VII will consider the wisdom and constitutionality of such proposals.

II. Fault and No-Fault Divorce

Today's reasons for the United State's divorce laws are similar to the reasons divorce laws were needed in the past. Adultery, abuse and incompatibility, were, and still are the key reasons for divorce.¹⁶ These reasons do not differ from the grounds in Louisiana's Covenant Marriage Law.¹⁷ The arguments for and against divorce are also unsurprisingly familiar. Opponents of divorce believed that divorce would lead to rampant immorality and would endanger

¹⁴ ABC World News Tonight:*Divorce and its Impact on Children* (ABC television broadcast June 2, 1997).

¹⁵ *Id.* And, in sixty-four cities, clergy from every denomination have agreed to require counseling before performing a marriage.*Id.*

¹⁶ Laura Branford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 609, Lisa J. McIntrye, *Law and the Family in Historical Perspective: Issues and Antecedents*, FAMILIES AND LAW 5, 19 (Lisa J. McIntrye et al. eds. 1995).

¹⁷ Covenant Marriage Act, 1997 La. Sess.Law Serv. 1380 (West), Part VII.

the very existence of American society.¹⁸ "The men and women who led the fight for divorce reform. . . were preoccupied with eradicating evil."¹⁹ Proponents believed that less restrictive divorce laws would encourage individual autonomy and protect individuals and their families from destructive relationships.

Historically, a court would grant a fault divorce only with proof that one party had committed a serious offense against the other in the marriage.²⁰ One of the spouses must have committed adultery, abandoned the marital home, or have been physically abusive to the other spouse or the children. This type of divorce was known as for-cause divorce. "This type of divorce was repudiated by every state by the late 1970's."²¹ The new and improved divorce

¹⁸ Lisa J. McIntyre, *Law and the Family in Historical Perspective: Issues and Antecedents*, in *FAMILIES AND LAW* 5, 19 (Lisa J. McIntyre et al. eds., 1995)

¹⁹ LYNNE CAROL HALEM, *DIVORCE REFORM* 29 (1980)

²⁰ Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 *VA. L. REV.* 15 (Feb. 1990).

²¹ Ira Mark Ellman & Sharon Lohr, *Marriage as a Contract, Opportunistic Violence, and other Bad Arguments for Fault Divorce*, 1997 *UNIV. ILL. L. REV.* 722 (1997).

was no-fault divorce. No-fault divorce allowed either spouse to unilaterally seek a divorce without meeting any criteria specified by state statute. A divorce was granted as long as he or she met the requisite waiting period.

For-cause divorce was the norm until approximately the 1960's. The United States quickly embraced the idea of no-fault divorce because the laws in place were often subverted and ignored.²² Because laws were ignored the laws had to be changed.²³ Without the change the integrity of the legal system would be badly undermined.²⁴ "The early reform movement was led primarily by academics, lawyers, and clerics; curiously, there is little evidence that public dissatisfaction with traditional divorce law was a significant factor."²⁵

²² Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, 14 (1990).

²³ Laura Branford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607 (1997).

²⁴ Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, 17 (1990)

²⁵ Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, 14 (1990).

Parties seeking divorce would evade for-cause laws by traveling to a state where the laws were more open to divorce (the well-known Reno divorce), or in a state where fault was required, the couple would commit perjury to establish fault.²⁶ What made a state attractive to a person seeking divorce was both lenient the divorce law and a short time period to establish domicile.²⁷ The popularity of Nevada as a jurisdiction in which to obtain divorce was based in part on its six week residency requirement to establish domicile.²⁸ In a typical case, the spouse "moved" to Nevada, remained long enough to establish domicile, obtained a divorce, and then returned to his or her "home" state, i.e., the state with more restrictive divorce laws.²⁹

²⁶ *Id.*

²⁷ Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, 94, fn 16 (1990).

²⁸ DANIEL SITARZ, *DIVORCE AND DISSOLUTION OF MARRIAGE LAWS OF THE UNITED STATES*, 108 (1990)(summarizing the state's requirements for divorce).

²⁹ Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, 14 (1990).

1969 was the banner year for "quickie" divorce because California passed the United States' first no-fault divorce law.³⁰ After six years of studies, and subsequent legislative hearings, a bill was introduced to implement the recommendations of a commission appointed by the Governor of California.³¹ The report by the California Governor's Commission on the Family stated "that a system which inflexibly characterizes one spouse as 'innocent' while thereby stamping the other as 'guilty' simply does not jibe with a realistic assessment of human behavior."³² With the passage of the law by California, the fault-based system in other states and nations started to crumble.³³ The British Parliament passed the Divorce Reform Act and the National Conference of Commissioners on Uniform State Laws (NCCUSL)

³⁰ Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U.L. REV. 79, 83(1991) citing Cal. Civ. Code sec. 4000-5138 (West 1983) and M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987). California's no-fault divorce law was also the first in the world. *Id.*

³¹ *Id.* at 83, 84.

³² Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, 16 n. 20 (1990)(quoting Report of the Governor's Commission on the Family 30 (1966).

³³ *Id.*

endorsed no-fault divorce.³⁴ "In 1970, shortly after the nation's first modern no-fault divorce law took effect in California the NCCUSL voted to propose a Uniform Marriage and Divorce Act in which the sole ground for divorce was a modern no-fault ground."³⁵ The need to show the other spouse had committed adultery or that remaining in the marriage constituted intolerable cruelty was gone.³⁶

The early reform movement was initiated by academics and legal scholars who sought to save the integrity of the law.³⁷ Efforts were made to bring dignity to the divorce process by removing the need to lie in open court.³⁸ Initially reforms sought to streamline the process, but not to make it easy: "Mandatory counseling was required and proof of breakdown was needed . . . the objective was to promote a careful determination that the marriage was indeed

³⁴ Lynn D. Wardle, *No Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79, 86 (1991).

³⁵ *Id.* at 87.

³⁶ LYNNE CAROL HALEM, *DIVORCE REFORM*, 245 (1980).

not viable.”³⁹ But, after California passed its no-fault divorce laws, other states soon followed.⁴⁰ Fault became a basis for alimony awards but was not necessary to obtain a divorce.⁴¹ Some states would consider fault when calculating alimony and settlement awards, others would remove fault from the equation altogether. As an example of how Connecticut, and two of the largest states in the United States handle fault and alimony, consider the following: In Connecticut today, cause is used as a basis to help courts structure the alimony awards given to spouses in divorce cases.⁴² In New York, cause is not specified as a factor in considering an alimony award, but the court may use any factor the court deems to be just and equitable.⁴³ In

³⁷Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, n.14 (1990).

³⁸*Id.* at 14.

³⁹*Id.*

⁴⁰Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYUL. REV. 79,137 (1991). In 1969 eight states had passed no-fault divorce provisions. By 1971, eighteen states followed. In 1979, the count was up to forty-five, and by 1987, forty-nine states had passed no-fault provisions, and the District of Columbia. *Id.*

⁴¹LYNNE CAROL HALEM, *DIVORCE REFORM* 281 (1980).

⁴²CONN. GEN. STAT. ANN. TITLE 46B, CH. 82 AND 86 (West 1997).

⁴³N.Y. DOMESTIC RELATIONS LAW Ch.236A:6 (McKinney 1986).

California, the code specifically rules out marital misconduct as a factor in determining the amount of support.⁴⁴ There has been criticism of the total removal of fault from the divorce equation. "No-fault divorce law fail to provide 'the rhetoric and the remedies for addressing good and bad marital conduct and abuses of trust in intimate relationships.'⁴⁵ The fact that "no-fault divorce does not allow the aggrieved to tell their stories and obtain vindication and compensation"⁴⁶ troubles even some proponents of no-fault divorce.

No-fault laws were designed to provide a method for facilitating the termination of marriages⁴⁷ based on the premise that if one or both of the parties decide that their marriage is no longer satisfactory, the law should not raise barriers to ending the relationship. If either spouse wishes

⁴⁴ CAL. CIV. CODE ch. 2 §.4320 (West 1997).

⁴⁵ Ira Mark Ellman & Sharon Lohr, *Marriage as a Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. REV. 719, 735 (1997).

to end their marriage, the law now allows a quick and simple end to the relationship.⁴⁶ In most states, except Mississippi, New York, and Tennessee, it is currently possible to end a marriage in less than a year if the basic residency requirements are met.⁴⁷ In Connecticut one can obtain a divorce in ninety days if the residency requirement is met. There are three ways to meet the residency requirement: (1) residency by one of the parties for at least twelve months;(2) or if one of the parties was domiciled in Connecticut when married, and returns to the state with the intent to remain;(3) or the cause of the dissolution occurred in the state.⁴⁸ Once the residency requirement is met, the waiting period is ninety days from

⁴⁶ *Id.*

⁴⁷ Elizabeth S. Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 VA. L. REV. 9, 17 (1990)

⁴⁸ *Id.* at 17.

⁴⁹ DANIEL SITARZ, *DIVORCE AND DISSOLUTION OF MARRIAGE LAWS OF THE U.S.*, 1-193 (1990). In New York couples must live apart for a specified period of time, and in Mississippi and Tennessee, mutual consent and a separation agreement is necessary. Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 723, n. 8 (1997).

⁵⁰ CONN.GEN.STAT. sec. 46B-44C (1997).

the return date.⁵¹ The simple residency requirements illustrate how easy it is to obtain a divorce in Connecticut.

In 1985, Michigan Law Review published a cogent article by Professor Carl Schneider concerning the transformation of family law.⁵² Professor Schneider's thesis aids us in understanding why our society has embraced no-fault divorce. Professor Schneider states that divorce is a key component in the transformation of family law.⁵³ He proposed that:

[F]amily law has undergone momentous change [and] that the transformation in family law can be understood as a diminution in the law's discourse in moral terms about the relations between family members and as a transfer of moral decisions from the law to the people the law once regulated.⁵⁴

He stated that four forces helped change family law and moral discourse: (1) the legal tradition of noninterference

⁵¹ CONN.GEN.STAT. sec. 46B-67A (1997). The return date is thirty days from the date on the complaint which was originally served on the defendant in the action. The return date is an arbitrary date specified by Connecticut statute to ensure uniform procedure in filing a lawsuit. CONN. PRACTICE BOOK ANN. 1, Ch. 3, sec. 49 (West 1989) CONN. GEN. STAT. ANN. sec. 52-48 (West 1991).

in family affairs, i.e., a hands-off approach by the government; (2) the ideology of liberal individualism, i.e., the individual as a libertarian; (3) Our society's changing moral beliefs, i.e., the free love of the 1960's; and(4) the rise of psychologic man which describes a host of changes in the way law and society views human relationships.⁵⁵

Professor Schneider's article explained the effects of the change to no-fault divorce:

[B]efore no-fault divorce a court discussed a petition for divorce in moral terms; after no-fault divorce, such a petition did not have to be discussed in moral terms; Before no-fault divorce, the law stated a view of moral prerequisites to divorce; after no-fault divorce, that law is best seen as stating no view on the subject. Before no-fault divorce, the law retained for itself much of the responsibility for the moral choice whether to divorce; after no-fault, most of that responsibility was transferred to the husband and wife.⁵⁶

In short, this hypothesis stated that moral discourse in family law has diminished and that responsibility for

⁵² Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

⁵³ *Id.*

⁵⁴ *Id.*

moral decisions has been removed from the law.⁵⁷ Early in American history, the standard of behavior was set by enforcing an ideal of marital fidelity and responsibility.⁵⁸ Divorce was discouraged and was justified only by serious misconduct by a spouse, and only the innocent party could seek a divorce.⁵⁹

"Modern family law rejects the old standards as meaningless, undesirable and wrong[,] it says in essence 'Do your own thing, as long as you don't hurt anybody else'".⁶⁰ Present American acceptance of a hands-off approach to divorce is clear. Divorce is not the taboo subject it was in the 1940's. People who are divorced are no longer ostracized from society. In this author's opinion, although divorce is a problem that clearly harms families, it seems

⁵⁵*Id.*

⁵⁶ Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1808 (1985).

⁵⁷ *Id.* at 1808.

⁵⁸ *Id.* at 1803.

⁵⁹ *Id.*

unlikely that United States divorce laws will return to the past and to exclusively for-cause divorce⁶¹. Professor Schneider attributes these changes to:

[T]he encounter of an upper-middle class whose mores are changing with traditional legal regulation of divorce, abortion, and contraception, and to the response of a more feminist upper-middle class to the law's failure to prevent spouse abuse, nonpayment of alimony, and inequitable allocation of marital property.⁶²

It is true that sweeping changes in family law have occurred in the latter part of the twentieth century.

*Griswold v. Connecticut*⁶³, *Eisenstadt v. Baird*,⁶⁴ *Roe v.*

*Wade*⁶⁵ and *Carey v. Population Services International*⁶⁶

illustrate the major changes our society went through to protect the individual, married, or single person(s)' right to privacy and autonomy.

⁶⁰ Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1818 (1985).

⁶¹ Katherine Shaw Spaht, *Would Louisiana's "covenant marriage" be a good idea for America?*, INSIGHT MAGAZINE 24 (Oct. 1997).

⁶² Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 Mich. L. Rev. 1803, 1820 (1985).

⁶³ *Griswold v. Conn.* 381 U.S. 479 (1965).

⁶⁴ *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

⁶⁵ *Roe v. Wade*, 410 U.S. 113 (1973).

⁶⁶ *Carey v. Population Services International*, 431 U.S. 678 (1977).

Griswold held that a Connecticut law which proscribed the use of birth control was unconstitutional.⁶⁷ The court struck down the law because the law sought to regulate the intimate relationship between a husband and wife. The key right that came from *Griswold* was the right to privacy.⁶⁸

Later in *Eisenstadt*, the Supreme Court struck down a Massachusetts' statute that allowed married couples to obtain contraceptives but prohibited singles persons from obtaining the same product. The Court held that prohibiting single people while allowing married couples, violated the Equal Protection clause of the Fourteenth Amendment. The Court refined "the right of privacy" from *Griswold*: "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally

⁶⁷ *Griswold*, 381 U.S. at 479, 480.

⁶⁸ *Id.* at 480.

affecting a person as the decision whether to bear or beget a child."

Roe v. Wade further expanded this right to privacy by allowing women to opt for an abortion to end an unwanted pregnancy.⁶⁹ Although in *Roe* the court held the right to privacy was not absolute:

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation. [Where] certain "fundamental rights" are involved, the Court has held that regulation limiting these rights may be justified only by a "compelling state interest" [and] that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake.⁷⁰

In *Carey*, the Supreme Court struck down as unconstitutional a New York statute which prohibited (1) the distribution of contraceptives to anyone under the age of sixteen; (2) which prohibited distribution to anyone over sixteen by anyone other than licensed pharmacists; and (3)

⁶⁹ *Roe*, 410 U.S. at 113.

⁷⁰ *Id.* at 114.

banned advertising and display of contraceptives.⁷¹ The Court held "[t]he right to privacy in connection with decisions affecting procreation extends to minors as well as to adults."⁷²

These new boundaries ensured that the state would not encroach on individual rights to make key decisions that affect their family relationships. The "right to privacy" cases came at a time when American society had wholeheartedly embraced the idea of no-fault divorce. No-fault divorce affirmed, in United State's family law, that married couples had the right to make important decisions about marriage without undue government interference. "This right of personal privacy includes 'the interest in independence in making certain kinds of important decisions."⁷³ "While the outer limits of this aspect of

⁷¹ Carey v. Population Services International, 431 U.S. 678 (1977).

⁷² *Id.* at 679

⁷³ Carey v. Populations Services International, 431 U.S. 678, 684, (1977)

privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage."⁷⁴

Traditionally, courts have not wanted to interfere with the family.⁷⁵ "That tradition rests in large measure on the practical difficulties of enforcing family law and the practical consequences of trying to do so."⁷⁶ American courts reluctance to interfere with the family helped facilitate the move to no-fault divorce.⁷⁷

As early as 1868, in *State v. Rhodes*, a North Carolina court held "that intervention in a domestic dispute without permanent injury or intolerable conditions was not necessary."⁷⁸ "Because each family has a domestic government

⁷⁴ *Carey v. Populations Services International*, 431 U.S. 678, 684, (1977) citing *Loving v. Virginia*, 388 U.S. 1,12 (1967).

⁷⁵ Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1835 (1985).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *State v. Rhodes*, 61 N.C. (Phil. Law.) 453 (1868)(husband had battered his wife).

. . . formed for themselves. . . the strong arm of the law [is] not necessary.”⁷⁹

Historically, the police and the courts have not wanted to get involved with family disputes.⁸⁰ “Police Departments throughout the United States adopted a “non-arrest” policy, assigned domestic violence calls a low response priority, and discouraged arrest.”⁸¹ “This insensitivity had negative effects on those women who sought help or escape, and possibly encouraged the batterers to continue their physical abuse.”⁸² Prosecutors had a similar response: “Prosecutors often avoided prosecuting domestic violence cases because

⁷⁹ *Id.*

⁸⁰ Pamela Blass Bracher, *Mandatory Arrest for Domestic Violence: The City of Cincinnati’s Simple Solution to a Complex Problem*, 65 U. CIN. L. REV. 155, 161 (Fall, 1996)

⁸¹ *Id.*

⁸² *Id.* Thurman v. City of Torrington, 595 F. Supp. 1521 (D. Conn. 1984). A Civil rights action in which the plaintiff alleged that her constitutional rights were violated by Torrington police officers because they failed to protect her from her ex-husband’s threats and assaults.*Id.* at 1521. After repeated calls to the police to protect her from her abusive ex-husband, and after securing restraining orders, Ms. Thurman was brutally stabbed by her ex-husband.*Id.* at 1524. The court held that “[c]ity officials and police officers are under an affirmative duty to preserve law and order, and to protect the personal safety of persons in the community.” *Id.* at 1527. “This duty applies equally to women whose personal safety is threatened by individuals with whom they have or have had a domestic relationship as well as other persons whose personal safety is threatened, including women not involved in domestic relationships.” *Id.* The court found a violation of the Fourteenth Amendment’s equal protection clause because the city and its police officers used an “administrative classification of assault complaints that resulted in discriminatory treatment” thus violating the Equal Protection clause.*Id.*

they felt that this was a family matter that did not belong in court.⁸³ It is only recently that state courts have been discussing the need to set-up domestic violence courts.⁸⁴ Additionally, Congress has reacted by enacting the Violence Against Women Act which "allocated 1.6 billion dollars nationally to fight gender-based violence."⁸⁵

In spite of recent attempts to address troubling family law issues, the difficulty our court system has had with dealing with domestic problems is well-illustrated by the following quote:

The law not only suspects that intervention will do harm; it doubts that intervention will do good: in family law as in few other areas of the law, the enforcement problems are ubiquitous and severe. Consider the frustrations of the law's attempts to prevent divorce; to enforce spousal support obligations; to compel alimony and child

⁸³ Bracher, *supra* note 80 at 161.

⁸⁴ Waterbury was the third judicial district in the state of Connecticut to set up a court whose session is dedicated entirely to domestic violence cases. See e.g. Lynne Tuohy, *Waterbury Court Dedicated to Domestic Abuse Cases*, THE HARTFORD COURANT, Aug. 7, 1997, at A3. Shirley Downing, *Gibbons Wants Court on Domestic Violence*, THE COMMERCIAL APPEAL, Jan. 8, 1997, at B1. Jan Hoffman, *Plan to Improve Courts Includes Separating Domestic Violence Cases*, N. Y. TIMES, Dec. 4, 1996, at B2. *Florida Ruling Voids New Domestic Court*, N.Y. TIMES, Jul. 9, 1994, at A6. *Special Court Is Aiding Home-Violence Crimes* [Philadelphia], N.Y. TIMES, Dec. 26, 1991, at B5.

⁸⁵ Pamela Blass Bracher, *Mandatory Arrest fro Domestic Violence: The City of Cinninnati's Simple Solution ot a Complex Problem*, 65 U. CIN. L. REV. 155,165 n. 92 (Fall 1996) citing Catherine F. Klein, *Full Faith and Credit: Interstate Enforcement of Protection Orders Under the Violence Against Women Act of 1994*, 29 FAMILY L. Q. 253, nn. 1-2 (1995).

support payments; to deter spouse and child abuse; to enforce fornication, cohabitation, sodomy, and adultery statutes; to regulate the use of contraceptives. . . Nor is this inefficacy surprising -- the very nature of family law suggests that it should be peculiarly and inherently difficult to enforce.⁸⁶

This difficulty provides one of the primary reasons for the change to no-fault divorce laws. By allowing a simple and quick solution to a failed marriage the court avoids some of the difficulty involved with dissolving a marriage in a fault-based system. The court avoids apportioning blame and it avoids being in the uncomfortable position of adjudicating a case where couples are colluding in order to meet the statutory requirements for a fault-divorce.

A second reason for allowing no-fault divorce is individual autonomy. Society allows individuals to make decisions that affect their lives alone. The Supreme Court has interpreted the Constitution as protecting an

⁸⁶ Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1836 (1985).

individual's right to privacy.⁸⁷ However, the 1986 Supreme Court decision in *Bowers v. Hardwick* dispelled any idea that the government will allow persons to govern their personal lives wholly free from governmental interference.⁸⁸ In *Bowers*, the Supreme Court upheld the Georgia statute that criminalized sodomy. This holding is contrary to the right to privacy created in *Griswold*. As stated in Justice Blackmun's dissent:

Only the most willful blindness could obscure the fact that sexual intimacy is 'a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality.' The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom a individual has to choose the form and nature of these intensely personal bonds.⁸⁹

⁸⁷ *Griswold*, 381 U.S. at 479.

⁸⁸ *Bowers v. Hardwick* 428 U.S. 186 (1986).

⁸⁹ *Bowers*, 478 U.S. at 188. (Blackmun, J. dissenting).

The freedom to choose "intensely personal bonds"⁹⁰ is the unwritten policy behind the United States' no-fault divorce laws. In this author's opinion this decision upsets the right to privacy holding of *Griswold*⁹¹ and its progeny, because the state is wrongly involved in an individual's personal choice, and is thus contrary to what has become our legal system's belief in an individual's right to personal autonomy.

The sexual revolution of the 1960's also helps to explain why our society has changed to a no-fault divorce system.⁹² It tested attitudes about every area of sexual morality. One cause of the sexual revolution that surely also opened the door for accepting no-fault divorce was the

⁹⁰ *Id.*

⁹¹ *Griswold*, 381 U.S. at 479.

⁹² Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1842 (1985).

waning influence of Christianity among the relatively affluent, educated elite.⁹³

In other words, because religious views are less universally and strongly held, statements of moral aspiration linked to religion have slipped more readily from legal discourse. This change is visible, for example, in the child-custody area, where evidence that the concern for the moral welfare of the child -- as instanced, for example, by evidence that the parent sends the child to Sunday school-- is increasingly thought irrelevant. Because religious views on marital obligations have changed, the move to no-fault divorce was eased, and perhaps even made more necessary.⁹⁴

The above is clearly not an exhaustive list of reasons why our society moved from fault to a no-fault nation. However, it does outline some of the basic reasons why our laws changed. Coincidentally, the advocates who wish to return to a fault-base system emphasize a return to stricter morality and the need for government intervention due to the disintegration of the family, and ultimately, society.⁹⁵

This does not differ greatly from the cries of earlier

⁹³ *Id.* at 1843.

⁹⁴ *Id.* at 1844.

⁹⁵ Louisiana House of Representatives Civil Law and Procedure Committee, 1997 Regular Session, Minutes of Meeting (May 6, 1997) at 15.

"reform" proponents who advocated eradicating divorce altogether.⁹⁶

IV. What is Covenant Marriage?

A. The Statute.

Louisiana passed the statute authorizing Covenant Marriage on July 15, 1997.⁹⁷ The purpose of the statute was to strengthen marriage in society.⁹⁸ The bill was introduced to committee by Representatives Tony Perkins and James Donelen on March 20, 1997.⁹⁹ The significance of the date is that it took the Louisiana legislature only three months and twenty-six days to pass this bill into law.¹⁰⁰ The statute consists of nine pages outlining the new requirements for any couple wishing to choose the Covenant

⁹⁶ HALEM, *supra* note 36 at 86.

⁹⁷ Covenant Marriage Act, 1997 La. Sess. Law Serv. Act 1380(H.B. 756) (West).

⁹⁸ Louisiana House of Representatives Civil Law and Procedure Committee, 1997 Regular Session, Minutes of Meeting (May 6, 1997) at 15.

⁹⁹ Legislative Document Services of Baton Rouge, La provided *Detail Listing From First to Last Step of H.B.756* dated Sep. 11, 1997.

¹⁰⁰ *Id.*

Marriage.¹⁰¹ The definition of Covenant Marriage is provided by the statute:

A covenant marriage is a marriage entered into by one male and one female who understand and agree that the marriage between them is a lifelong relationship. Parties to a covenant marriage have received counseling emphasizing the nature and purposes of marriage and the responsibilities thereto. Only when there has been a complete and total breach of the marital covenant commitment may the nonbreaching party seek a declaration that the marriage is no longer legally recognized.¹⁰²

The first thing one notes about this legislation is the reference that the covenant marriage is entered into by one male and one female, thus eliminating any same-sex marriage issues.¹⁰³

The next line simply states that a Covenant Marriage is for life.¹⁰⁴ It is clear from society's acceptance of divorce and the divorce options provided by the statute that marriage is not always necessarily for life. Premarital counseling is the first requirement imposed by the Louisiana

¹⁰¹ Covenant Marriage Act, 1997 La. Sess. Law Serv. 1380(H.B.756) (West).

¹⁰² Covenant Marriage Act, Part VII, §272 A.

¹⁰³ § 272 A.

¹⁰⁴ §272 A.

government.¹⁰⁵ The counseling is mandatory. This is similar to the *pre-cana*¹⁰⁶ requirements of the Catholic church and other religious practices where counseling is mandatory for any couple who wishes to marry in a church, under the eyes of God.¹⁰⁷

Next the statute requires that the couples sign an affidavit, which together with an attestation from the counselor who performed the premarital counseling, states that the counselor has discussed (1) the seriousness of a covenant marriage; (2) that the commitment to the marriage is for life; (3) that there is an the obligation of the couple to seek premarital counseling if problems arise in their marriage; and (4) the exclusive grounds for divorce or

¹⁰⁵ §272 A.

¹⁰⁶ The name Cana recalls . . . the marriage feast at Cana of Galilee at which Christ, at the suggestion of his mother , worked His first miracle and evidenced His concern for the happiness of married couples. Cana Conferences take varied forms, but in general they can be described collectively as a movement which has its purpose the indoctrinating of married couples with the Christian ideals of marriage. [T]he conferences discuss the meaning of marriage and the problems of family life. The attempt is made to replace the secularist attitude toward marriage and the family . . . with a more Christian outlook. ALPHONSE HENRY CLEMENS, *THE CANA MOVEMENT IN THE UNITED STATES* v (1953).

¹⁰⁷ *Id.* at 3.

legal separation.¹⁰⁸ The legislature added the pre-marital counseling requirement so a couple would carefully consider the seriousness of the marriage commitment.¹⁰⁹ The statute states that the "Department of Justice will promulgate an informational pamphlet which shall outline in sufficient detail the consequences of entering into a covenant marriage."¹¹⁰ "The informational packet shall be made available to any counselor who provides marriage counseling as provided for by this act."¹¹¹ The pamphlet consists of a one page easy-to-read explanation of the requirements of covenant marriage.¹¹² To date this is the only counseling required prior to entering into a covenant marriage.

The covenant marriage requirements are simpler in contrast to the more in-depth and substantive *pre-cana*

¹⁰⁸ Covenant Marriage Act, 1997 La. Sess. Law Serv. 1380 (H.B. 756)(West), Part VII, § 273 A2(a).

¹⁰⁹ Louisiana House of Representatives Civil Law and Procedure Committee, 1997 Regular Session, Minutes of Meeting,(May 6, 1997) at 16.

¹¹⁰ Louisiana State Senate Committee on Judiciary A Minutes (June 10, 1997) at 15.

¹¹¹ Covenant Marriage Act, §309 B. (3) §(5).

¹¹² Covenant Marriage Act 1 (La. Div. of Admin. State Printing Office ed., 1997).

requirements. Contemporary *pre-cana* counseling can consist of a weekend or a six hour day of intensive counseling¹¹³ in direct comparison to Louisiana's counseling requirement which could probably be met in well under one hour.¹¹⁴

With deference and respect to the Louisiana legislature it is doubtful that their four simple questions will aid Louisiana couples in keeping their marriages intact. It will likely help them consider the ramifications and the difficulties that will result if they try to end a covenant marriage. Perhaps, it will also encourage them to consider

¹¹³ Telephone Interview with Father Ernest Esposito Catholic Center of the Diocese of Bridgeport. Conn. (Oct. 1997).

¹¹⁴ The counseling requirement could likely be met in one hour because the requirements set forth by the statute are simple. Because the concepts are elementary they would not require a great deal of in-depth explanation. A hypothetical covenant marriage counseling session could proceed in this manner: Counselor: "Good Morning, Jane and John, Nice to meet you both" Couple response "Hello." Counselor: "Well, we are here today to discuss, ah let me see, oh yes, you wish to enter into Louisiana's covenant marriage." Couple: "Yes, that's right." Counselor " Well, its really quite simple, first off you both understand that the covenant marriage is a serious endeavor?" Couple: "Yes, we do." Counselor: "Well, that's very good. You also understand that the marriage commitment is supposed to be for life?" "Yes, we do counselor." Counselor: "Ah that's very good. Next, let's see, you also understand that if you experience any difficulty with your marriage you are obligated to seek more counseling?" Couple: "Yes, we do." "That's good, and you know you both should feel free to come back and see me at any time." Couple: "Oh, of course." Counselor: "Not that this would happen to such a nice couple like the both of you, but I must, according to Louisiana law, go over the exclusive grounds for divorce. Basically, this means you cannot dissolve your marriage unless you meet these criteria, do you understand?" Couple: "Yes." "The grounds are adultery, commission of a felony, abandonment for one year, physical or sexual abuse of spouse or child, living apart continuously for two years, habitual intemperance, meaning for example drug or alcohol abuse. Do you understand these grounds?" Couple: "Yes, we do." Counselor: "Great! Well all

marriage more seriously because of the contract-like agreement they will attest to and sign. However, it is unlikely that this counseling will help couples resolve the many difficult issues that can arise during a marriage because the counseling is so superficial.

Other religious sects offer premarital counseling to couples. John L. C. Mitman, an Episcopalian minister from Michigan State University, writes "the purpose of [the pre-marriage] individual interview is to begin to paint a portrait of the proposed marriage primarily for the couple . . . [t]he aim is to examine the various facets of the relationship in as unprejudicial way as possible and to begin to project the potential this relationship has in the immediate, intermediate and long-range future."¹¹⁵ Fourteen facets of marriage are reviewed from communication, to

we have do now is sign this affidavit and you to are on your way." Couple: Thank you so much."
Counselor: "That will be \$75 please, and good luck!"

¹¹⁵ JOHN L. C. MITMAN, *PREMARITAL COUNSELING*, 40 (Seating Press, 1980).

family planning, decision-making conflict, psychological roles, sexuality, economics, spiritual dimension, interfaith/intercultural marriages, where couples can seek help and the final end, the divorce."¹¹⁶ Catholic premarital counseling and Episcopalian pre-marital counseling are similar.¹¹⁷ The main difference is that strict followers of the Catholic faith believe that a couple cannot obtain a divorce and remain Catholic.¹¹⁸ Conversely, Episcopalians understand the need for divorce and do not penalize their parishioners because of divorce. "Today, the church is in a great muddle over the issue of divorce and remarriage."¹¹⁹ "While few churches would fail to accept a person who has been divorced, the American churches run the gamut from those which are strict and legalistic on both issues to

¹¹⁶ See generally, JOHN L. C. MITMAN, *PREMARITAL COUNSELING*, 40-70 (Seating Press, 1980).

¹¹⁷ *Id.*

¹¹⁸ Philip Pullella, *Pope, In Brazilian Homily, Speaks Out Strongly Against Divorce*, THE BUFFALO NEWS, Oct. 5, 1997, at 13A. Diana Jean Schemo, *Pope, In Rio, Uses Showmanship to Champion the Family*, N.Y. TIMES, Oct. 6, 1997, at p. 3, sec. A, col. 1.

¹¹⁹ JOHN L. C. MITMAN, *PREMARITAL COUNSELING*, 66-67 (Seating Press, 1980).

those which, out of pastoral concern for the individual involved, take a more liberal and permissive position."¹²⁰

In short, Episcopalians will allow a divorce if specific criteria are met. Typically, the pastor decides three things: (1) if the marriage is dead, with no hope of redemption, (2) that the counselor did all it could to help resolve the couple's problems and (3) the new marriage is entered into with mature understanding of what a Christian marriage entails.¹²¹ The pastor's recommendations are made to the diocesan bishop who usually concurs with the local pastor.¹²²

An argument could be made that since the Covenant Marriage Act is a state law, the legislature should not be involved in adding religious requirements, to a civil

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

statute because of the separation of church and state.¹²³

Although, counseling is not per se religious the likelihood of non-religious counseling seems slight in a state like Louisiana where 75-80% of the population marry in churches.¹²⁴ Moreover, more bite might have been given to the statute if more extensive counseling was required. It is unclear whether this part of the statute will truly aid couples in upholding the contract of the Covenant Marriage. It is also unclear whether additional counseling will truly aid in stopping divorces, as mandatory counseling was a requirement in earlier divorce legislation and the rate of divorces did not decrease because of the requirement.¹²⁵

Finally, marital counselors have problems with the statute's lack of specificity. John Shalett, President of the Louisiana Association for Marriage and Family Therapy,

¹²³ U.S. CONST. AMEND. I.

¹²⁴ Telephone Interview with Katherine Spaht, Professor of Family Law, Louisiana State University of Law Center, Baton Rouge, LA. (Sept. 1997).

is concerned because the type of counseling is not clearly defined in the law.¹²⁶ He believes that "the bill offers no definition of who marriage counselors are (other than clergy) and what their qualifications should be."¹²⁷ "Further the bill offers no definition of counseling that includes methods and duration of pre-marital or marital counseling."¹²⁸

Section B of the statute outlines the license requirements for the Covenant Marriage and requires that couples who seek a Covenant Marriage declare their intent to contract for a Covenant marriage:

A declaration of intent to contract a covenant marriage shall contain all of the following:

(1) A recitation by the parties to the following effect:

"A Covenant Marriage

We do solemnly declare that marriage is a covenant between man and woman who agree to live

¹²⁵ LYNNE CAROL HALEM, DIVORCE REFORM 260, (1980).

¹²⁶ *License Marriage Counselors*, THE NEW ORLEANS TIMES -PICAYUNE, 8-16-97 at B6.

¹²⁷ *Id.*

¹²⁸ *Id.*

together as husband and wife for so long as they both may live. *We have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into this marriage.* We have received premarital counseling on the nature, purposes, and responsibilities of marriage. We have read the Covenant Marriage Act, and we understand that a Covenant Marriage is for life. If we experience marital difficulties, we commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling. With full knowledge of what this commitment means, we do hereby declare that our marriage will be bound by Louisiana law on Covenant Marriages and we promise to love, honor, and care for one another as husband and wife for the rest of our lives."¹²⁹

The vows reinforce the Legislature's intent that couples take the contract of marriage seriously.¹³⁰ The required recitation, "We have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into this marriage," is key language. That couples attest that they have been forthright in disclosing information which could harm their marriage in the future is significant.

¹²⁹ Covenant Marriage Act, § 273A. Italics added for emphasis.

¹³⁰ Louisiana House of Representatives Civil Law and Procedure Committee, 1997 Regular Session, Minutes of Meeting (May 6, 1997) at 15.

However, the statutory vows and attestation may seem ineffectual in upholding a marriage when compared to the following excerpts from a cohabitation contract, where the parties have chosen only to live together yet wish to bind each other by written agreement:

WHEREAS: Consort I and Consort II love each other; and

WHEREAS: the parties desire to share joint rents and to share the same dwelling;and

WHEREAS: the parties are having sexual relations and have decided to live openly together.

NOW THEREFORE, in consideration of the following covenants, it is agreed as follows:

1. The parties agree to be emotionally committed to each other and to love, honor, and respect each other until the first to occur of the following:
 - A. until death they do part.
 - B. until this agreement is substituted by lawful marriage between the parties.
 - C. until either party decides to move out of the joint residence. . .
4. The parties each agree to use their own names and in all respects to identify themselves as single people.
5. Neither party shall use the credit of the other.
6. Neither party shall claim alimony or rights to community property against the other. . .
11. The following items will be payable promptly using the "equal obligation system":
 - A. Entertainment of both consorts together (such as theater tickets, dinner out, etc.
 - B. Gifts from mutual friends.

C. Vacations taken jointly

12. The parties shall maintain a cookie jar for the purpose of depositing all receipts, bills cash register tapes, and evidence of payment of joint funds. The parties shall go through this jar monthly for the purposes of divvying up expenses and making appropriate compensation.¹³¹

While the contract above is not a perfect sample of what couples who enter marriage should think about, it illustrates some of the issues that are important to any relationship. Compared to this contract, it again seems the Louisiana Legislature has missed the opportunity to add force to what could have been a effective and explicit agreement. If the Legislature intended to provide couples with a new and improved marriage contract then the statute could have provided a template that truly reflects marriage, and provides guidelines for basic issues that commonly cause problems in a marriage. It seems that a legislature wishing to rescue society's fragmenting belief in lifetime marriage could have taken a more affirmative stance by providing a

more useful form of contract to assist couples in achieving this goal.

However, the simplicity of the agreement created by the Louisiana Legislature does have merit. The couple should not be bound by too many restrictive clauses created by the state. A legislature would have difficulty creating an agreement that would be appropriate for all married couples.

Couples who marry outside Louisiana, but(have) moved to the state, and Louisiana couples who married before this legislation was passed may also opt into a covenant marriage.¹³² Previously married couples need to provide a marriage certificate and complete the simple process by declaring their intent to abide by the covenant marriage.¹³³ They also need to file required forms with a Louisiana

¹³¹ HAMILTON McCUBBIN ET AL., MARRIAGE AND FAMILY 18 (Wiley & Sons, Inc. (1985))

¹³² Covenant Marriage Act, § 275B.

¹³³ Covenant Marriage Act, § 275B.

parish officer.¹³⁴ The affidavit, counseling attestation¹³⁵ and notarization of forms are required here as well.¹³⁶

The next and very controversial part of the statute sets forth the exclusive grounds for divorce, and "separation from bed and board." Separation from bed and board is an arrangement whereby married couples live apart from each other while remaining married.¹³⁷ This is also known as legal separation.¹³⁸ Legal separation does not "dissolve the bond of matrimony since the separated husband and wife are not at liberty to marry again; but it puts an end to their conjugal cohabitation, and to the common concerns, which existed between them."¹³⁹ "Spouses who are

¹³⁴ § 275B.

¹³⁵ Sect. 275(b)(i) An affidavit by the parties that they have discussed their intent to designate their marriage as a covenant marriage with a priest . . . or marriage counselor, which included a discussion of the obligation to seek marital counseling in times of marital difficulties and the exclusive grounds for legally terminating a covenant marriage by divorce or by divorce after a judgment of separation from bed and board. *Id.*

¹³⁶ § 275C(a).

¹³⁷ § 309A(1)

¹³⁸ CONN. BAR ASSOC., *Dissolution of Marriage*, Pamphlet No. 95-527, (12-95).

¹³⁹ Covenant Marriage Act, § 309A(1).

judicially separated . . . shall retain that status until either reconciliation or divorce.¹⁴⁰

Prior to obtaining a divorce couples who have a covenant marriage must receive counseling.¹⁴¹ The exclusive grounds for divorce set forth by the statute are:(1) "The other spouse has committed adultery"¹⁴²; (2) "The other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor"¹⁴³; (3) "The other spouse has abandoned the matrimonial domicile for a period of one year and constantly refuses to return"¹⁴⁴; (4) "The other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses"¹⁴⁵; and (5) "the spouses have been living separate and apart continuously without reconciliation for a period of two years."¹⁴⁶

¹⁴⁰ § 309A(2).

¹⁴¹ § 307A.

¹⁴² § 307A(1).

¹⁴³ Covenant Marriage Act, § 307A(2).

¹⁴⁴ § 307A(3).

¹⁴⁵ Covenant Marriage Act, § 307A(4).

¹⁴⁶ §307A(5).

The sixth and final ground is separation from bed and board "on 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 such a nature as to render their living together insupportable."¹⁴⁷

There are specific criteria that must be met for each ground. First, the ground of adultery must be filed by the innocent spouse.¹⁴⁸ Therefore, a spouse wishing to escape the marriage cannot commit adultery and then file for divorce, instead the innocent spouse must initiate the proceedings.¹⁴⁹ The second and third ground are self-explanatory.

¹⁴⁷ Covenant Marriage Act, § 307B(5).

¹⁴⁸ §307B.

¹⁴⁹ *Id.*

The fourth ground requires physical or sexual abuse of spouse or child of one of the spouses.¹⁵⁰ Here the abuse must be proved to the court, where under Louisiana's no-fault system, no proof was necessary.¹⁵¹ Before, in order to obtain a divorce, the parties simply filed for a separation from bed and board, and after six months of living apart, without reconciliation, the couple was granted a divorce.¹⁵² In the Covenant Marriage, the risk for the abused spouse is that he or she will not have the funds to prove the abuse occurred,¹⁵³ or he or she will not have any witnesses to the abuse.¹⁵⁴ Unfortunately, this is a common problem in domestic violence cases.¹⁵⁵

The fifth ground is the spouses have lived separate and apart.¹⁵⁶ Here, either spouse may obtain a divorce by

¹⁵⁰ CMA *supra* note 145.

¹⁵¹ LA. CIVIL CODE art. 102.

¹⁵² LA. CIV. CODE ANN. art. 138,139 (WEST 1996).

¹⁵³ Louisiana State Senate, Senate Committee on Judiciary A Minutes, June 10, 1997, at 15.

¹⁵⁴ House Committee, *infra*, at 55 n. 174

¹⁵⁵ *Id.*

¹⁵⁶ CMA,*supra* at 45, n. 138.

showing proof that the couple has not lived together for two years. As stated above, if children are involved the clause extends the waiting period to three years and six months.¹⁵⁷

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.¹⁵⁸

If the couple with children had already initiated the process via a separation from bed and board, the waiting period is reduced to one year because the couple has already been separated for two years.¹⁵⁹ If the couple does not wish to divorce, the couple may legally separate.¹⁶⁰ In that

¹⁵⁷ Covenant Marriage Act, § 307A(6)(b).

¹⁵⁸ § 307A(6)(b).

¹⁵⁹ § 307A(6)(b).

¹⁶⁰ § 309A(1).

case, one spouse will seek a separation from bed and board for the same reasons as one seeks a divorce.¹⁶¹

The sixth ground is separation "on the account of habitual intemperance."¹⁶² Proof of the habitual intemperance would have to be shown in a court of law, and the waiting period would become retroactive to the date the judgment of separation from bed and board was obtained.¹⁶³ For example if Jane and John were married on January 1, and Jane filed for a judgment of separation from bed and board for habitual intemperance and it was granted on July 1, she could obtain her divorce on the following July 1, if she and John had been living separately and continuously apart for one year.¹⁶⁴

B. Why Louisiana passed the law.

¹⁶¹ Covenant Marriage Act, §307B.

¹⁶² §307B(5).

¹⁶³ § 309B(1).

¹⁶⁴ § 309B(1).

The Louisiana Legislature passed the Covenant Marriage Act to try save what the law's proponents saw as a crumbling society.¹⁶⁵ The Legislature believed that crime, teenage pregnancy and most of the ills of society are caused by divorce.¹⁶⁶ "The movers behind the new law were representative Tony Perkins, a 34-year-old Baton Rouge Republican and graduate of Liberty University, which was founded by Baptist evangelical Jerry Falwell; and Professor Katherine Spaht, who teaches family law at the Louisiana State University Law Center."¹⁶⁷ Twenty-seven other representatives of the Louisiana Legislature also co-authored the bill.¹⁶⁸ Rep. Perkins, in his introduction of the bill to the committee, stated that "the problem with 'today's legislation' is that it deals with the symptoms of

¹⁶⁵ Louisiana's State Senate Committee on Judiciary A, Minutes, (June 10, 1997) at 12.

¹⁶⁶ Audio tape of Louisiana House of Representatives Committee Hearing on H.B. 756, Covenant Marriage Act. (May 6, 1997)(on file with Legislative Document Services, P.O. Box 44305, Baton Rouge, La.).

¹⁶⁷ Terry Carter, *A Stealth Anti-Divorce Weapon*, 83 ABA JOURNAL 28 (1997).

¹⁶⁸ Audio tape of Louisiana House of Representatives Committee Hearing on H.B. 756, Covenant Marriage Act. (May 6, 1997)(on file with Legislative Document Services, P.O. Box 44305, Baton Rouge, La.).

society not the true cause of the problems."¹⁶⁹ As an example, Rep.Perkins explained that the Legislature passes new laws meant to hinder crime by increasing the penalty for crimes. It is the Louisiana Legislature's belief that it can help society more by dealing with what it believes to be the cause of society's problems, the disintegration of the family.¹⁷⁰ Rep. Perkins believes that "the family is the cornerstone of the nation" and since the change to no-fault divorce in 1970's the American culture has changed.¹⁷¹ "Statistically, divorce rates have risen since the 1940's because of the addition of the no-fault laws. . .in the 1940's less than 20% of the marriages ended in divorce, in the 1960's divorce tripled, and today nearly 60% of marriages end in divorce."¹⁷²

¹⁶⁹ Louisiana's State Senate Committee on Judiciary A, Minutes, (June 10, 1997) at 12

¹⁷⁰ Audio tape of Louisiana House of Representatives Committee Hearing on H.B. 756, Covenant Marriage Act. (May 6, 1997)(on file with Legislative Document Services, P.O. Box 44305, Baton Rouge, La.).

¹⁷¹ Louisiana House of Representatives Civil Law and Procedure Committee, 1997 Regular Session, Minutes of Meeting (May 6, 1997) at 15.

¹⁷² *Id.*

According to Perkins, the negative consequence of divorce is its effect on children. "Ten million live in single parent homes. . .one million children each year feel the effects of divorce. . .half a million children will experience a second divorce before they leave high school."¹⁷³ Perkins referred to an article for *American Enterprise* by Carl Zenmeister stating "there is a mountain of scientific evidence that proves the cause of the drug crisis, the education crisis, teenage pregnancy, and the crime rate, basically, all the ills of society can be traced to broken families."¹⁷⁴

The Louisiana legislature's reason for passing the bill was to strengthen marriage in society.¹⁷⁵ "People are beginning to realize that broken families are the source of

¹⁷³ *Id.*

¹⁷⁴ Audio tape of Louisiana House of Representatives Committee Hearing on H.B. 756, Covenant Marriage Act. (May 6, 1997)(on file with Legislative Document Services, P.O. Box 44305, Baton Rouge, La.).

¹⁷⁵ Louisiana House of Representatives Civil Law and Procedure Committee, 1997 Regular Session, Minutes of Meeting (May 6, 1997) at 15.

many, many problems that our children are facing."¹⁷⁶ The Christian right and pro-conservative groups are not alone in believing that the destruction of families are the cause of many of society's problems.¹⁷⁷ "This myth that marriage and divorce is purely a private matter is blithering nonsense" said James Sheridan, the Michigan judge who spearheaded the effort in that state to require pre-marital counseling.¹⁷⁸ "All we ask is that you get to know the person you're marrying before you marry them. . . [w]ho pays when these children drop out of high school and go on welfare? The taxpayer pays."¹⁷⁹ Others contend that new research which suggests that children are profoundly harmed by divorce is "[t]he real catalyst behind the anti-divorce campaign."¹⁸⁰

¹⁷⁶John Jeter, *Law would make divorce more difficult*, CONN. POST, Aug. 24, 1997, at C3.

¹⁷⁷Barbara DaFoe Whitehead published an essay in the *Atlantic Monthly* titled "*Dan Quayle was Right*", citing studies that tracked the development of children raised by single parents, she identified broken families as Public Enemy No. 1, responsible for a generation of sad and angry, underachieving youngsters. In a flash, Whitehead's point of view won converts no less influential - and liberal - than Donna Shalala and Hillary Clinton, who in her book *It Takes a Village* wrote of feeling "ambivalent about no-fault divorce when children are involved." Walter Kirn, *The Ties that Bind*, TIME 48 (Aug. 18, 1997).

¹⁷⁸John Jeter, *Law would make divorce more difficult*, CONN. POST, Aug. 24, 1997 at C1.

¹⁷⁹*Id.* at C3.

¹⁸⁰*Id.*

The research claims that divorce brings with it such emotional trauma that it stays with children throughout their adult years.¹⁸¹ And further, that children raised by single parents are more likely to drop out of high school, bear out-of-wedlock children and use drugs than children from two parent households.¹⁸²

Twenty-three proponents were there the day the House committee approved the legislation.¹⁸³ Only two opponents to the bill were on record.¹⁸⁴ One was Attorney Martha Kegel from the ACLU, who did not appear at the House hearings.¹⁸⁵ The other opponent, a Professor Majit Kang, another member of the ACLU, read Attorney Kegel's speech and provided an argument that the bill was unconstitutional.¹⁸⁶

¹⁸¹ *Id.*

¹⁸² John Jeter, *Law would make divorce more difficult*, CONN. POST, Aug. 24, 1997 at C3.

¹⁸³ Louisiana House of Representatives Civil Law and Procedure Committee, 1997 Regular Session, Minutes of Meeting (May 6, 1997) at 17-18.

¹⁸⁴ *Id.* at 16, 18.

¹⁸⁵ Audio tape of Louisiana House of Representatives Committee Hearing on H.B. 756, Covenant Marriage Act. (May 6, 1997)(on file with Legislative Document Services, P.O. Box 44305, Baton Rouge, La.).

¹⁸⁶ Louisiana House of Representatives Civil Law and Procedure Committee, 1997 Regular Session, Minutes of Meeting (May 6, 1997) at 16.

The ACLU's argument was that the bill violated the Constitution, specifically, separation of church and state,¹⁸⁷ because the law imposes biblical restrictions(adultery and abandonment) in order to permit a divorce. It is questionable whether this is a violation of the Constitution because other states have included these grounds in their divorce statutes.¹⁸⁸ Moreover, because the Covenant Marriage Act presents an option for the people of the state of Louisiana, it is not imposed by the government at all.

Professor King said the bill violates public policy because it violates a spouse's right to sue for a protective order and because an abused spouse may not be able to get a divorce.¹⁸⁹ Further, Professor King stated that the wife may not be able to prove the grounds necessary for a divorce,

¹⁸⁷ U.S. CONST. I.

¹⁸⁸ ILL. COMP. STAT. ANN. ch. 750, sec. 401 (West 1997);IDAHO CODE Title 32, Ch. 61 sec. 32-603(1997);N.J STAT. ANN. Title 2a, Ch. 34-2 (1997).

because typically abuse happens in private without witnesses, and therefore would be difficult to prove.¹⁹⁰ Finally, Professor King stated that the First Amendment prohibits government involvement in religion and forbids a government forcing its religious beliefs on those who do not agree with those views.¹⁹¹ Representative Perkins' response to the ACLU's criticisms of the bill was that the covenant marriage is an option that the people of Louisiana do not have to choose if they do not so desire.¹⁹² Also, the proponents of the bill said that a spouse still has the right to secure a temporary restraining order in the case of abuse under Chapter 8 of Title 1569 of the Louisiana civil

¹⁸⁹ Louisiana House of Representatives Civil Law and Procedure Committee, 1997 Regular Session, Minutes of Meeting (May 6, 1997) at 16.

¹⁹⁰ Audio tape of Louisiana House of Representatives Committee Hearing on H.B. 756, Covenant Marriage Act. (May 6, 1997)(on file with Legislative Document Services, P.O. Box 44305, Baton Rouge, La.).

¹⁹¹ *Id.*

¹⁹² *Id.*

code.¹⁹³ The bill passed through the House committee with a 9 to 1 vote in favor of the bill.

The Louisiana State Senate heard similar arguments for the bill by Representative Perkins.¹⁹⁴ The Senate voiced concerns about the issue of domestic abuse and restraining orders.¹⁹⁵ This concern was quickly resolved as the right to temporary restraining orders remains unchanged.¹⁹⁶ Martha Kegel for the ACLU attended the Senate hearing on the bill.¹⁹⁷ She shared three concerns: (1) that the bill makes battered spouses second class citizens (2) that the bill lacked an adequate informed consent provision and (3) that marriage counselors are not trained in the law and therefore, they might give out the wrong information.

Despite Attorney Kegel's concerns, and after some minor amendments: the promulgation of a pamphlet explaining the

¹⁹³La. Civ. Code Ann. art. 1569 Title XV Ch. 8 (West 1997).

¹⁹⁴La. State Senate Comm. Minutes *supra* note

¹⁹⁵Louisiana State Senate, Senate Committee on Judiciary A Minutes, June 10, 1997, at 13.

covenant marriage; and the addition of mental cruelty to the bill, the bill was approved by the Senate Judiciary Committee, 28 yeas and 9 nays.¹⁹⁸

Part V. Marriage as a Contract

This Note will now turn to marriage as a contract, how society has treated the marriage contract in society, and why treatment of marriage as a true contract has not taken hold.

A covenant is a formal agreement or promise usually under seal.¹⁹⁹ Whether marriage is a contract²⁰⁰ or should be treated as more than a contract is an issue that has been debated by scholars for centuries. Resulting from that question, the following questions are implied: If marriage

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Legislative Document Services of Baton Rouge, LA provided *Detail Listing From First to Last Step of H.B. 756* dated Sep. 11, 1997.

¹⁹⁹ E. ALLAN FARNSWORTH, *CONTRACTS*, 2D. ED., 14, (Little, Brown & Co. 1990).

²⁰⁰ A contract is a promise or set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty. E. ALLAN FARNSWORTH, *CONTRACTS*, 2D. ED., 3, (Little, Brown & Co. 1990) citing Restatement Second §1.

is a contract why are parties who marry not bound by contract law? Why is there a special set of laws to dissolve a marriage contract? Why is a divorce not limited to the doctrines that excuse contracts i.e. impossibility, frustration, reformation and rescission? And, finally, are covenant marriages more like a contract because the covenant marriage limits the parties' ability to dissolve it?

First, is a marriage a contract? It certainly fits Farnsworth's definition as a promise which if breached there is a remedy and the performance of which there is a duty.²⁰¹ One could say marriage contains a promise to love and honor, that each spouse has a duty to the relationship, and that the remedy for breach is a divorce.²⁰² However, "[t]he Supreme Court felt that marriage was more than a mere contract but rather was a "status".²⁰³ *Maynard v. Hill*

²⁰¹ FARNSWORTH, *supra* at 58, n. 181.

²⁰² *Id.*

²⁰³ MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 10 (N.Y. Univ. Press. 1993)

expressed what had been the view for years, that a marriage is not simply a contract in the eyes of the common law:²⁰⁴

"Whilst marriage is often termed by text writers as a civil contract --generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization--it is something more than a mere contract . The consent of the parties is of course essential to its existence; but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.²⁰⁵

The Supreme Court eloquently described why the premise of marriage as a contract is not feasible. Although mutual consent is needed in a marriage, as in contract, society has not viewed marriage as a contract.²⁰⁶ "We know that the state of mind which the law of contracts generally requires focuses on arms-length bargaining and an economic exchange

²⁰⁴ *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888).

²⁰⁵ *Maynard*, 125 U.S. at 210-11.

²⁰⁶ RESTATEMENT (SECOND) OF CONTRACTS SEC. 190 (1) (1979)

relationship”²⁰⁷ but, it is difficult to imagine a marriage agreement as an arms length transaction. Because society has viewed marriage as a status,²⁰⁸ and because of the difficulty in applying contract law to a marriage, it seems unlikely that a marriage will ever be considered a true contract.

The United States law values the ability of parties to contract as one of our basic liberties, however, it does not wish to reduce the sanctity of marriage to what is bargained for and accepted by parties.²⁰⁹ Marriage does fit contract law by analogy, but, contract law seems too detached, too utilitarian for even modern day society. Consider that if Americans wished marriage to be a legal contractual relationship then at some point in the United States’ two hundred and twenty year history, its legislators would have passed laws making marriage the equivalent of a modern day

²⁰⁷ Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 779, (1994).

²⁰⁸ *Maynard*, 125 U.S at 210-211.

commercial contract. Total legislation of marriage by the government would limit a couple's ability to define for themselves, what is a personal and intimate relationship. Society would rebel against a Congress which enacted laws that regulated the day to day existence of a marriage, or laws that presumed to create a contractual structure for marriage. Legal requirements restricting or dictating the number of children a married couple would bear, whether one spouse would work outside the family home, and the type of daycare provider, in house or out, would be an outrageous invasion into the privacy of the married couple.

Rudimentary rules governing the initial entry into the marriage contract that might specify the length of time spent courting(to ensure a true to meeting of the minds), or a government which enforced implied contracts when unmarried

²⁰⁹ RESTATEMENT (SECOND) OF CONTRACTS SEC. 190 (1979 Main vol.).

couples became pregnant, illustrate the ludicrous scenarios that would result.

The *Restatement(Second) of Contracts* expressly states that "the marital relationship has not been regarded by the common law as contractual in the usual sense."²¹⁰ However, one could consider a marriage as a type of contractual arrangement because couples do set and alter its terms. For example: Couples choose who they will marry and when; they concur on the day to day activities, who will pay the bills, who will work outside the home, and whether to buy a house or rent. They may also agree to modify the arrangement by separating for a time or expanding the family to include children.

Even though the marital relationship is analogous to a contract, historically, "[m]any terms of the relationship are seen as largely fixed by the state and beyond the powers

of the parties to modify.”²¹¹ The United States laws against bigamy and adultery can be seen as terms of the marital relationship that are fixed by the state. Such rules could be seen as society imposed rules governing marriage.

These marital terms that are fixed by society are analogous to the terms set by the Uniform Commercial Code (hereinafter U.C.C.) governing contracts.²¹² The U.C.C. has certain code sections that govern commercial contracts.²¹³ For example section 1-203 of the U.C.C. requires that all contracts governed by the U.C.C. be performed in good faith.²¹⁴ Society’s unacceptance of bigamy and adultery within a marriage are similar to the U.C.C.’s requirement of good faith. Because contract law and the U.C.C.’s terms are

²¹⁰ RESTATEMENT (SECOND) OF CONTRACTS SEC. 190 (1979 Main vol.).

²¹¹ *Id.*

²¹² Uniform Commercial Code §1-102 (1991).

²¹³ *Id.*

²¹⁴ U.C.C. §1203, Good faith is defined in §1201(19). It reads “Good faith” means honesty in fact in the conduct or transaction concerned. *Id.*

consistently analogous to marriages, interesting questions arise when one applies contract law to marriages.

For example if a couple decide to conduct an open marriage, where the couple agree to have sexual relations with other parties, should a court uphold that part of the agreement? If these outside relationships are part of the marital agreement there is nothing that could prevent the couple from conducting their marriage this way in the privacy of their own home. However, if the couple contracts with each other to have an open marriage, and then one of the spouses becomes dissatisfied with the arrangement, the question becomes, should a court uphold the private contract disallowing a spouse a divorce because of the open marriage provision contracted for by the parties prior to the marriage contract? Or, should the court, if in a fault-based state, like Connecticut, have its divorce laws supersede the

marital contract and dissolve the marriage because of the adulterous behavior?

One solution would be to set minimum standards for marital contracts similar to the Uniform Commercial Code's standard requirement of good faith, diligence and reasonableness and care which could not be disclaimed by agreement.²¹⁵ Good faith could be analogized to marrying for love and companionship, not for money and a meal ticket. Working at the marriage could be substituted for diligence, and reasonableness could remain, with the code providing examples of what is reasonable for a guide. The first example might be that open marriages are not reasonable because when one agrees to love, honor and obey, it means each other, and not the neighborhood. Therefore, whether the state's divorce laws included adultery as a cause, or whether the state looked at marriage as a contract, the

court would not uphold the adulterous marriage because it followed the U.C.C. and it would be unreasonable to expect a marriage based on adultery to continue.

The problem with enforcing a marriage as a contract is the difficulty legislators would have in creating rules to govern such an intimate relationship. What may be acceptable in California is not necessarily the standard that Louisiana would wish to adhere to in creating laws for marriage contracts. This dichotomy of standards present the problem with the covenant marriage. Should a court grant a divorce to a covenant marriage couple who has not met the requirements of the act? Although it may not violate the state's policy to grant the divorce, it certainly encourages a couple to break solemn vows in contravention of the agreement they made in Louisiana.²¹⁶ One could argue that the court granting the divorce undermines Louisiana's laws

²¹⁵ Uniform Commercial Code §1-102(3) cmt. 2.

and the meaning of the marital promise intended by the Louisiana Legislature.²¹⁷ Conversely, one could argue that this scenario is not any different from the couples who sought out Nevada's more lenient divorce laws before no-fault divorce laws became the norm.²¹⁸ Then, couples underwent a ceremony and made solemn vows to each other, and with the Nevada divorce decree the solemn vows were broken.

One could also argue that disregarding Louisiana's legislation, its purpose, and the couples original intent violates public policy because it encourages couples to make solemn promises that are easily avoided and that are not upheld when placed in a court of law.

Three more reasons provide further support for the idea that marriage cannot be viewed as a contract: "One is that there is public interest in the relationship, and

²¹⁶ CMA, *supra* at 1, n. 1

²¹⁷ *Id.*

²¹⁸ SITARZ, *supra*, at 9 n. 29.

particularly in such matters as support and child custody, that makes it inappropriate to subject it [the marriage] to modification by the parties."²¹⁹ Secondly, although contract-like, marriage is more like a status,²²⁰ and third, that the court does not have adequate contract laws, nor is it the appropriate forum to settle what could be very personal disputes.

First, the United State's institution of marriage should not be subject to modification like a business transaction. The Louisiana Legislature felt it should limit the parties ability to modify the marriage contract by offering its couples the choice of a for-cause divorce, essentially providing a non-modifiable contract for its couples. The covenant marriage provides a vehicle for the couples to consider the arrangement. In counseling the couples will consider the terms: the causes available for a

²¹⁹ *Id.*

divorce; the seriousness of their agreement; and that the commitment is for life. Because of the public's interest, i.e. that broken marriages are causing serious problems in society, one could say the legislature is trying to legislate non-modification. There are other arguments for non-modification of marriage contracts. A society needs a degree of certainty to function. If marriage, which has since its inception required certain obligations between the parties, is allowed to be changed and modified by the parties, the marital institution would become chaotic. Today, a couple understands when he or she marries that he or she pledges him or herself to the other party for life. If modifications were allowed the institution would become unsettled. Couples would not know what to expect because of the variety of modifications that could exist. So, although contract-like, marriage is more like an institution that is

²²⁰ *Maynard*, 125 U.S. at 210-11.

governed by basic beliefs imposed by society, and to have otherwise would create chaos and confusion.

Secondly, "[w]hile marriage is a contract, the contract is executed with the marriage, and after that marriage is a status in which the judgment of the community, through law, then controls the situation.²²¹ An analogy to the above is the employer and employee relationship. Traditionally, the relationship has been an at-will relationship where an employee can be dismissed at the employer's will.²²² But, as society has developed, so has a public policy exception.²²³ The public policy exception is "if the former employee can prove a demonstrably important violation of public policy"²²⁴ then the employer's right to dismiss at-will will be put aside. The convention that most employers follow is to dismiss an employee only for cause. This convention

²²¹ Carol Wesisbrod, *The Way We Live Now*: 777, 780.

²²² *Sheets*, 179 Conn. 471, 477.

²²³ *Sheets v. Teddy's Frosted Foods, Inc.* 179 Conn. 471, 427 A.2d 385 (1980).

developed because society values the employer/employee relationship. Society recognizes that it will be more productive if an employee is assured that he will only be dismissed for good reason, and not at the will or whim of his employer. Similarly, in a marriage, one convention is that marriage is for life, and a husband and wife will care for each other in sickness and in health. So, if a spouse has terminal breast cancer and a husband wishes to divorce, society will impose payment of alimony to counteract what it believes to be an inappropriate end to an emotional and financial relationship. This alimony is analogous to the unemployment compensation an employee will receive if the employee is fired by the employer without good cause.²²⁵ In sum, a marriage is a status that is controlled by society's judgment on what is right and wrong, much like the society's control over the employer/employee relationship.

²²⁴ *Id.* at 477.

Another problem with treating marriage as a contract is the poor fit a typical contract remedy would have to the dissolution of a marriage. As an example, specific performance would be detrimental, because it would force incompatible couples to stay together. One could argue this is what the Covenant Marriage Act does by limiting the grounds for divorce thus forcing couples to stay together.

How to award money damages in a marriage governed by contract law could also cause problems. Conventionally, breach of contract results in money damages.²²⁶ Alimony and child support could be viewed as a type of money damages. Currently, state guidelines stipulate the amount of child support based on the earning potential of the spouse who is expected to pay.²²⁷ Courts do have the discretion to award

²²⁵ Conn. Agencies Reg. §31-237g-34(c) (1997)

²²⁶ Utah Law Review 777, 812.

²²⁷ Conn. Bar Assoc., Dissolution of Marriage, Pamphlet No. 95-527 (12-95).

amounts higher than these guidelines.²²⁸ If a marriage was governed by absolute rules like the contract/cover rule²²⁹ the court's discretionary power in this important area might disappear.

A third reason that supports not having contract law govern a marriage is that the court is not an appropriate forum and it does not have a standard form it could follow.²³⁰ Again, one could suggest the Uniform Commercial Code utilizing the standards of good faith, etc. However, this would create a need for matrimonial attorneys who were experts in marital contract interpretation. Courts would be supplying missing terms in a variety of bizarre circumstances, as it is impossible to consider every contingency when creating a standard contract. This problem would worsen if it was a marital contract because of the

²²⁸ *Id.*

²²⁹ U.C.C. §2-711

²³⁰ *Id.*

minutia involved. 'It is only when one uses the method of silence in such odd and outlandish relations . . . that the whole scheme breaks down because the law has no guide for filling in the blanks.'²³¹

Ancillary verbal agreements would crop up everywhere. The parol evidence rule would get a work out. Consider the mother-in-law who heard one spouse tell another that he/she would create a Roth IRA for their future. This oral agreement, if subject to contract law, is one example which would be brought to court for resolution.

Imagine, if a couple contracted to marry, and added a term allowing an open marriage, thus allowing each party to date other people. A court would not be the appropriate forum for one spouse to sue another for violating the terms of such a contract because society's belief in monogamous

²³¹ Carol Weisbrod, Symposium: *Twenty-Five Years of Divorce Revolution; The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777, quoting NATHAN ISAACS, CONTRACTS, TORTS AND TRUSTS, IN 6 LEGAL RELATIONS 1, 34 (Roscoe Pound et al. eds., 1939).

marriages could not be overlooked. Any court's decision upholding this type of marriage agreement would surely violate public policy and any marital contract law created by the state.²³²

As stated in the *Restatement* "A promise by a person contemplating marriage or by a married person, other than as part of an enforceable separation agreement, is unenforceable on grounds of public policy if it would change some essential incident of the marital relationship in a way detrimental to the public interest in the marriage

²³² Traditionally, marriage has consisted of a monogamous relationship between one man and one woman.

Nineteenth century judges and scholars were explicit in emphasizing that marriage was a status and not a mere contract. Because the husband and wife had consented to marry, their promise to marry constituted consent to assume marital status. The clear message of nineteenth century law was that marriage was not simply a private matter primarily of concern to the parties involved. As a status, marriage involved certain standard rights and duties. 'Marriage confers on the husband the right to companionship and services of the wife,' and the wife could expect her husband to 'protect and support her while in substantial discharge of these duties.' Any agreement by the spouses to alter these rights were unenforceable. [T]hese duties served to constitute marriage itself, as is illustrated by the Kansas Supreme Court's affirmance of a conviction for illegal cohabitation in 1887. The defendants in this case had not obtained a marriage license, but had lived together professing to be husband and wife, which normally would have entitled them to the presumption of common law marriage. However, they had proclaimed in their wedding ceremony that marriage was a "strictly personal matter" immune from state regulation, and the groom had acknowledged his bride's right to control her own property, to keep her own name, . . . and to call on him for equal child care responsibility. The court declared of the parties that "they have lived together, but have no intention of creating that relation of status known and defined by law and by custom

relationship.”²³³ This does not mean that couples cannot make contracts that will be upheld by our court system. Married couples or couples to be married may enter into prenuptial contracts dealing with the disposition of property.²³⁴ Additionally, if one part of an agreement is unenforceable it does not mean that the whole agreement is unenforceable. At times, the court will simply uphold the enforceable parts of the agreement.²³⁵

Finally, the marriage contract is not a legal contract in the legal sense of the term contract. It is more like a pseudo contract that has its own set of rules and policies attached to it.²³⁶ The Covenant Marriage is a type of contract between couples in Louisiana bound by specific criteria set forth by the Louisiana legislature.²³⁷ These

and usage of all civilized societies as marriage.” State v. Walker, 36 Kan. 297 (1887).

MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 10 (1993).

²³³ RESTATEMENT (SECOND) OF CONTRACTS SEC. 190 (1979 Main vol.).

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Covenant Marriage Act, § 272B.

criteria do not violate public policy even though there are opponents to the law who believe the legislature has gone too far.

VI. Analysis - Covenant Marriage and other states.

The analysis section of this Note will focus on the choice of law issues, specifically, which state's law Connecticut should apply when it is faced with a Covenant Marriage couple in its divorce courts. Because the law that is applied will affect a couple's ability to dissolve their marriage, this question is key. Whether states will honor the decisions made by other states will be examined through past cases. These cases dealt with similar issues when states like Nevada allowed divorce, where other states did not. Further, seminal cases including *Sherrer v. Sherrer*,²³⁸

²³⁸ *Sherrer v. Sherrer*, 334 U.S. 343 (1975) (appearance by spouse in contested divorce suit afforded spouse due process of law).

Esenwein v. Pennsylvania,²³⁹ *Sosna v. Iowa*²⁴⁰ and *Williams v. North Carolina*²⁴¹ will be analyzed. Finally, special consideration will be given to Connecticut's residency requirements and its policy on choice of law.

Choice of law is a complex area that tries to resolve the differences between the laws of different states when a person has acquired rights in two or more states.²⁴² For a Covenant Marriage couple in Connecticut's divorce courts the following questions will be asked: May the couple only divorce for the Louisiana Statute's exclusive reasons?²⁴³ Should Connecticut recognize only those grounds if it dissolves a covenant marriage? Or should the Connecticut courts apply Connecticut's own divorce law, which includes a no-fault option?

²³⁹ *Esenwein v. Pennsylvania*, 325 U.S. 279 (1945). (Pennsylvania courts under a duty to accord prima facie validity to Nevada decree).

²⁴⁰ *Sosna v. Iowa*, 419 U.S. 343 (1948) (one year residency requirement is not unconstitutional).

²⁴¹ *Williams v. North Carolina*, 317 U.S. 287, (1942) (judgment obtained in a sister state is entitled to full faith and credit). *Williams v. North Carolina II* 325 U.S. 895 (1945) (On remand N.C. Supreme Court found no bona fide domicil[e] for couple seeking divorce in Nevada. Therefore, it did not need to uphold Nevada's divorce decree.).

Before a divorce can be granted in any state, the court must be competent to hear the case by having jurisdiction over the parties.²⁴⁴ A state has power to exercise judicial jurisdiction over an individual who is present within its territory.²⁴⁵ Domiciled means present in the state with the intent to remain.²⁴⁶ "It is a general rule that a court has no jurisdiction to grant a divorce if neither party is domiciled in that jurisdiction."²⁴⁷ This rule has been upheld in state courts all over the United States.²⁴⁸

Once jurisdiction is established the next question is what law should Connecticut apply? According to the

²⁴² 16 AM. JUR. *Conflict of Laws* §1 (1997).

²⁴³ See supra notes 150-53, 155.

²⁴⁴ *Pennoyer v. Neff*, 95 U.S. 714 (1877).

²⁴⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, SEC. 28 (1971).

²⁴⁶ *Williams v. North Carolina*, 325 U.S. 226, 236 (1945).

²⁴⁷ RESTATEMENT (FIRST) OF CONFLICT OF LAWS, SEC. 20 (1971 App.).

²⁴⁸ Husband domiciled in Connecticut who went to Nevada for purpose of obtaining a divorce but who did not intend to remain in Nevada permanently did not lose his former domicil. Therefore, Nevada court did not have proper jurisdiction to grant the divorce. *Mills v. Mills*, 119 Conn. 612, 618 (1935). Husband who left New Jersey to procure divorce in Nevada did not change domicile even though he intended never to return to New Jersey when, at time he left, he had no definite intention as to where he would live after obtaining Nevada divorce. Therefore, New Jersey court did not have jurisdiction. *Sprague v. Sprague*, 131 N.J. Eq. 104, 107 (1942). In action for divorce brought by army officer whose military records listed Nebraska as his home, although he and his wife had built a home in Colorado and he had expressed some intention of residing there after his retirement from the army, his legal residence was in Nebraska, and Nebraska court had jurisdiction to hear divorce action and award an absolute divorce. *Willie v. Willie*, 167 Neb. 449, (1958).

Restatement of Conflict of Laws, "the local law of the domiciliary state in which the action is brought will be applied to determine the right to divorce."²⁴⁹ In other words, if a couple is domiciled in a state, that state's divorce laws will be applied. The rationale is that the state has the primary interest in the couple's marital status and therefore has the judicial jurisdiction to grant him a divorce.²⁵⁰ "The same considerations which give a state judicial jurisdiction [i.e., the parties are residents of the state and intend to remain,]. . . make it appropriate for the state to apply its local law to determine the grounds upon which the divorce should be granted. The local law of the forum determines the right to a divorce, not because it is the place where the action is brought but

²⁴⁹ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, SEC. 285 (1969 Main Vol).

²⁵⁰ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, SEC. 285. cmt.a. (1969 Main Vol.).

because of the peculiar interest which a state has in the marriage status of its domiciliaries." ²⁵¹ As an example:

A and B are married in state X and make that state their home for several years. A then abandons B and goes to state Y, where he acquires a domicile, and there brings suit against B for divorce on the grounds of mental cruelty. The Y court will apply its own local law, rather than the local law of X, in determining whether A is entitled to the divorce.²⁵²

"In a few states of the United States, it is provided either by statute or by common law rule that the acts for which the divorce is sought must either have taken place in the state of the forum or else must be recognized as grounds for divorce by the state where the plaintiff was domiciled at the time they occurred."²⁵³

However, Connecticut usually applies the law of the state where the injury occurred, *lex loci delicti*.²⁵⁴ In the case of divorce, if the grounds for dissolution occurred in Connecticut a couple could be divorced here. If,

²⁵¹ *Id.*

²⁵² RESTATEMENT (SECOND) OF CONFLICT OF LAWS, SEC. 285. illust. (1969 Main Vol.).

²⁵³ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, SEC. 285. cmt. b (1969 Main Vol.).

however, *lex loci delicti* produces an irrational, arbitrary result a recent court decision has held that Connecticut courts should apply the *Second Restatement* rule that the local law should be applied.²⁵⁵ *O'Connor v. O'Connor* held that Connecticut law should be applied in the Connecticut court where a passenger brought an action against a driver for personal injuries suffered in Canada.²⁵⁶ The Supreme Court of Connecticut reexamined the doctrine of *lex loci delicti* in personal injury cases.²⁵⁷ The Plaintiff maintained that Connecticut courts should "no longer adhere. . . to the doctrine of *lex loci* but should . . . apply the law of the jurisdiction that has the most significant relationship to the controversy."²⁵⁸ The parties in *O'Connor* were held to have a significant relationship to Connecticut because:

²⁵⁴ *O'Connor v. O'Connor*, 519 A.2d 13 (Conn. 1986).

²⁵⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, SEC. 285 (1969 Main Vol.).

²⁵⁶ *O'Connor*, 519 A. 2d at 13.

(1)both parties are domiciled and employed in Connecticut; (2) both parties are subject to the requirements and entitled to the benefits of Connecticut's no-fault insurance law; (3) aside from the Plaintiff's initial treatment after the accident, the Plaintiff received all her post-accident medical care in Connecticut.²⁵⁹

The court recognized that "strict application of the *lex loci delicti* rule frustrates the legitimate expectations of the parties and undermines an important policy of this state."²⁶⁰ Although the doctrine of *lex loci delicti* is a doctrine that has been used in Connecticut since the late nineteenth century the Supreme Court was willing to overrule this precedent in this case.²⁶¹

The court justified overruling the law by responding to the four reasons the law has been retained.²⁶² First, by maintaining the choice of law doctrine of *lex loci* it allows

²⁵⁷ *Id.* at 13.

²⁵⁸ *Id.* at 15.

²⁵⁹ *Id.* at 15.

²⁶⁰ *O'Connor*, 519 A. 2d. at 15.

²⁶¹ *Id.* at 16.

²⁶² *Id.* at 18.

the Legislature to alter it.²⁶³ The Court disagreed with this premise and found that since the legislature has not chosen to act it is the responsibility of the court to modernize the rules.²⁶⁴ Second, the court addressed *stare decisis*.²⁶⁵ "While courts should not overrule established precedent except in compelling circumstances, the force of precedent will not hinder our rejection of a rule whose application no longer serves the ends of justice."²⁶⁶ Third, the need for certainty and predictability was recognized by the court.²⁶⁷ Even though certainty is necessary the American legal system, the court stated that a balancing test was necessary.²⁶⁸ "The virtue of simplicity must, however, be balanced against the vice of arbitrary and inflexible application of a rigid rule."²⁶⁹

²⁶³ *Id.* at 18.

²⁶⁴ *Id.* at 19.

²⁶⁵ *Id.* at 19.

²⁶⁶ *O'Connor*, 519 A.2d. at 19.

²⁶⁷ *Id.* at 19.

²⁶⁸ *Id.* at 19.

²⁶⁹ *Id.* at 19.

The fourth principal for retaining *lex loci* was "the prevention of parochial applications of forum law in controversies involving foreign jurisdictions."²⁷⁰ Here the concern is that without *lex loci* the forum will "not take seriously the foreign jurisdiction's interest in the controversy."²⁷¹ This argument was also rejected by the court, which reasoned: "A principled search for the local law of the state with the most significant relationship to the occurrence and to the parties will often cause foreign law to be recognized as the law that should govern the controversy."²⁷²

It is likely that a Connecticut court would apply Connecticut law if faced with a Connecticut domiciliary who was married under Louisiana's Covenant Marriage statute

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.* at 20.

because of the *O'Connor* holding.²⁷³ Because the Connecticut court has the most significant relationship to the controversy i.e. the person as a domiciliary lives and works in Connecticut and should be governed by its laws.²⁷⁴

Second, because the Supreme Court in *O'Connor* held that the *Restatement* should be applied in determining what law should be used and the *Restatement* states "the local law of the domiciliary state in which the action is brought will be applied to determine the right to divorce"²⁷⁵ it is unlikely that Louisiana law will be applied.

However, if the Connecticut court applied contract law to the covenant marriage agreement the result would be different. In contract, the Uniform Commercial Code provides, that in absence of an effective choice of law by the parties as to what law will govern, "[t]his Act applies

²⁷³ *Id.* at 13.

²⁷⁴ *O'Connor*, 519 A.2d at 15.

²⁷⁵ RESTATEMENT (SECOND) OF CONFLICT OF LAWS, SEC. 285 (1969 Main Vol.)

to all transactions bearing and appropriate relation to this state'.²⁷⁶ Therefore, if there is no agreement as to the governing law, the U.C.C. will govern if the state has adopted the U.C.C., and the transaction has an "appropriate" relation to the state.²⁷⁷ The mere fact that the suit is brought in a state does not make it appropriate to apply that state's substantive law.²⁷⁸ So, in the example above, Connecticut law would not automatically apply if the U.C. C. governed. Comment two of the U.C.C. clearly states where a relation to the enacting state is not appropriate: "Where the parties have clearly contracted on the basis of some other law,"²⁷⁹ and not based their agreement on the U.C.C., then the U.C.C. should not govern.

In applying this analysis to the covenant marriage couple, one must consider that the couple who sign the

²⁷⁶ U.C.C. §1-105 (1991).

²⁷⁷ U.C.C. §1-105 cmt. 2 (1991).

²⁷⁸ *Id.*

covenant marriage agreement did choose Louisiana law as the governing law. This is evident because of the recitation by the parties which includes the statement 'we do hereby declare that our marriage will be bound by Louisiana law on Covenant marriage.'²⁸⁰ If the out-of state courts found that the couple had chosen Louisiana law based on the covenant marriage agreement then Louisiana law would apply.

However, if the court finds that this recitation by the couples was not a true choice of law then the court may apply the UCC's "appropriate relations test".²⁸¹ Although "[t]he UCC does not define the test, it does state that the mere fact the a suit is brought in a state does not make it "appropriate" to apply the substantive law of that jurisdiction."²⁸² Further, "a relation to the forum is not "appropriate" where the parties clearly contracted on the

²⁷⁹ U.C.C. §1-105 cmt. 2 (1991).

²⁸⁰ Covenant Marriage Act, §273A

²⁸¹ UCC §1-105(1).

basis of some other law."²⁸³ The Code comment states that whether the relation is "appropriate" will be left to judicial decision, but adds the caution that in deciding the question the court is 'not strictly bound by precedents established in other contexts.'²⁸⁴ Here, it would seem the courts could go either way. On one side, the forum has the appropriate relationship because its domicillaries are before the court and the state has an interest in the people of its state. Conversely, the couple made a solemn vow under Louisiana law. As this would be a case of first impression it is not clear what would be the outcome.

Another result is possible if the court construes that the Louisiana law governs the marriage, but not the divorce; because marriage was specified in the statute. Therefore, a strict reading of the statute might

²⁸² Lewis C. Warden, Commercial Code, 15A Am. Jur. 2d Commercial Code §13 (1997 cum. supp.)

²⁸³ *Id.*

²⁸⁴ Lewis C. Warden, Commercial Code, 15A Am. Jur. 2d Commercial Code §13 (1997 cum. supp.)

find that the marriage is governed by Louisiana's Covenant Marriage Act, but not the divorce. Therefore, other state law could govern the dissolution.

Standard contact law would reach the same result, even if the UCC was not applied. The governing law is the law of the state under which the contract was created.²⁸⁵ Unless, there is a valid reason which supports the use of the forum's laws. For example, if it is shown that the parties no longer have a substantial relationship to the state when the contract was negotiated.²⁸⁶ Or, if the parties did not have a choice of law provision, and "application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue," then the forum's law would apply.²⁸⁷

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²⁸⁶ Restatement (Second) of Conflict of Laws §187 (1988 Rev. Main Vol. Pkt. Pt.)

²⁸⁷ Restatement (Second) of Conflict of Laws §187 (1988 Rev. Main Vol. Pkt. Pt.)

In short, there are two possibilities. If a contract analogy is used then Louisiana law may or may not apply. If standard choice of law is applied it would seem that in Connecticut, the local Connecticut law would apply unless it would so violate public policy that it would be inappropriate to apply Connecticut law.²⁸⁸ As the choice of law relates here to Covenant Marriage, it is unlikely that a divorce in Connecticut would cause an extreme violation of public policy, even if one considers the Connecticut court is allowing the couples to break a solemn vow. The vow, though telling, appears to be an extended version of the vows couples currently make under the eyes of God when married in a church. And, unfortunately, these vows are broken daily with the hundreds of divorces that are granted in the family courts across the country. Because of the

citing U.C.C. 1-105 comment
²⁸⁸ *O'Connor*, 519 A.2d. at 15.

above, Connecticut law would likely apply, and the Louisiana couples would be granted their divorces.

One of three alternatives is necessary to determine if Connecticut can hear a divorce action between a covenant marriage couple:

1) one of the spouses must be a resident of Connecticut for one year; (2) one of the spouses was a resident of Connecticut at the time of the marriage and returned to Connecticut with the intention of remaining in Connecticut; or (3) the grounds for dissolution of marriage arose in Connecticut.²⁸⁹

If these residency requirements have been met then the Connecticut court is competent to hear the case.

Because Connecticut will likely apply its own divorce law, Louisiana's restrictive grounds for divorce will be moot.

If a covenant marriage couple is granted a no-fault divorce in Connecticut, then the following questions will arise: Will Louisiana honor a Connecticut divorce decree

²⁸⁹ CONN. GEN. STAT. ANN. Tit. 31, Ch. 348; Tit.46b, Ch. 44; and Tit.51, Ch. 349 (West 1997).

should one who divorced in Connecticut wish to return to Louisiana and remarry? Does Connecticut's no-fault divorce judgment have the protection of the Full Faith and Credit clause of the Constitution? If one does remarry in Louisiana could the Connecticut divorcee be criminally charged with bigamy?

It seems that past decisions may have answered these questions. *Williams v. North Carolina*²⁹⁰ concerned a criminal conviction for bigamy overturned by the Supreme Court. The Court held that a sister state's judgment is entitled to Full Faith and Credit.²⁹¹ "The purpose of the Full Faith and Credit clause is to alter the status of the several states as independent foreign sovereigns, each free to ignore obligations created under the laws or by the judicial proceedings of the other, and to make them integral parts of

²⁹⁰ *Williams v. North Carolina*, 317 U.S. 287 (1942).

²⁹¹ U.S. CONST. art. IV, sec. 1.

a single nation.”²⁹² Notwithstanding the Court’s ruling in *Williams*, where the case was remanded so the North Carolina court could follow the Supreme Courts ruling, (and uphold the Nevada divorce), the North Carolina court, on remand, found that Nevada did not have jurisdiction over the parties. The case returned to the Supreme Court, (hereafter *Williams II*) and the court found that the North Carolina court was correct in not honoring the Nevada divorce because of Nevada’s lack of jurisdiction over the parties.

In *Williams I*, the petitioners were tried and convicted of bigamous cohabitation under sec. 4342 of the North Carolina Code,²⁹³ and each was sentenced for a term of years to state prison.²⁹⁴ The conviction was affirmed by the Supreme Court of North Carolina.²⁹⁵ The United States

²⁹² *Williams v. North Carolina*, 317 U.S. 287 (1942) citing U.S.C.A. CONST. art. IV, sec. 1.

²⁹³ *Williams*, 317 U.S. at 287 (N.C. GEN. STAT. 1939 sec. 4342, since recodified, see footnote 236.).

²⁹⁴ *Williams*, 317 U.S. at 287.

²⁹⁵ *Williams*, 220 N.C. at 445.

Supreme Court granted certiorari.²⁹⁶ The section of the North

Carolina Code that the William's violated was:

Section 4342 of North Carolina's code provides in part: 'If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage.'²⁹⁷

The facts that brought the case to the Supreme Court were as follows: Both petitioners were married to other people prior to 1940.²⁹⁸ In May of 1940, the petitioners went to Las Vegas, Nevada and on June 26, 1940, they each filed a divorce action in the Nevada Court.²⁹⁹ The defendants in the actions did not appear and were not served process in Nevada.³⁰⁰ One was served via publication in a Las Vegas newspaper and a copy of the summons and complaint was

²⁹⁶ *Williams v. North Carolina*, 315 U.S. 795 (1942).

²⁹⁷ N.C. GEN. STAT. §14-183 (1993) (effective 1995).

²⁹⁸ *Williams*, 317 U.S. at 289.

mailed to his last known address, a post office box.³⁰¹ The other was served the summons and complaint by a sheriff in North Carolina.³⁰² Both Petitioners were granted a divorce, one for extreme cruelty and the other for willful neglect and extreme cruelty.³⁰³ Both Petitioners were found to be bona fide and continuous residents of the County of Clark, Nevada, as both had been residents for more than six weeks immediately preceding the commencement of the suit.³⁰⁴

"Thereafter the couple returned to North Carolina to live together [as husband and wife]."³⁰⁵ Subsequently, the couple was indicted for bigamy and offered as evidence of their innocence the exemplified copies of the Nevada proceedings.³⁰⁶ The state contended that because neither of the Defendants to either divorce action had appeared, nor

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Williams*, 317 U.S. at 290.

³⁰³ *Id.*

³⁰⁴ *Id.*

³⁰⁵ *Williams* at 317 U.S. 287, 293.

were either served in Nevada, the Nevada decree would not be recognized in North Carolina.³⁰⁷ Because the North Carolina courts would not recognize the Nevada divorce decree, the North Carolina court held that couple had committed bigamy.³⁰⁸

The Supreme Court did not agree with the North Carolina courts.³⁰⁹ The threshold question was whether the couples were domiciliaries of the state of Nevada.³¹⁰ If they met Nevada's residency requirements, all other states must honor the decree issued by Nevada.³¹¹ The key to the Court's reasoning is:

Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those

³⁰⁶ *Id.* at 290.

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 289.

³⁰⁹ *Williams* at 317 U.S. 291.

³¹⁰ *Id.* at 292. However, the court decided to proceed with the decision based on the assumption that the parties were domiciliaries of Nevada so the Court could address the full faith and credit issue.

³¹¹ U.S. CONST. art.IV, sec. 1.

of the foreign state are superior to those of the forum.³¹²

Because full faith and credit does not require a state to substitute other states' laws for its own laws the decree issued by other states does not upset that state's sovereignty.³¹³ What the recognition of judgment from one state to another does is accentuate our federalist ideals and avoids balkanization among the states.³¹⁴

Moreover, the court emphasizes the importance of the parties' domicile which grants the court the competency to hear the case. "Domicil[e] is essential in order to give the court jurisdiction which will entitle the divorce decree to extraterritorial effect, at least when the defendant has neither been personally served nor entered in an appearance."³¹⁵

³¹² *Williams*, 317 U.S. at 296.

³¹³ *Id.* at 298

³¹⁴ *Id.* at 303.

³¹⁵ *Williams*, 317 U.S. at 283, 297.

The court held that the Nevada statute does not require simple residency but actual domicile. "Hence the decrees in this state, like other divorce decrees, are more than *in personam* judgments. "They involve the marital status of the parties." "Domicil[e] creates a relationship which is adequate for numerous exercises of state power."³¹⁶ Because the state law gains strength when it is applied to its domiciliaries, the court held that the Nevada divorce decree was valid, and was worthy of interstate recognition guaranteed by the Full Faith and Credit clause.³¹⁷

States have the power over their domiciliaries' domestic relations because:

[e]ach state has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interest, and the enforcement of marital responsibilities are but a few of commanding problems in a field of domestic relations with which the state must deal.³¹⁸

³¹⁶ *Williams*, 317 U.S. at 287, 298.

³¹⁷ *Id.* at 303.

³¹⁸ *Id.* at 298.

The Court explained the ramifications of not recognizing a sister states judgment in a domestic relations case:

[i]n this case a man would have two wives, a wife two husbands. The reality of a sentence to prison proves that that is no mere play on words. Each would be a bigamist for living in one state with the only one with whom the other state would permit him to lawfully live. Children of the second marriage would be bastards in one state but legitimate in the other.³¹⁹

Moreover,

where a state adopts, as it has the power to do, a less strict rule, it is quite another thing to say that its decrees affecting the marital status of its domiciliaries are not entitled to the full faith and credit in sister states. Certainly if decrees of a state altering the marital status of its domiciliaries are not valid throughout the Union even though the requirements of procedural due process are wholly met, a rule would be fostered which could not help but bring 'considerable disaster to innocent persons' and 'bastardize children hitherto supposed to be the offspring's of lawful marriage.'³²⁰

Although, Williams I clarifies the full faith and credit clause as it relates to divorce, Williams II holds that a state need not honor a sister state's divorce

³¹⁹ *Id.* at 300.

judgment if the state successfully attacks the sister

state's jurisdiction:

North Carolina was not required to yield to her state policy because a Nevada court found that petitioners were domiciled in Nevada when it granted them decrees of divorce. North Carolina was entitled to find, as she did, that they did not acquire domicil[e]s in Nevada and that the Nevada court was therefore without power to liberate the petitioners from amenability to the laws of North Carolina governing domestic relations.³²¹

If North Carolina found that Nevada did have the proper jurisdictional authority the bigamy charge would have been dropped and the North Carolina court would have honored the Nevada decree. This case provides the foundation for court competency. If the couple from Louisiana, who appear in Connecticut's courts, are proper domicilliaries, then any Connecticut judgment must be honored by Louisiana, and all other states.

³²⁰ *Williams*, 317 U.S. at 301 (quoting Justice Holmes' dissent in, *Haddock v. Haddock*, 201 U.S. 628).

³²¹ *Williams v. North Carolina*, 325 U.S. 226, 239(1945).

There is also a concern that Louisiana's sovereignty will be undermined if couples dissolve their marriages, in other states, under other laws. "[I]f such divorce decrees [are] given Full Faith and Credit, a substantial dilution of the sovereignty of other states will be effected." For it is pointed out that under such a rule one state's policy of strict control over the institution of marriage could be thwarted by the decree of a more lax state."³²² If a Connecticut court can dissolve a covenant marriage under its more lenient divorce laws the whole purpose of the Covenant Marriage Act will be circumvented. Couples may even opt for the covenant marriage because they know they can easily go out of state to avoid the grounds.

According to Martha Kegel, who until recently was a staff attorney for the ACLU, the covenant marriage will affect the people of Louisiana by limiting their abilities

³²² *Id.* at 302.

to secure divorce. Her claim is that most Louisiana citizens will not be able to afford to cross state lines and establish residency to secure a divorce.³²³ When one considers that the person seeking the divorce would need to establish residency, and be able to show an intent to remain, (by quitting his or her job in Louisiana and securing another), Attorney Kegel's claim appears plausible.³²⁴ It seems likely that many Louisianans would be unable to afford to establish residency in nearby Texas, Mississippi, Arkansas or Alabama to take advantage of their more lenient divorce laws.³²⁵ Because the law allows couples to divorce if they have lived continuously and separately apart for two years,³²⁶ they will not necessarily need to

³²³ Telephone Interview with Martha Kegel, ACLU Attorney, Baton Rouge, LA (Sept. 1997) Ms. Kegel is an opponent of the Louisiana statute and her speech was read at the House Committee hearing on the bill. Ms. Kegel left the ACLU shortly after the bill passed and is pursuing other areas of the law.

³²⁴ Moreover, a party would have to secure a place to live, reregister automobiles, install new telephones and numerous other mundane tasks that occur with a move.

³²⁵ In Texas, one can secure a divorce in eight months TEX. (FAMILY CODE) CODE ANN. chs. 3.21, 3.60 (West 1993); in Mississippi, 6 months MISS. CODE ANN. tit. 93, chs. 5-5 (West 1996); Arkansas, five months ARK. CODE ANN. tit.9 ch. 12-307(1993); Alabama, six months ALA. CODE tit.30 ch. 2-5 (1975).

³²⁶ Covenant Marriage Act, § 307A(5).

leave the state to secure a divorce, instead they may just wait out the two years in Louisiana.³²⁷

Another possibility is a couple where one wants a divorce and the other is ambivalent. The spouse who wants the divorce colludes with the ambivalent spouse to claim adultery, or abuse to meet the covenant marriage requirements. The ambivalent spouse agrees because the spouse who wants the divorce is willing to pay a large sum of money up front to get it. This scenario circumvents the agreement and creates a fraud on the court which records this charade for public record.

A third possibility is a spouse who wishes to divorce, but does not have the necessary grounds, and for any number of reasons (lying is repugnant or against their morals or Christian values) does not wish to make up a ground. It would appear that this couple would be stuck, forced to

³²⁷ § 307A(5).

abandon the marital home, set-up some type of financial arrangement to support the other spouse, (if necessary), and if the party was divorcing to set up a new and improved relationship, he or she would be forced to live in "sin" until the proper grounds could be met and the divorce granted.

Past cases have clarified the law allowing a spouse to leave a state and set up a domicile in a new state to secure a divorce.³²⁸ Other states must honor a foreign state court's divorce decree if the court had jurisdiction to hear the case.³²⁹ In other words, if the party met the domiciliary requirements and if the jurisdiction of the court survived a collateral attack, the decree must be afforded Full Faith and Credit by its sister states.³³⁰

³²⁸ *Williams*, 317 U.S. at 287.

³²⁹ *Sherrer*, 334 U.S. at 343, 349.

³³⁰ *Id.* at 350.

Other cases have been brought to the Supreme Court when parties crossed state lines to divorce. In *Sosna v. Iowa*, the plaintiff challenged the constitutionality of the residency requirements required to secure a divorce in Iowa.

³³¹ However, this challenge failed because the Supreme Court upheld as constitutional, the state's ability to legislate certain requirements limiting its residents' ability to divorce.³³² Iowa's residency requirements were not found to be unconstitutional because the party

[i]s not irretrievably foreclosed from obtaining some part of what she sought. . . . A decree of divorce is not a matter in which the only interested parties are the State as a sort of "grantor", and a divorce petitioner such as appellant in the role of "grantee". Both spouses are obviously interested in the proceedings, since it will affect their marital status and very likely their property rights Iowa may insist that one seeking to initiate such a proceeding have the modicum of attachment to the state required here A state such as Iowa may quite reasonably decide that it does not wish to become a divorce mill for unhappy spouses who have lived there [a] short time.³³³

³³¹ *Sosna v. Iowa*, 419 U.S. 393 (1975).

³³² *Sosna*, 419 U.S. at 410.

³³³ *Sosna*, 419 U.S. at 405-407.

A third important divorce case that reached the Supreme Court is *Esenwein v. Pennsylvania*.³³⁴ The Court held that a Nevada divorce decree will not be upheld in another state if the defendant is successful in attacking the Plaintiff's domicile in Nevada, thus upsetting the Nevada court's jurisdiction and rendering the divorce decree invalid.³³⁵ In *Esenwein*, the Pennsylvania trial court decided as a factual issue that *Esenwein* did not have a bona fide domicile in Nevada.³³⁶ The Supreme Court of Pennsylvania sustained the Pennsylvania Superior Court decision.³³⁷ The Supreme Court granted certiorari and found that the Pennsylvania Supreme Court, after reviewing the evidence, found that there was enough "convincing countervailing evidence to disprove petitioner's intention to establish a domicile in Nevada."³³⁸

"The Pennsylvania courts have viewed their constitutional

³³⁴ *Esenwein v. Pennsylvania*, 325 U.S. 279 (1945).

³³⁵ *Id.*

³³⁶ *Id.*

duty correctly."³³⁹ Pennsylvania recognized the need "to accord prima facie validity to the Nevada decree."³⁴⁰ However, since the defendant sustained "her burden of impeaching the foundation of the jurisdictional prerequisite of bona fide domicil[e]"³⁴¹ the decree from Nevada is invalid.

An opposite holding was made by the Supreme Court where the respondent *Sherrer v. Sherrer* attempted to collaterally attack Florida's jurisdiction in a Massachusetts court. In *Sherrer v. Sherrer*,³⁴² the petitioner correctly established her domicile in Florida and lawfully secured a Florida divorce.³⁴³ Her husband appeared and did not contest the Florida court's competency.³⁴⁴ Later, the husband sought to overturn the decree in a Massachusetts court by collaterally

³³⁷ *Esenwein v. Pennsylvania*, 325 U.S. 279 (1945).

³³⁸ *Esenwein v. Pennsylvania*, 322 U.S. 725 (1944).

³³⁹ *Esenwein*, 325 U.S. at 281.

³⁴⁰ *Id.* at 280.

³⁴¹ *Id.* at 281.

³⁴² *Sherrer v. Sherrer*, 334 U.S. 343 (1948).

³⁴³ *Id.* at 346.

attacking the Florida decree.³⁴⁵ Because the Defendant participated in the original divorce proceedings in Florida and was "accorded the full opportunity to contest the jurisdictional issues [then] the decree is not susceptible to . . . collateral attack"³⁴⁶ in the state court which rendered the decree.³⁴⁷

Because the respondent had ample opportunity to challenge the Florida court's jurisdiction and because he did not exercise that option in Florida, the Supreme Court overturned the Massachusetts decision that voided the Florida divorce decree.³⁴⁸

These four cases illustrate the problems that have arisen with states honoring other states' divorce decrees. The problems are primarily jurisdictional questions, which

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 347.

³⁴⁶ *Sherrer*, 334 U.S. at 351-52,

³⁴⁷ *Sherrer*, 334 U.S. at 351-52,

³⁴⁸ *Id.* at 352.

are resolved if the domicile and residency requirements of the state which granted the divorce are properly met.

However, none of these cases illustrate the novel question of what will occur if a covenant marriage couple appears in its court seeking a divorce, has not met the grounds, and the court dissolves the marriage in violation of the covenant marriage agreement. Potentially, the state could prosecute the returning spouse for bigamy, if either spouse returns to Louisiana to live with a new spouse. One result may be that by the time the couple returns, and a criminal prosecution ensues, (because of filled court dockets) the two year wait will have already expired, and the couple will have divorced, potentially rendering the bigamy proceeding moot. Another possibility is that the state will not pursue the couple for bigamy, rendering the covenant marriage grounds as meaningless. Or, the worst possibility, Louisiana will prosecute the couple and jail

them for bigamy, disrupting the lives of couples who made a mistake by choosing the covenant marriage and their former spouse in the first place.

In sum, a Connecticut court, if faced with a covenant marriage couple, will only address the issue of domicile and jurisdiction if the party seeking the divorce does not meet the aforementioned requirements. Once the party has established domicile, he or she must meet the statutory requirements for residency. To recap, the requirements for Connecticut are (1) residency for one year, or (2) if one spouse was a resident at the time of the marriage and returns with the intent to remain, or (3) if the grounds for dissolution arose in this state.³⁴⁹ Once the residency requirements are met, a complaint may be filed. Ninety days from the return date of the complaint, the court would

³⁴⁹CONN. GEN. STAT. sec. 46-b-44c (1997). If a spouse committed adultery in Connecticut, then a Connecticut court could hear the divorce action.

proceed upon the complaint and the divorce will be granted.³⁵⁰

However, the following questions have not been answered: What law will Connecticut apply: Louisiana's, requiring the specified grounds, or Connecticut's more liberal mixed fault/no-fault laws. If Connecticut applies its law will other states be required to honor the judgment? Will Louisiana prosecute its residents as bigamists if they divorce in contravention of the Covenant Marriage Act? Unfortunately, the answers will only come with divorcing Louisiana couples. The question will only be answered after the adjudication of these cases.

Part VII. Proponents and Opponents to the Covenant Marriage

³⁵⁰The return date is thirty days from the date on the complaint which is originally served on the defendant in the action. The return date is an arbitrary date specified by Connecticut statute to ensure uniform procedure in filing a lawsuit. CONN. PRACTICE BOOK ANN. 1, Ch. 3, sec. 49 (West 1989) CONN. GEN. STAT. ANN. sec. 52-48 (West 1991).

³⁵⁰ Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1985).

Will the Covenant Marriage help strengthen marriages in Louisiana? Will families stay together because the premarital counseling required by the law will resolve the societal problems that cause divorce. Will there be fewer divorces? Will the Covenant Marriage produce more happily married couples? Or will the Covenant Marriage create more problems than currently exist? This section provides answers to these questions.³⁵¹

The proponents of the Covenant Marriage Act believe that by making divorces harder to obtain it will help

³⁵¹ Proponent of the law, Professor Katherine Spaht from Louisiana State University Law Center,³⁵¹ and an opponent of the law, a divorce attorney from Lake Charles, Louisiana, Attorney Fuerst provided some of the material for this section.³⁵¹ Professor Katherine Spaht is a Professor of Family Law at Louisiana's State University at Baton Rouge. She is the chief consultant for the legislators who sponsored the state's super-marriage covenant law. Katherine Shaw Spaht, *Would Louisiana's 'covenant marriage' be a good idea for America?*, INSIGHT MAGAZINE, Oct. 6, 1997 at 24. Since, 1981, Spaht has been the reporter for the Louisiana Law Institute committee that handles family law matters. The institute is a state agency that studies certain subjects for the Louisiana Legislature and recommends new law. Terry Carter, *A Stealth Anti-Divorce Weapon*, ABA JRNL, Sept. 1997 at 28. Professor Spaht has also co-authored a text, *Louisiana Family Law Course*, which is in its sixth edition as of 1992, as well as numerous law review articles published in Louisiana's Law Reviews and Law Journals. Professor Spaht was kind enough to answer a series of questions about Louisiana's Covenant Marriage.

³⁵¹ Attorney Randy J. Fuerst practices law in Lake Charles, La. He is Of Counsel at Stockwell, Sievert, Viccellio, Clements & Shaddock, a firm in Lake Charles, Louisiana. He is also secretary and treasurer of the Family Law Section of the Louisiana State Bar Association and vice chair of the Family Courts Committee of the ABA's Family Law Section. Attorney Fuerst has handled hundreds of divorce cases in Louisiana. He also lectures on family law and speaks at women's conferences on a variety of issues. Attorney Fuerst was also kind enough to take the time and answer my questions, as well as provide his perspective, on what was right and wrong with the Covenant Marriage Act.

families stay together thus benefiting society.³⁵² In contrast, the opponents to Louisiana's Covenant Marriage Act believe that by making a divorce harder to obtain, Louisiana will destroy the independence won by women with the Feminist movement of the 1970's.³⁵³ They also believe that the stricter divorce laws will beget more domestic violence and result in lengthy legal battles, as couples attempt to free themselves from the covenant marriage.³⁵⁴

First, will the Covenant Marriage help strengthen marriages in Louisiana? It is difficult to predict what effect the Covenant Marriage Act will have on marriages in Louisiana. However, based on the recent statistics couples have not been opting for the covenant marriage.³⁵⁵ Clearly, if couples do not choose the option then the law will have had little effect. Until there are empirical studies which

³⁵² Katherine Shaw Spaht, *Would Louisiana's 'covenant marriage' be a good idea for America?* INSIGHT MAGAZINE, Oct. 6, 1997 at 24.

³⁵³ Walter Kirn, *The Ties that Bind*, TIME, Aug. 8, 1997 at 49.

track which couples both options it will not be clear if the divorce rate was positively affected.

Second, will families stay together because of the premarital counseling requirement? Proponents believe "the premarital and marital counseling will increase conversations between a husband and wife and deliberation about marriage in general."³⁵⁶ It would be difficult to argue that more marital counseling will not be beneficial to Louisiana couples, especially based on the current divorce rate. Simply putting the requirement in the statute is likely to have a beneficial effect on couples because it will foster a dialog about important issues.³⁵⁷

Whether the counseling is substantive enough is another issue. Proponents believe that because seventy-five to eighty-five percent of the Louisiana couples marry in

³⁵⁴ Editorial, *A Covenant for Couples*, WALL ST. J., Aug. 15, 1997 at A16.

³⁵⁵ *Supra* note.

churches, it is likely that the counseling will be performed by a priest or minister, and so it will be substantive.³⁵⁸ Conversely, critics believe the counseling requirement is not substantive enough (Remember, the counseling includes four simple questions.).³⁵⁹ However, whether the state should dictate the type of counseling is another question. One could propose that the counseling should explain the ramifications of a divorce, teaching couples responsible communication and respect for marriage, not simply how a Covenant Marriage will limit one's ability to get a divorce.³⁶⁰ The problem is that some of society would not be comfortable with the government dictating this type of counseling. While others might view the state's regulation of pre-marital counseling as akin to the requirements of

³⁵⁶ Telephone Interview with Katherine Spaht, Professor of Family Law, Louisiana State University of Law Center, Baton Rouge, LA. (Sept. 1997).

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ CMA, *supra* at

³⁶⁰ Telephone Interview with Randy Fuerst, Attorney, Lake Charles, LA. (Oct. 2, 1997).

getting a driver's license. One possibility would be that the state provide funding for couples who need counseling when they divorce.³⁶¹ If a couple chose the state funding they would be required to follow the state's guidelines. Another possibility would be to begin marital counseling in high school. Teaching children how to form appropriate relationships, conveying the importance of the marriage vows, as well as depicting the negative consequences of divorce.³⁶² This, however, would be an extremely controversial addition to a school's curriculum. Moreover, there is already a shortage of classroom time for academics. Finally, most children, based on statistics, are already too aware of the negative effects of divorce.

There is also concern that counselors will not be trained in the law and will not be able to inform covenant

³⁶¹ *Id.*

marriage couples adequately about the risks involved with opting for the covenant marriage. Here, the legislature could have provided some type of training for the counselors, or at least some minimum standards, rather than the simple one page pamphlet that was promulgated.³⁶³

Whether there will be fewer divorces is also a difficult question to answer. Proponents believe that because the divorce process is slowed to two years rather than 180 days, it gives couples an opportunity to deliberate and reconcile rather than seek an immediate divorce.³⁶⁴ The premise is that because of the extra time couples will be able to work through their problems, seek counseling, and avoid divorce. But again until studies are made this question cannot be answered. Conversely, one could envision

³⁶² *Id.* (Although, it would seem that children could probably teach this course themselves, many being the products of a divorced families. Perhaps a support group for children of divorced parents is not a bad idea).

³⁶³ *Supra*

³⁶⁴ Telephone Interview with Katherine Spaht, Professor of Family Law at the Louisiana State University of Law Center in Baton Rouge, LA. (Sept. 1997).

that the two year waiting period for divorce may actually encourage adultery.³⁶⁵ Because couples will not be able to secure a divorce for two years, they may resort to extramarital affairs, being unable to wait the two year period. Additionally, the two year wait could cause couples to separate leaving a mother with children and no financial support. The spouse who left may set-up a household with another and live in "sin" while waiting out the two-year period.

As support for this argument, Attorney Fuerst, who speaks at many women's conferences, asked the women at the conference how many women who sought a divorce had engaged in sexual intercourse during Louisiana's six month waiting period.³⁶⁶ One half of the one hundred women at the conference raised their hands.³⁶⁷ Attorney Fuerst asserted

³⁶⁵ *Id.*

³⁶⁶ Telephone Interview with Randy Fuerst, Attorney Lake Charles, LA. (Oct. 2, 1997).

³⁶⁷ *Id.*

that the state has unwittingly come up with a way to foster adultery.³⁶⁸

Whether the covenant marriage will create more problems than currently exist is a speculative question. Since the couples opt for the covenant marriage the minor administrative tasks necessary to secure a covenant marriage cannot be perceived as a problem. However, the aforementioned conflict of law issue could be troublesome. Depending whether the state adheres to the Louisiana's requirements, or not, will determine the outcome of this question.

Some believe that the government is too involved in the lives of the Louisianians. In a TIME/CNN telephone poll of over one thousand adults, fifty-nine percent did not believe that the government should make it harder to obtain a

³⁶⁸ *Id.*

divorce.³⁶⁹ Government legislation in such a private area does seem to contradict the *Griswold* line of cases³⁷⁰. Others believe the government role in enacting the covenant marriage option is appropriate. Rather than finding that the government is too involved in its citizens lives, some believe it is important for the government to legislate morality.³⁷¹ Proponents believe the law will help change the cultural view of marriage by raising couple's consciousness about the importance of marriage.³⁷²

In the same TIME/CNN poll, fifty percent surveyed believed that it should be harder for couples to obtain a divorce. Clearly, the answers to these questions are contradictory. This poll shows that people want change, but that they do not want the government to involve itself in

³⁶⁹ Walter Kirn, *The Ties that Bind*, TIME, Aug. 18, 1997, at 49.

³⁷⁰ *supra*

³⁷¹ Kirn, *supra* note 358, at 49.

³⁷² *Id.*

facilitating the change.³⁷³ Attorney Fuerst conducted another informal survey of the approximately 100 women at a Women's conference where he lectured in Louisiana.³⁷⁴ The first question he posed to the conferees was how many thought that Louisiana should make a divorce harder to obtain?³⁷⁵

Approximately three out of the one hundred women raised their hands.³⁷⁶ However, of the three that raised their hands, not one stated their reason was to save marriages, rather their reason was to protect the children of the marriages.³⁷⁷ This reasoning is unsurprisingly similar to the Louisiana's legislators who proposed and passed the bill.

A key problem with the Covenant Marriage law is that it "feel-good" legislation.³⁷⁸ "Feel-good" legislation is legislation that is passed to make society feel better about

³⁷³ Kim, *supra* at 123 n. 359.

³⁷⁴ Telephone Interview with Randy Fuerst, Attorney Lake Charles, LA. (Oct. 2, 1997).

³⁷⁵ *Id.*

³⁷⁶ *Id.*

³⁷⁷ *Id.*

³⁷⁸ Telephone Interview with Randy Fuerst, Attorney, Lake Charles, LA. (Oct. 2, 1997).

itself, and the problem, even though it may not resolve the issue.³⁷⁹ For example, the government legislating a requirement that one week of the year be designated as National Highway Safety Week, although it reads well in the press, ultimately provides no discernible reduction in accidents. Unfortunately, the Covenant Marriage Act cannot legislate that two people will not fall out of love and wish to end their marriage.³⁸⁰ Couples decide to stay married and to divorce for a number of reasons.³⁸¹ The only thing the Covenant Marriage Act can do is create a dialog about some of these issues before the marriage and before the problems escalate to the level where a divorce is the only solution.

Another concern is that the lying and collusion that occurred before the no-fault laws were passed will return.³⁸² Because a couple may divorce if they have been living

³⁷⁹ *Id.*

³⁸⁰ Telephone Interview with Randy Fuerst, Attorney, Lake Charles, LA. (Oct. 2, 1997).

³⁸¹ *Id.*

separate and apart for two years there is a risk that couples will lie to the court in order to dissolve their marriages more quickly.³⁸³ Also, because of the need for the specified grounds for divorce, couples will again lie about adulterous behavior to ensure they fulfill the necessary grounds.³⁸⁴

Attorney Fuerst described the need for grounds for divorce as fostering "green mail".³⁸⁵ Attorney Fuerst suggested the following example: A doctor wishing to divorce his wife and marry someone new contacts his lawyer and ascertains that he must have grounds to file for divorce (e.g. his wife has committed adultery or they must have lived separately for two years).³⁸⁶ Attorney Fuerst predicted that the doctor will negotiate a settlement with his wife's

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.*

³⁸⁵ Fuerst, *supra* at . Green mail is when Party #1 is in the position to request money from Party #2 because Party #1 has something that the Part #2 wants, and Party #2 is willing to pay Party #1 to get it. *Id.*

³⁸⁶ *Id.*

attorney that she provide the grounds, and the doctor, in appreciation, will pay whatever figure his wife's attorney ascertains to be a fair and equitable settlement.³⁸⁷

One must question whether the bill will assist couples with dealing with the many difficulties that may arise with marriages today. Financial strain, unsafe daycare providers, and young children doing drugs, are just a few of the problems facing contemporary married couples. It is unlikely that this legislation will aid couples in facing these formidable issues. However, the legislature did not claim it could resolve all of marriage's ills with one small piece of legislation. "We doubt the law is going to make everyone happy, but Louisiana deserves no small measure of gratitude for what it is attempting to do."³⁸⁸

³⁸⁷ *Id.*

³⁸⁸ Review & Outlook (editorial), *A Covenant for Couples*, THE WALL STREET JOURNAL, Aug. 15, 1997, at A16.

VIII. Conclusion: "But love is blind, and lovers cannot see.

The pretty follies that themselves commit."³⁸⁹

Unfortunately, Covenant Marriages probably will not alter the status quo as hoped for by the conservative right who back the concept. Couples, when faced with the decision on which union to choose, may choose the covenant marriage.³⁹⁰ Though currently couples seem to be bypassing the covenant marriage, with more publicity about the covenant and more education this may change. If couples do opt for the covenant the question remains, will the covenant marriage keep couples from divorcing? This is a difficult question to answer. People do not enter a marriage thinking it is going to end in divorce. If the covenant marriage causes couples to think about the ramifications of divorce perhaps they will be more prepared to deal with the many issues that cause marriages to fail.

³⁸⁹WILLIAM SHAKESPEARE, *MERCHANT OF VENICE* act 2, l.36.

One solution for our divorce prone society is prenuptial agreements. Because prenuptial agreements force couples to plan for the long term, and consider the negative outcomes at the beginning of the marriage it is likely that a more rational reaction will result when marital breakdown rears its ugly head.³⁹¹ "The reason parties need protection [from a bad divorce] is that they are unlikely to be able to think clearly for themselves about the time of divorce at any time, and certainly not immediately before the marriage."³⁹²

One result of the covenant marriage union may be more costly divorces as couples are forced to prove adultery, sexual or physical abuse, or habitual intemperance in order to dissolve their marriages.³⁹³ Courts will again become the forum for couples to air the most intimate details of their

³⁹⁰ *supra*

³⁹¹ *Supra* Bix p 45.

³⁹² *Id.*

lives. A backlog of cases may occur because what was a simple process is returned to one of fault and proof which is extremely time-consuming. Another problem will be that now there are two years for the divorce process to unfold. Attorneys will make more money as the initial consultation will last two years before anything can realistically be accomplished unless the proper ground exists. Because the process is protracted it will take more time for couples to extricate themselves from the bad marriage and return to a normal life. A divorce is usually an extremely upsetting process, and a trial even worse, because people's emotions and intimacies are brought before the court.

It is unclear whether the couples will be able to circumvent the Louisiana law by securing a divorce in another state. Because this marriage is a type of contract and because it appears that the couples choose Louisiana law

³⁹³Covenant Marriage Act, § 307B(6).

it seems unlikely that another state would apply its own laws. Therefore the criteria of the Covenant Marriage Act would remain intact.

Other states will likely join Louisiana because this type of legislation enables society to feel good about its laws. However, great change in our nation's divorce rates will probably not occur because people who marry make mistakes, and the option of divorce is firmly ingrained in our society. People who choose a more restrictive union, because they believe in marriage, will stay together because they would have stayed together anyway. Couples who choose the Covenant Marriage, because it is "the right thing to do", will probably divorce at the same rate as America's (historically rising)divorce rate.³⁹⁴

United States law has moved toward making divorce a simpler process. "No-fault divorce has given the parties to

a marriage substantial power to end the (legal) relationship if they so choose (to the point that in many states the current rules, as applied, give each spouse more or less the right to divorce upon demand)."³⁹⁵ In contrast, the Covenant Marriage Act is a return to more restrictive divorce laws. Society recognizes that divorce has cause many problems within the family and it is trying to rectify those problems by limiting divorce. "Everyone is against divorce in the abstract, but in the concrete, they understand why particular people they know have to divorce."³⁹⁶ Even though there is a need for no-fault divorce laws, "[t]he gap between the way we'd like families to be and the way they are creates a constant toothache that can be poked."³⁹⁷

³⁹⁴ In 1950, 30% of marriages ended in divorce, in 1960, 39%, in 1970, 48%, and in the 1980's, 48%.
CONSTANCE R. AHRONS, *THE GOOD DIVORCE* 279 (1994).

³⁹⁵ Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, Page 20, (January 12, 1998).

³⁹⁶ *supra* time.

³⁹⁷ *supra* time.

With the covenant marriage perhaps couples will discuss the potential difficulties that can occur in marriage prior to getting married. And, perhaps with this discussion, the multitudes of problems that can occur, will not occur.

Perhaps covenant marriage couples will be better prepared to deal with the problems of marriage. Perhaps the proponents of the covenant marriage will be correct in their assumption that all society needs to make marriages work is a written contract and some premarital counseling. Why should history repeat itself?