Louisiana's Covenant Marriage: Social Analysis and Legal Implications

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Marriage cultivates virtue by offering love, care, and nurture to its members, and by holding out a model of charity, education, and sacrifice to the broader community. Marriage enhances the life of a man and a woman by providing them with a community of caring and sharing, of stability and support, of nurture and welfare. . . . Marriage enhances the life of the child by providing it with a chrysalis of nurture and love, with a highly individualized form of socialization and education. It might take a whole village to raise a child properly, but it takes a marriage to make one. . . . [For] [t]he procreation of children can be among the most important Words we have to utter.1

I. INTRODUCTION: “FOR THE SAKE OF THE CHILDREN”

To preserve and to nurture those most important Words, our children,2 motivated the covenant marriage legislation,3 legislation that permits a husband
and a wife to oblige themselves legally to a stronger, more enduring union. The covenant marriage and its legal consequences more closely resemble the promises made by each spouse in the wedding ceremony. The children of the marriage are third party beneficiaries of the promises made by their parents and

one of the spouses, divorce after legal separation is permitted when the spouses have lived separate and apart for only one year.

In her article entitled "It's Deja Vu All Over Again": The Covenant Marriage Act in Popular Cultural Perception and Legal Reality, 72 Tul. L. Rev. 1701 (1998), my friend Jeanne Carriere, who urges repeal of the law, failed to specifically consider the welfare of the children. The student author, Melissa S. LaBauve of Comment, Covenant Marriages: A Guise for Lasting Commitment?, 43 Loy. L. Rev. 421 (1998), recognized that the legislature was motivated by the interests of children: "The consequences of the dissolution of a marriage on the children are so strong in the eyes of Louisiana legislators that they developed a new law aimed at curtailing the effects of divorce." Furthermore, the student author, Robert M. Gordon of Note, The Limits of Limits on Divorce, 107 Yale L.J. 1435, 1438-42 (1997), acknowledged that there is a powerful "child-centered case" against no-fault divorce, but then subtly dismisses its supporters as optimists and "develops the darker sensibility of a skeptical liberalism." Id. at 1442.


See also Eric Rasmussen and Jeffrey Evans Stake, Lifting the Veil of Ignorance: Personalizing the Marriage Contract, 73 Ind. L.J. 453, 495-96 (1998) (recommend permitting more contractual options for marriage rather than only one as in covenant marriage, although without the freedom permitted in commercial contracts). To the same effect but advocating a broader private ordering of marriage and divorce, see Gary S. Becker, Why Every Married Couple Should Sign a Contract, Bus. Week, Dec. 29, 1997, at 30. On both sides of the political and religious spectrum there is some agreement with Stake and Rasmussen: some homosexual activists see the dejuridification of marriage as an opportunity for them to demand participation in the sacred institution of marriage and some committed Christians believe that they live in Babylon and prefer to construct their own law rather than be subject to Babylonian law. In addition some libertarians argue that marriage should be completely privatized as a personal and religious ceremony, and the State should confer no special status on marriage.

5. This is true of traditional wedding ceremonies, the vast majority of which take place in churches. But see David Blankenhorn, I Do?, First Things, Nov. 1997, at 14-15, in which he abhors modern American marriage vows because they reflect a "loving relationship" of undetermined duration created of the couple, by the couple, and for the couple. He makes the point in his article that the marriage vow is deeply connected to the marriage relationship.

6. La. Civ. Code art. 1978. They are not simply incidental beneficiaries, since (1) the third party beneficiaries of any contract need not be named (Andrepont v. Acadian Drilling Co., 255 La. 347, 231 So. 2d 347 (1969)) as long as they can be identified when the benefit is sought to be enforced; (2) they are persons with whom the parties have both a legal (La. Civ. Code art. 227) and factual relationship such that there exists the possibility of future liability (La. Civ. Code arts. 227, 229) once they are born; and (3) they can accept the benefit stipulated in their favor (in this case implicitly) at any time before revocation including by filing suit (La. Civ. Code art. 1979). For a
benefit in both tangible and intangible ways—economically,7 physically,8 psychologically, and emotionally.9 Judith Wallerstein’s unique twenty-five year

recent analogous example, see Sandi v. Palmer, 713 So. 2d 822 (La. App. 5th Cir. 1998) (contract between father and former wife and her husband to set up and fund trust for daughters).


Legislation involving families typically produces results that range far beyond the husband and wife involved. Children are the third parties most obviously affected by marriage and divorce legislation. Two features of the Louisiana covenant marriage proposal seem to benefit the offspring of a marriage. First, it is that fewer couples will divorce, and, since divorce almost always harms children, children will benefit. The other interesting feature of the legislation is the inclusion of abuse directed against a child as a grounds both for absolute . . . divorce and for a mensa divorce. . . . The only state currently allowing fault divorces where it is not the spouse, but the child who is physically or sexually injured, is West Virginia. . . . Covenant marriage should foster the kind of permanence that would allow more specific investments in the marriage. This would include not only degrees, but also children. . . .

(Emphasis added).

See Amy S. Poling, Comment, Protecting the Interests of Children of Divorce: A Proposal to Create Exceptions to the Louisiana Prohibition Against Contracting for Future Successions, 72 Tul. L. Rev. 1853 (1998).

7. Although Lenore Weitzman in her seminal work The Divorce Revolution: The Unintended Social and Economic Consequences on Women and Children in America (1987) was the first to document the economic devastation suffered by children (and women) after changes in divorce law in the 1970’s, numerous studies since the publication of her research support her conclusions. There are disagreements about Weitzman’s calculations of the disparity between post-divorce income and standard of living for men and for women and children, but only a few dispute that women and children suffer more economic hardship than men after divorce. See Saul Hoffman & Greg Duncan, What Are the Economic Consequences of Divorce?, 25 Demography 641 (1988); Atlee L. Stroup & Gene E. Pollock, Economic Consequences of Marital Dissolution, J. of Divorce and Remarriage 22 (1994); Richard R. Peterson, A Re-Evaluation of the Economic Consequences of Divorce, 61 Am. Soc. Rev. 528 (1996). See also Katharine T. Bartlett, Saving the Family from the Reformers, 31 U.C. Davis L. Rev. 809, 835 (1998).

In Brinig, supra note 6, the author explains the economic impact as follows: “[T]he same parties now maintain two households, eliminating economies of scale that were present during the marriage. Given the same incomes, the parties are effectively poorer because of increased costs.”


There is strong evidence from the British research that the structure of the family is related directly to the safety of mothers and children. The most dangerous place for a woman and her child is in an environment in which she is cohabiting with a boyfriend who is not the father of her children. The rate of child abuse may be as much as 33 times higher. Even cohabiting with the children’s father may lead to a rate of abuse as much as 20 times higher. Marriage provides the safest environment for children. It therefore truly makes a difference in advancing the safety and well-being of America’s children.

Fagan et al., supra, at 14.

A longitudinal study of children of divorce establishes what the average citizen intuited before the post-modern era:

Unlike the adult experience, the child’s suffering does not reach its peak at the breakup and then level off. On the contrary. Divorce is a cumulative experience for the child. Its impact increases over time. At each developmental stage the impact is experienced anew and in different ways. . . . The impact of divorce gathers force as they reach young adolescence, when they are often insufficiently supervised and poorly protected, and when, additionally, they are required then (if not earlier) to adjust to new stepparents and stepsiblings. The impact gathers new strength again at late adolescence when they are financially barred from choosing a career or obtaining an education equivalent to that of their parents. And again, at young adulthood, when their fears that their own adult relationships will fail like those of their parents rise in crescendo. The effect of the parents’ divorce is played and replayed throughout the first three decades of the children’s lives.  

Despite criticism of the size and quality of her sample of children, her findings have been affirmed by a myriad of other larger studies. A survey of Louisiana appellate court opinions on issues of succession law over the last fifteen years reveals that the pain and anger experienced by children of divorce (referred to in those opinions as children of a “former marriage”) outlive the parent. 

Perspectives on Divorce (Sharlene A. Wolchik & Paul Karoly eds., 1988); David Demo & Alan Acock, The Impact of Divorce on Children: An Assessment of Recent Evidence, 50 J. Marriage & Fam. 619, 622 (1988).

Glenn S. Stanton’s Why Marriage Matters: Reasons to Believe in Marriage in Post-Modern Society (1997) is one of the most recent of all the books written by authors who wish to emphasize the positive effects of marriage. Stanton compiles all of the sociological data to date on the detrimental effects of divorce. For example, see Chapter 5, “Shattering the Myth: The Broken Promises of Divorce and Remarriage” at 123-58. See also Jenifer Kunz, The Effects of Divorce on Children, in 2 Family Research: A Sixty-Year Review, 1930-1990, 325 (Stephen Bahr ed., 1992).

In Brinig, supra note 6: “The question for those evaluating restrictions on divorce is whether the gains to adults’ autonomy from the easier exits of no-fault regimes outweigh the apparently large costs they inflict upon children.”


11. Her study has been criticized because the number of children was small (116-130 children) and they all came from middle-class northern California families in 1970. Their parents were well-educated.

12. See Stanton, supra note 9, at 123-58, for the results of those studies.

13. The author’s devotion to the cause of forced heirship was almost exclusively based upon the plight of children of a first marriage, and the recognition that some of the strongest pressure to change the system of the children’s legitime came from subsequent spouses (second, third wives).
published in 1997, documents the two left-of-center authors' extensive research findings about the effect of divorce on children and contains the compelling statement: "Spending one-third of one’s life living in a marriage that is less than satisfactory in order to benefit children—children that parents elected to bring into the world—is not an unreasonable expectation." Dr. Wade E. Horn, reviewing the Amato and Booth findings and two other studies, recently commented in a newspaper article: "[C]onventional wisdom tells us that it’s better for the children if their parents divorce than if they stay in an unhappy marriage. . . . Only trouble is, both conventional wisdom and the experts, it turns out, are wrong. Three new studies point to divorce—not marital conflict—as the problem." As Barbara Dafoe Whitehead so eloquently summarizes:

In a culture of divorce, children are the most “unfree.” Divorce abrogates children’s rights to be reasonably free from adult cares and woes, to enjoy the association of both parents on a daily basis, to remain innocent of social services and therapy, and to spend family time in ways that are not dictated by the courts . . . . Divorce involves a radical redistribution of hardship, from adults to children, and therefore cannot be viewed as a morally neutral act.


Professor Cynthia A. Samuel of Tulane Law School in Samuel, supra note 4, treats the subjects of the demise of all-inclusive forced heirship and the enactment of covenant marriage legislation together in her article. In the mind of the author they are inherently connected—widespread divorce created pressure to repeal the law that reserved a portion of one’s property for all children. “In 1995 the tide of divorce was primarily what swept Louisiana’s law of forced heirship out to sea. But in 1997 when the tide came in again, it contained an unexpected hostility to divorce.”

Both easy divorce and the repeal of all-inclusive forced heirship represent the triumph of a radical individualism, inherently selfish and narcissistic. Civil institutions such as lifelong marriage enforced by strict laws of divorce and the reserve of property for children at death necessarily curbed a citizen’s narcissism. What now passes for “liberty” is often more properly understood as undisguised selfish “license.”


As poignant as these findings and conclusions, social scientists are increasingly convinced that the weakening and virtual collapse of marriage explain the exploding phenomena of cohabitation. Maggie Gallagher in her book *The Abolition of Marriage: How We Destroy Lasting Love* persuasively argues that there is an indisputable connection between the weak institution we now call *marriage*, which is defined in no small part by divorce law, and the irregular living arrangement known as cohabitation.

There seems to be a tipping point at which marriage becomes so fragile and divorce so common that an increasing number of women decide it may be safer to dispense with marriage altogether: Illegitimacy surges in the wake of a surge in divorce.  

David Popenoe and Barbara Dafoe Whitehead, two names well-known among social scientists and in the popular culture, have completed a massive study of countries throughout the West and conclude that in countries where marriage as an institution is weakest, cohabitation is the most widespread. In other

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18. See id., in which the author argues that the definition of marriage which includes permanency has been so diluted and weakened by easy divorce that it is no surprise homosexuals can demand entry into what was once a sacred institution distinguished historically by such attributes as sexual complementarity and permanence. See David Orgon Coolidge, *Same-Sex marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. Tex. L. Rev. 1 (1997). See also Elizabeth S. Scott and Robert E. Scott, *Marriage as Relational Contract*, 84 Va. L. Rev. (forthcoming 1998): "The Louisiana statute grows out of a widespread dissatisfaction with the current social and legal landscape of marriage and divorce, and a sense that marriage itself is threatened under no-fault divorce law."

*Contra:* Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. Ill. L. Rev. 719. It should be pointed out that Professor Ellman is the Chief Reporter for the American Law Institute's Principles of Family Dissolution and has consistently resisted, and his writings reflect why, the injection of fault into divorce proceedings with one notable exception, physical violence.

19. Maggie Gallagher, *The Abolition of Marriage: How We Destroy Lasting Love* 123 (1996). See *Marriage U.S.A.*, World Magazine (Sept. 19, 1998), in which the recently released figures in "Marital Status and Living Arrangements" by the United States Census Bureau show a steady increase in the number of unmarried couples in America. The article also includes studies by Illinois and Wisconsin researchers describing the bleak outlook for cohabiting couples which prompted Robert Knight of the Family Research Council to comment: "Until we hit rock bottom . . . see the damage . . . it's likely that large numbers of people will continue to live together."


21. David Popenoe & Barbara Dafoe Whitehead, *Cohabitation in America: A Report to the*
words, if marriage is a weak institution, what’s the point of it, a conclusion that has so alarmed Popenoe and Whitehead that they have founded “The Marriage Project” at Rutgers University. Not surprisingly, broken families lead to families that never form.

If a father and a mother committed to each other through lifelong marriage represents the ideal environment for the rearing of responsible, prosperous, and well-adjusted citizens, can the law restore and strengthen the Nation, National Marriage Project at Rutgers, the State University of New Jersey (forthcoming fall, 1998). See also Scott and Scott, supra note 18: “If the state extends privileges and benefits to married couples that are not offered to individuals or cohabiting couples, the value of marriage increases as compared to alternatives, and getting and staying married becomes more attractive.” The authors cite as general authority Eric Posner, The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action, 63 Chi. L. Rev. 133 (1996).

This study essentially undercut Katharine T. Bartlett’s notion of a “family-enabling model of reform” that treats all family structures as potentially desirable, including the cohabitation model, and suggests legal rules to govern such structures (gay and lesbian marriage, etc.). See Bartlett, supra note 7. The “reformers” to which Bartlett refers in the title to her article are trying to save the family from earlier reformers.

See also Allan Carlson, The Family, Public Policy & Democracy: Lessons from the Swedish Experiment, 12 The Family in America (newsletter of The Howard Center for Family Religion & Society, August, 1998): “The central error in the Swedish model lies at the very beginning: in the assumption that the human family is malleable, a derivative social construct ever adjusting to meet new economic conditions, rather than a system rooted in a relatively fixed human nature” Id. at 7.


For a different more inclusive view of family, see, e.g., Bartlett, supra note 7.

23. See Stanton, supra note 9, at 105. He summarizes the findings of the study by Sara McLanahan & Gary Sandefur, Growing Up with a Single-Parent: What Hurts, What Helps (1994), and then quotes them as follows: “Regardless of which survey we look at, children from one-parent families are about twice as likely to drop out of school as children from two-parent families.” McLanahan & Sandefur, id. at 41.

“It is no exaggeration to say that a stable, two-parent family is an American child’s best protection against poverty.” Kamarck & Galston, Progressive Policy Institute, Putting Children First: A Progressive Family Policy for the 1990s, at 12 (1990).

See also David Blankenhorn, Fatherless America (1995).

24. In the “Call to a Civil Society” the result of two years of discussion and drafting and released by the Institute for American Values, on May 28, 1998, the authors, who include Professor Mary Ann Glendon, David Blankenhorn, Professor Don Browning, Professor James Q. Wilson, Senator Dan Coats, and Senator Joe Lieberman, recommend that to renew our democracy morally America should first, increase the likelihood that more children will grow up with their two married parents. One of the specific recommendations that pertains to the family is number 8:

We hope that state legislatures will consider reforming no-fault divorce laws. The twin purposes of reform are lowering the divorce rate and improving the quality of marriage. Ideas for reform include: extending the waiting period for divorce; establishing incentives or requirements for pre-marital education and for marital counseling in cases of at-risk marriages; and, in cases in which only one spouse wants the divorce, requiring the
institution of marriage. Law played an indispensable role in the near-destruction of marriage, so surely it can and must in light of its complicity, contribute to the rehabilitation of marriage—for the sake of the children. How best to restore the ideal of eternal, self-sacrificial love is the question. Although the debate is far from over even in Louisiana, covenant marriage legislation,

establishment of fault. Another potentially promising reform is “covenant marriage” legislation, recently adopted in Louisiana and now being considered in other states, which permits individual couples to opt out of the no-fault system and enter into a legally more binding marriage.

Id. at 19-20 (emphasis added).

25. See Spaht, supra note 2, at 1559-62, in which the author argues that the interrelationship of law and culture, particularly in this country, is symbiotic.

Professor Mary Ann Glendon has always recognized the influence of law on the culture. See Mary Ann Glendon, The New Family and the New Property (1981); Mary Ann Glendon, Abortion and Divorce in Western Law (1987) [hereinafter Abortion and Divorce]; Mary Ann Glendon, A Nation Under Lawyers (1994). “Concerning divorce law in the United States, as Professor Glendon has observed, it has come ‘to embody the idea that termination of a marriage [is] a matter of individual right.’” Spaht, supra note 2, at 1559-60 (quoting Glendon, Abortion and Divorce, supra note 25, at 113).

Even the student author, Melissa Lawton of Note, The Constitutionality of Covenant Marriage Laws, 66 Fordham L. Rev. 2471, 2507 (1998), acknowledges that liberals agree that “law influences how people behave, and individuals perceive other people and institutions. . . .” See also id. at n.320 and authorities cited therein.

26. See Leora Friedberg, Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data, 88 Am. Econ. Rev. 608 (1998). The author observes: “States that adopted divorce laws which were more strongly unilateral had greater increases in the divorce rate. Nevertheless, the evidence shows that adopting any type of unilateral divorce raised the divorce rate.” To the same effect, see Margaret F. Brinig & F.H. Buckley, No-Fault Laws and At Fault People, 18 Int'l Rev. L. & Econ. (forthcoming 1998) (no-fault divorce significantly increased divorce rates because the costs of filing for divorce decreased; study isolated effect of legal variable from other demographic and social factors).


But see Note, supra note 3, at 1435, in which the author argues that the effect of law is limited. In doing so he merely echoes what many academics have said before. See Ellman & Lohr, supra note 18.


WHEREAS, on September 5, 1969, California enacted the first no-fault divorce law and within five years thereof forty-four other states enacted similar legislation; and

WHEREAS, the state of Louisiana also enacted similar no-fault legislation pursuant to which a majority of divorces in this state are granted; and

WHEREAS, Louisiana’s “no-fault” grounds are provided in Civil Code Articles 102 and 103 which simply require that the spouses have lived separate and apart for one hundred eighty days prior to the filing of the rule to show cause, or that the spouses have lived
first introduced in Florida in 1990 and now the law in both Louisiana and Arizona, answers the question by making the ideal a matter of choice—what "communitarians" refer to as "opportuning virtue." In addition to the obvious virtues cultivated by marriage, the selection of covenant marriage encourages the virtue of keeping one's promises, which ironically is required in simple contractual relationships with strangers. Furthermore, because a covenant marriage is a choice made by the couple, the legislation offers the possibility of eventually changing the culture.

To promote the selection of a stronger

separate and apart continuously for a period of six months or more on the date the petition is filed; and

WHEREAS, according to a news release of the American Bar Association, nearly thirty years after no-fault divorce was first introduced in the United States, many state legislators are trying to reinstate fault as a prerequisite for divorce in their states.

THEREFORE, BE IT RESOLVED that the House of Representatives of the Legislature of Louisiana does hereby request that the Louisiana State Law Institute study and make recommendations to the Civil Law and Procedure Committee as to the merits of reinstating fault as a prerequisite to a divorce.

See also S.B. No. 160 (1997 Reg. Sess.) by Senator Max Jordan provided that couples with children under the age of 18 could not divorce without proving fault grounds. The amended bill passed out of Senate Committee Judiciary A without objection but was defeated on the Senate floor by a vote of 12-25.


30. In fact, the Communitarian Network has produced a booklet entitled, Opportuning Virtue: Lessons to be Learned from Louisiana's Covenant Marriage Law: A Communitarian Report (Arnai Etzioni & Peter Rubin eds., 1997). In that publication is an article by Arnai Etzioni entitled How to Make Marriage Matter from Time Magazine, Sept. 6, 1993, at 73, in which he urges the possibility at law of "super-vows" which incorporates the same notion as covenant marriage legislation. See also William A. Galston, Progressive Family Policy for the Twenty-First Century, Building the Bridge: 10 Big Ideas to Transform America 149, 156 (Will Marshall ed. 1997).
Margaret F. Brinig in her article, Brinig, supra note 6, concludes with the observation: "It [covenant marriage legislation] allows the noble sentiments and incentives that lie behind covenant marriage to precommit without completely extinguishing personal freedom. With the covenant alternative in a federal system, contractual alternatives in family law widen considerably, and to good ends."

31. See Joe Loconte, I'll Stand Bayou, 89 Policy Rev. 30, 32-33 (1998), in which the author refers to covenant marriage as a sleeping giant: "Covenant marriage uses both law and civil society to confront couples with the nature of their marriage commitment. Such confrontation could help rewrite our nation's most troubling cultural tale." Id. at 34.

The observation in footnote 131 in Carriere, supra note 3, at 1721, attributed to her colleague Harvey Couch that those who initially select the option of a covenant marriage will be those who are least likely to divorce is at least partially true. As one might expect, those initially opting into a covenant marriage in Louisiana are generally deeply committed Christians. See Jeff Hooten, Tying the Knot a Whole Lot Tighter, 12 Citizen Mag. 6 (1998). However, Christian denominations are not immune from divorce; in fact, the number of divorces in Christian denominations is roughly equal to the overall divorce rate in the United States. Id. at 9.
marital commitment, proponents of covenant marriage must convince each couple of the desirability of covenant marriage, which requires intensive missionary work, winning converts one couple at a time.

This article explores how covenant marriage legislation attempts to strengthen marriage through the legal commitment of “covenant couples.” By their example and public discussion of the optional covenant marriage, the cultural perception of marriage could gradually shift to the point of acceptance of a new, yet at the same time very old, paradigm—lifelong marriage. Then the author discusses in detail the provisions of the covenant marriage legislation and the legal implications of its enactment on Louisiana divorce law. In the process, the author will address some of the criticisms of the covenant marriage legislation published elsewhere. It is

Christopher’s view of marriage and divorce is best reflected in the passage in Mark 10: 2-12, in which Jesus is addressing his disciples about his statements concerning divorce.

32. The importance of public debate of the disintegration of marriage and the consequences of divorce for society is largely overlooked in the articles written criticizing the covenant marriage legislation. For example, in Carriere’s article, supra note 3, she dismisses the effectiveness of the legislation because the numbers of couples selecting the option thus far are small and probably self-selecting. See No Honeymoon for Covenant Marriage, Wall St. J., Aug. 17, 1998; Covenant Marriage: Some Do, More Don’t, Times Picayune, Aug. 17, 1998. One need only consider how effective the recent public discussion (and in some cases misinformation) about the evils of tobacco has been. Another example was the public discussion ensuing over civil rights during that movement.

Ultimately, whether the option of covenant marriage can change the cultural attitude of the citizens of Louisiana and Arizona toward marriage and divorce will be determined. The National Science Foundation and The Center for the Family at Brigham Young University are financing the proposed five-year empirical study of Professors Steve Nock at the University of Virginia, Laura Sanchez at Tulane University, and Jim Wright at Tulane University of the proposition, “Can Louisiana’s (Arizona’s) Covenant Marriage Law Solve America’s Divorce Problem?” (emphasis added).

Others interested in “The Marriage Movement” hope to ignite the public debate using a community marriage policy (see discussion in infra note 56): “In public discourse, marriage is the ‘M’ word,” says Theodora Ooms of the Family Impact Seminar, in Washington, D.C. ‘Nobody talks about it.’ So we are using the new marriage policy as a way to begin a public dialogue.” Roger Sider, Grand Rapids Erects A Civic Tent for Marriage, 6 Policy Rev. 6-7 (July-Aug. 1998).


34. For example, Carriere, supra note 3; Note, supra note 3 (the effect of law on culture and the principal arguments of the student author introduced with this sentence, “The child-centered case against no-fault divorce, like the view it opposes, rests on a distinctive vision of human nature and legal authority. . . .”, is addressed by the author elsewhere in Spsh, supra note 3); Comment, supra note 3. See also Bartlett, supra note 7.

One criticism will not be addressed and that is that no one knew about the legislation (Stealth Anti-Divorce Weapon, ABA J., Sept. 1997, at 28) because it is addressed elsewhere (Katherine Shaw Spah, Why Covenant Marriage? A Change in Culture For the Sake of the Children, 46 La. B.J. 116 (Aug. 1998) (hereinafter Why Covenant Marriage?) and because in both Carriere’s article and the student comment in the Loyola Law Review the authors cite numerous newspaper articles written during the period of time when the legislature was considering the covenant marriage legislation and published in the two largest newspapers in the state, The Times Picayune and The Advocate. Every single one of the articles, consisting of editorials and op-ed pieces, opposed the enactment of the legislation.
remarkable in some cases—the American Civil Liberties Union—and predictable in others—family law attorneys, feminists, and other liberal

Furthermore, to the criticism that the legislation was enacted in haste, the author’s response is that that observation is simply not true and I was there. Secondly, to the criticism that other approaches should have been adopted, such as a mandatory scheme (see Note, supra note 3, at 1441, my response is “been there, tried that.” See supra note 27, describing a Senate Bill introduced during the 1997 session that would have imposed a scheme disallowing no-fault divorce if the couple had minor children. Third, to the criticism that the Law Institute should have been involved (see Comment, supra note 3), my response is “been there, tried that, too.” See Katherine Shaw Spaht and Kenneth Rigby, The New Divorce Legislation: Background and Commentary, 54 La. L. Rev. 19, 20 (1993).

35. The only testimony offered in opposition to the covenant marriage legislation came from the American Civil Liberties Union. Liberties is highlighted because this august organization that protects our most precious liberties, such as the right to abort one’s fetus, would deny two people the liberty to contract a more binding marriage.

In Note, supra note 25, at 2508, the author states: “The American Civil Liberties Union (‘ACLU’) takes another liberal view, arguing that covenant marriage laws are an impermissible joiner of church and state insofar as the legislation incorporates Christian values into law. The ACLU asserts that the term ‘covenant’ has biblical connotations and promotes marriages found in the Bible, complete with a dominant husband and submissive wife. Indeed, the original legislation was proposed by a Promise Keeper, and graduate of Liberty University.” Of course, the author of this article drafted the legislation and testified in favor of it in both legislative committees.

A staff attorney for the ACLU described the covenant marriage law as a “‘Trojan horse’ that would, in some cases, harm children by holding them hostage to bad marriages.” Note, supra note 33, at 282 n.125.

36. After passage of the legislation, members of the family law section of the Louisiana State Bar Association attacked the bill. See The Stealth Anti-Divorce Weapon, supra note 34, at 28, quoting Randy Fuerst, an attorney in Lake Charles. See infra discussion in text at notes 90-94.

37. Hard-core feminists are reported to be in opposition to covenant marriage legislation because they “find that the legislation’s efforts to protect women from divorce demeaning, or worse, dangerous.” Note, supra note 25, at 2508-11. “Covenant marriage laws fail to address ‘the potential for oppression between the individual and other forms of organized social authority,’ such as the family.” Id. at 2510. This one sentence best sums up the feminist view of marriage and family—oppressive. Another example is the Note, supra note 33, at 280:

Despite the fact that divorce generally resulted in a financial disadvantage for women, the change from fault to no-fault FORCED women to become better educated, more marketable, and consequently, more financially independent. To revert to a traditional, fault-based divorce system would ENCOURAGE women to resume traditional gender roles, which emphasize the financial dependence of women on their spouses.

(Emphasis added). Unlike these women, the author desires to offer women a choice.

The feminists’ ultimate agenda is best described in Carolyn Graglia’s, Feminism Isn’t Antisex. It’s Only Antifamily, Wall St. J., Aug. 6, 1998:

The founding principle of NOW was that women should abandon homemaking and child-rearing and enter the workplace so as to become economically and politically independent from men. Child care in the words of one critic of the domestic role is “boring, tedious, and lonely”; being financially dependent on a husband is “irksome and humiliating.” . . . Since their own interest in marriage was minimal, feminists encouraged women to abandon the ideal of chastity and even of marital fidelity. . . .

Mrs. Graglia is also the author of an excellent new book on the subject of the feminist agenda entitled Domestic Tranquility: A Brief Against Feminism (1998).
groups— who opposes a mere optional form of marriage and why, a form which is entirely voluntary and chosen by the couple.

II. IMMEDIATE OBJECTIVES OF THE COVENANT MARRIAGE LEGISLATION AND HOW THE LEGISLATION ACCOMPLISHES THOSE OBJECTIVES

As much as we honor the institution of marriage, it would seem that we should equally condemn divorce, for divorce is the enemy of marriage.  

Divorce, it is said, shatters the standing of marriage. It is dangerous to make the conjugal bond too fragile. Marriages are contracted with a light heart, if the couple feel that there is a way out. The objection [that divorce shatters the standing of marriage] is decisive when divorce is permitted, at pleasure, as it was the divorce of the Romans.

A. Strengthening Marriage

The first and foremost objective of the covenant marriage legislation is to strengthen the institution of marriage, principally for the sake of the children. The legislation proposes to accomplish that objective by (1) mandatory pre-marital counseling which stresses the seriousness of marriage and the expectation that the couple’s marriage will be lifelong; (2) a legally binding agreement in the

38. Other liberal views in opposition to covenant marriage legislation are described as those views which highly value individual autonomy and free choice. Note, supra note 25, at 2507-09.


40. Id. at 878.


43. The agreement of husband and wife to “take all reasonable steps to preserve the marriage, including marital counseling” is a legally binding contract permitted and sanctioned by the state as a limited exception to the fundamental principle that the personal obligations of the marriage contract may not be altered by the parties. La. Civ. Code art. 86, cmt. (b); La. Civ. Code art. 1968. Generally, the personal obligations of husband and wife, including when the marriage terminates,
Declaration of Intent that if difficulties arise during the marriage the spouses will take all “reasonable efforts to preserve the marriage, including marriage counseling”44 and (3) limited grounds for divorce making termination of the marriage depend on either misconduct by a spouse within the marital relationship 45 which society collectively condemns, or a lengthy waiting period of two years living separate and apart.46 Each of these three legal mechanisms in combination, it is hoped, will achieve the laudable purpose of strengthening marriage; and each will be addressed separately in the sections of this article that follow.

B. Revitalizing Mediating Structures: Inviting Religion to Assist In Preserving Marriages

Another less obvious objective of the legislation, which is reflected in who may perform the mandatory pre-marital counseling, is to revitalize and reinvigorate the “community” known as the church. Reinvigoration results from inviting religion back “into the public square”47 for the purpose of performing a function for which religion is uniquely qualified—preserving marriages. A minister,48

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45. La. R.S. 9:307(A) and (B) (Supp. 1998), such as adultery, conviction of a felony and sentenced to imprisonment at hard labor or death, abandonment for one year, physical abuse of a spouse or a child of the parties, and a legal separation for cruel treatment (mental cruelty) or habitual intemperance that renders the life together insupportable plus an additional one year or one year and one hundred eighty days of living separate and apart. See infra discussion in text at notes 280-458.
46. La. R.S. 9:307(A)(5) (Supp. 1998). This ground for divorce in a covenant marriage is considered to be an example of unilateral no-fault divorce. The significant difference between unilateral no-fault divorce in a “standard” Louisiana marriage and that in a “covenant” marriage is the lengthier waiting period of one year and one-half in a “covenant” marriage. Thus, the two-year waiting period significantly slows down the process of divorcing when compared to the 180-day waiting period for divorce in a “standard” marriage. La. Civ. Code arts. 102, 103.
48. Generally, a minister is understood to be the clergyman in a church of a Protestant denomination—Baptist, Methodist, Pentecostal.

The Louisiana Baptist Convention (Southern Baptist) adopted a resolution on November 17, 1997, endorsing covenant marriage and encouraging their ministers to use it as any other tool in strengthening marriage. The National Southern Baptist Convention in Nevada adopted a similar resolution in June, 1998, encouraging their members from states other than Louisiana and Arizona to encourage the introduction and passage of covenant marriage legislation in their states. By contrast, Dan E. Solomon, Bishop of the United Methodist Church in Louisiana released a statement on June 27, 1997, essentially describing the legislation as intrusive and redundant (on file with the author). Other evangelical Protestant denominations such as the Pentecostals and Assemblies of God have wholeheartedly endorsed covenant marriage.
priest,\textsuperscript{49} or rabbi\textsuperscript{50} may perform the required pre-marital counseling, just as any of them may perform the ceremony.\textsuperscript{51} Likewise, as in the case of performance of the ceremony,\textsuperscript{52} the legislation provides a secular alternative to who may provide the counseling, a marriage counselor.\textsuperscript{53} Preventing bad marriages or identifying potential areas of disagreement through serious pre-marital counseling requires intensive one-on-one attention. Furthermore, the work of preserving marriages through counseling when difficulties arise necessitates the same time-consuming personal investment which a minister, priest, or rabbi can perform well, not only by virtue of the commitment of his time, but also by virtue of his moral authority. The religious cleric communicates in both types of counseling sessions the religious view of marriage and the "community's"\textsuperscript{54} expectation that the couple will devote serious effort to preserving their marriage.

Because the legislation "invites" religion back to the public square, the legislation is careful not to "dictate" the content of the counseling beyond its basic contours.\textsuperscript{55} Furthermore, the legislature refused to dictate a fixed amount

\begin{itemize}
\item \textsuperscript{49} Priest clearly includes a Catholic and Episcopal clergyman.
\item The Catholic Bishops of Louisiana issued a Pastoral Statement on October 29, 1997, recognizing the commendable concern of the legislature for the permanence and stability of marriage by enacting the Covenant Marriage Act. Nonetheless, the statement continued:

Because there are elements in this particular Covenant Marriage Act which require those preparing couples for marriage to offer instruction on divorce contrary to the Church's teaching, Catholic ministers preparing couples for marriage will concentrate their focus on the Church's responsibility and teaching. The task to offer guidance with regard to the specifics of the Covenant Marriage Act will then be left to those who render this service in the name of the State. It would be inappropriate for those ministering to couples preparing for marriage in the Catholic Church to confuse or obscure the integrity of the Church's teaching and discipline by also providing this service, contradictory to Church teaching and mandated by this state law.

(On file with author).

By contrast, the Episcopal Bishop-Elect Charles Jenkins of Baton Rouge was quoted in the newspaper on October 30, 1997, as saying the following: "By bringing couples in covenant marriages back to a fault-based divorce system, with the cynicism and occasional collusion for the sake of a divorce, 'it goes back to the bad old days regarding divorce and dissolution of a household,' Jenkins said. 'We've been there; it doesn't work. Those old ideas compromised the moral character of couples, they compromised the integrity of judges, courts and attorneys.'" Bruce Nolan, Bishops Back Off Covenant Marriage, Times-Picayune, Thursday, Oct. 30, 1997, at A1.

\item No rabbi or other official of the Jewish faith has issued a formal statement; however, the Times-Picayune reports that Jewish leaders had already signaled little support for the new civil contract. See Nolan, supra note 49, at A1.


\item Id. at (2). A state judge or justice of the peace is permitted to perform the marriage ceremony.

\item Discussion of who is a marriage counselor under the statute appears in infra text at notes 112-120.

\item The "community" as used here refers not only to the congregation of the church or temple but also the larger society in which the couple lives, including their neighborhood, social circle, or city.

\item The basic contours consist of an emphasis on the seriousness of marriage, the intention of
of time for the pre-marital counseling, the reason being that to do so would be unnecessarily intrusive. Many religious denominations already have extensive pre-marital counseling programs in place, such as the Catholic Church's Pre-Canna, the Prep Course, or the Prepare Inventory. The latter two pre-marital counseling programs are attracting increased attention, particularly in those communities which have adopted a "Community Marriage Policy," such as Modesta, California; Austin, Texas; and Grand Rapids, Michigan. With the creation of the nascent national organization, Marriage Savers, which promotes pre-marital counseling, such serious, extensive programs will increasingly be initiated by religious denominations. Thus, criticism of the pre-marital counseling component of the legislation as "shallow" and lacking in rigorous content and time specifications fails to recognize that the "omission" was calculated to avoid serious objections from those issued an invitation to assist in preserving marriages.

the couple that it be lifelong, and an explanation of the differing grounds for divorce explicated in the Attorney General's pamphlet entitled "The Covenant Marriage Act." See infra discussion in text at notes 97-128.

56. Dr. Roger Sider in his article Sider, supra note 32, at 6-7, describes their community marriage policy:

These figures [divorce rate and percentage of children who grow up without married parents under the same roof] got the attention of a group of local citizens: a mayor, a pastor, a social worker, and myself, a psychiatrist. Each of us had become alarmed at the mounting toll exacted by the erosion of marriage in western Michigan, especially on children. In fall 1996, we set out to establish a community marriage policy, modeled on programs enacted in 86 cities across the nation, to give children a better chance of growing up in stable, two-parent homes.

Most other community marriage agreements rely heavily on churches to raise the bar for wedlock. Their strategies often include premarital counseling for engaged couples. That's a vital step, but we're going much further: In Grand Rapids, we are erecting a large civic tent under which a variety of community leaders—not only clergy but also political, medical, business, and judicial figures—come together to strengthen marriage.

The policy sets three goals to be achieved within 10 years: reduce the divorce rate by 25 percent, reduced by 25 percent the number of children growing up without the benefit of married parents in a stable home, and establish thorough preparation for marriage as a community norm.

Michael McManus, the author of MARRIAGE SAVERS (1995) and the architect of the community marriage policy concept points out that churches and synagogues are foundational to the policy's success. Because at least 75 percent of our community's weddings take place in churches, our clergy and our congregations have both a special responsibility and a special opportunity to revitalize marriage.


58. See extensive discussion in supra note 54.

59. See supra note 56. Marriage Savers is headed by President, Mike McManus and Director, Kent Dyer, 8500 Michael's Court, Bethesda, MD 20817.

60. See Carriere, supra note 3, at 1705-10.
Finally, the covenant marriage legislation seeks to restore some protection and some power to the "innocent" spouse who has kept her promises and desires to preserve the marriage. Unilateral no-fault divorce deprived the "innocent" spouse who desired a continuation of the marriage of any defense to an action for divorce by the spouse who "broke up" the family. Even Herma Hill Kay, Dean of the law school at the University of California, Berkeley, who continues to be an advocate of no-fault divorce law, observed that unilateral no-fault divorce is "closer to desertion than to mutual separation." By lengthening the period of time for a no-fault divorce by one and one-half years, the covenant marriage legislation seeks to provide some protection and some power to the "innocent" spouse.

61. Divorce was also known to have had a greater negative economic effect on women than on men, one reason being that no-fault divorce took away the bargaining power that the innocent spouse, usually the wife, had under the fault system to agree to divorce only in exchange for adequate alimony, child support, and property. By 1997 those who were frustrated in their attempt to better the economic situation of divorced women and those who were newly alarmed over the effect of divorce on children joined forces with those who objected to easy divorce on religious or moral grounds. They united in an effort to try a different approach.

Samuel, supra note 4.

Nevertheless, some commentators portray this bargaining power as the equivalent of blackmail: "A divorce law restricted to fault does harm by preserving legal unions that are emotionally nonviable, creating incentives for evasion and blackmail." Herma Hill Kay, Beyond No-Fault: New Directions in Divorce Reform, Divorce Reform at the Crossroads 6, 36 (1990). But even Dean Kay adds, "A no-fault, no-responsibility divorce law does harm by favoring the economically independent party over the dependent party, creating incentives to distort the law of property in search of just solutions. A framework for a nonpunitive, non-sexist, and nonpaternalistic system of marriage dissolution built on sharing principles can minimize, if not entirely eliminate, the financial harm done by divorce." Id. (emphasis added). See supra note 37 for a description of the feminists' opposition to covenant marriage.

See also Bartlett, supra note 7, at 834-43, in which the author who admits internal conflict as both a traditionalist and a feminist concludes that women and children may have the most to lose from divorce reform. Thereafter, she attempts to make the case principally for women, not children, which suggests her feminist side prevailed.

62. Even Herma Hill Kay acknowledges as much in her article, Kay, supra note 61:

The fault doctrine may have served to lend emotional vindication to the rejected spouse, as well as a measure of financial protection and status as the preferred custodian of children. If so, greater justification may be required in those cases for eliminating that doctrine from the related core areas of support, property distribution, and child custody. But if fault is withdrawn, the party formerly able to invoke that doctrine may be left in a vulnerable position both when negotiating a dissolution agreement and when litigating the matter in court.

Id. at 8.

For an example of the result of no-fault divorce on the spouse who desires to preserve the marriage, see Spaht, Why Covenant Marriage?, supra note 34.

See Ellman & Lohr, supra note 18 for a different view.

63. See Kay, supra note 61.

64. Kay, supra note 61, at 8.
marriage legislation empowers the "innocent" spouse by bestowing upon her the exclusive right to a divorce for a two-year period.\textsuperscript{65}

The "innocent" spouse's bargaining power\textsuperscript{66} can be exercised to insist upon serious counseling in an effort to preserve the marriage, or barring counseling's success, to demand financial advantages for herself\textsuperscript{67} or for her children.\textsuperscript{68} Since the right to receive an interim allowance (alimony pendente lite\textsuperscript{69}) exists at least until divorce\textsuperscript{70} and an interim allowance is ordinarily a larger sum than final spousal support,\textsuperscript{71} the "innocent" spouse who receives such an allowance enhances her already considerable bargaining power during the lengthy two-year period. In addition to the interim allowance, the "innocent" spouse may also have a claim for damages should the other spouse refuse to comply with his obligation to take all reasonable steps to preserve the marriage.\textsuperscript{72} The other spouse who, by his own fault, has "broken up" the family unit must wait two years to seek his own divorce. While he waits, he will be paying a significantly higher sum in spousal support than he will pay after the divorce. He also may be obligated to pay damages for breach of his contract to seek counseling. In

\textsuperscript{65} The grounds for immediate divorce that the "innocent" spouse may have against the other spouse include adultery, abandonment for one year, commission of a felony with a sentence to imprisonment at hard labor or death, or physical or sexual abuse of a spouse or a child of the parties. In addition, she may seek a legal separation for cruel treatment or habitual intemperance and one year or one year and six months later obtain a divorce. See infra discussion in text at notes 280-417.

\textsuperscript{66} The phenomena is described by Robert Mnookin & Lewis Kornhauserin, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L. J. 950 (1979). See also Samuel, supra note 4; Kay, supra note 61, at 8.

\textsuperscript{67} Such as a greater proportion of the community property (but without violating the formula for lesion, see La. Civ. Code art. 814) or a larger sum in final spousal support than she would be entitled to under La. Civ. Code arts. 111-116.

\textsuperscript{68} This is particularly true when the "innocent" spouse is not employed or earns less than the other spouse and the children are approaching majority, the time when children are the most expensive. In Louisiana the obligation to pay support for children 18 years or older is governed by the provisions of La. Civ. Code art. 229. Unlike child support for minor children, support for major children does not include a sum for education (i.e. college education). Furthermore, support is limited under Article 229 to food, clothing and shelter but only if the claimant is unable to support himself. Thus, the "innocent" spouse could exercise her bargaining power to entice the other spouse to agree to support the children during college (i.e. creation of a trust) in exchange for her initiation of divorce proceedings for legitimate grounds before the two year period elapses.

Furthermore, Cynthia Samuel in her article, Samuel, supra note 4, suggests that Louisiana Civil Code article 1976 be amended to remove the prohibition against one's future succession as the object of a contract. If the prohibition is removed, the "innocent" spouse may also exercise her bargaining power to exact a contract to provide for the children at the other spouse's death. See also Comment, supra note 6.


\textsuperscript{70} La. Civ. Code art. 113. See infra discussion in text at notes 444-446. This interim allowance may be claimed from the moment that the spouses begin living separate and apart before any divorce or separation action is instituted. See La. R.S. 9:291 (1991).

\textsuperscript{71} La. Civ. Code arts. 111, 112. Compare the criteria of an interim allowance and that of final periodic support.

\textsuperscript{72} See infra discussion in text at notes 182-279.
addition if he wants to remarry, he will be the especially vulnerable target of this shift in divorce law policy. Even one critic of the covenant marriage legislation acknowledges these advantages, but only in a footnote:

The delay offers two possible advantages to divorcing spouses: First, it permits an economically weaker spouse more time to make financial adjustments by prolonging the support obligation of marriage: and second, it may facilitate reconciliation if the partners marital difficulties are not irremediable.

Precisely.

Both of these "advantages" outweigh critics' concern for increasing acrimony in divorce, which has never been eliminated in Louisiana and now takes the truly venal form of allegations of sexual abuse of a child in a custody dispute. Isn't it preferable for one spouse to accuse the other of abandonment for one year, or even of adultery, than of sexually abusing their child, which

73. A motivation for no-fault divorce, Herma Hill Kay explained, was to remove punishment from the marital dissolution equation: "While the primary objective of the modern American no-fault divorce reform movement was to change the grounds for divorce, related reforms were proposed as well in the laws governing other core issues of family dissolution. These proposals were initially limited to an effort to remove the punitive function formerly performed by the fault doctrine from such questions as alimony, property distribution, and child custody." Kay, supra note 61, at 8. Nonetheless, Dean Kay in the next paragraph admits that fault "may have served to lend emotional vindication to the rejected spouse . . ." Id. At the end of her article, however, she continues to support a non-punitive system of marriage dissolution. Id. at 36.

An important function of law, i.e. tort and contract, is to punish. It seems particularly appropriate to punish a spouse for breaching his promise which was made solemnly and which is of such importance to third parties, principally his children but also to society at large.

74. See Ellman & Lohr, supra note 18, who interpret the circumstances differently.


76. This reducing acrimony in divorce has been the mantra of no-fault divorce advocates since the early 1970's. For example, Herma Hill Kay's observation in Kay, supra note 61, at 8: "It follows that once the marriage is no longer viable, neither its legal existence nor its related legal incidents should become weapons used to obtain revenge for the breakdown or to extort a favorable settlement."

77. Even in "standard" marriages, adultery and conviction of a felony remain as grounds for divorce. La. Civ. Code art. 103. Furthermore, "fault" of the claimant of final spousal support at divorce has always been and remains an absolute bar to its receipt (La. Civ. Code art. 111) and the conduct of a parent, including his moral fitness, has been and remains relevant to child custody determinations. La. Civ. Code art. 134(6). Other examples of issues to be litigated that explore "fault" in divorce proceedings include Post-Separation Family Violence Relief Act, La. R.S. 9:361-366 (1998). See also La. Civ. Code art. 2433 (fault is relevant for entitlement to the marital portion at death).

"Even without covenant marriage fault is still a factor in determining an award of post-divorce spousal support (i.e., post-divorce alimony), thus fault is already litigated in connection with support." Samuel, supra note 4.

78. Louisiana Revised Statutes 9:364 (Supp. 1998) in essence makes allegations of sexual abuse of a child the "atomic bomb" of divorce proceedings. If such sexual abuse can be proved, then the abuser's custody and visitation rights are terminated.
necessitates a physician's intimate examination of the child? Acrimony on account of divorce can never be eliminated unless both parties are in agreement that their relationship is "dead," because otherwise one spouse has been guilty of a violation of trust or a loss of romantic interest in the context of the most intimate of all human relationships. Furthermore, even if the two spouses agree that their relationship is "dead," what about the interest of the children, most of whom desire that their parents remain together, if their interest conflicts with the desires of the two parents?

Restoration of "moral discourse" to divorce law troubles most critics of the covenant marriage law more than any other aspect of the legislation. The "moral discourse" consists of society's collective condemnation of certain, selected conduct within the marital relationship. Returning to objective moral judgments about a spouse's conduct threatens the discredited mantra of libertarians and others that "you can't legislate morals." Of course, "you"


Despite acknowledging that Schneider and Mary Ann Glendon have thoughtful objections to no-fault divorce, Ellman & Lohr, supra note 18, at 734, conclude that:

[o]ne can be sympathetic to many of their points and still support no-fault divorce, for any number of reasons. Unfortunately, however, some of Schneider's and Glendon's observations have been made with phrases easily converted into slogans by others with less nuanced views. A particularly misleading example is the suggestion that no-fault divorce means "no-responsibility" divorce.

Such a suggestion is attributed to Galston, supra note 26, at 18.

80. See, e.g., Carriere, supra note 3, at 1723:

However, relatively few actions within the family are so violative of social norms that the relational context makes no difference to the question of blameworthiness. Western literature is replete with evidence for the proposition that even one party's adultery, while a clear breach of the marital obligation and never a good idea, can occur in a context in which culpability for the breach must be shared by the spouses. (see sources in footnote 140) Compare David Gelernter, Adultery Then and Now, The Weekly Standard 25-28 (Nov. 30-Dec. 7, 1998).

See also Ellman & Lohr, supra note 18. Professor Ellman is particularly vehement about the restoration of fault to divorce proceedings for any purpose. See, e.g., Ira Mark Ellman, The Misguided Movement to Revive Fault Divorce, and Why Reformers Should Look Instead to the American Law Institute, 11 Int'l J.L. Pol'y & Fam. 216 (1997) (Professor Ellman is the chief reporter of the ALI project on Principles of Family Dissolution); Ira Mark Ellman, The Place of Fault in a Modern Divorce Law, 28 Ariz. St. L.J. 773 (1996). His strong aversion to fault explains why the American Law Institute's project, Principles of the Law of Family Dissolution, does not include fault as a relevant factor for purposes of marital property distribution or compensation payments at divorce.

Even social commentators who understand the destructiveness of divorce are in some cases reluctant to suggest a return to fault-based grounds for divorce. See Maggie Gallagher, Barbara Dafoe Whitehead, End No-Fault Divorce?, First Things, Aug.-Sept., 1997, at 24.

81. Or, "[a] good marriage cannot be legislated, because '[a]lmost all couples who marry believe their love is forever and their commitment is for a lifetime. But things sometimes change and people sometimes change. And sometimes, no amount of work or commitment will make a marriage successful."" In Note, supra note 33, at 281 (quoting in note 120 from Difficult Divorces May Add to Misery (Baton Rouge, La.), June 13, 1997, 10 B (editorial)).
can. Congress and legislatures do it every day. Only when the morals to be legislated have the potential of impeding the affected person’s “liberty” to leave his family when he so chooses do we hear objections. Interestingly, the same objection is never made if the legislation concerns elements of contract law—for example, assigning blame for the breach of contract, requiring all contracts to be performed in “good faith,” and assessing damages for breach of contract based upon whether the party breached the contract in good faith or bad faith. Principles of contract and tort law involve moral judgments which most often apply in the context of a relationship between strangers. Why hesitate to make a moral judgment with spouses who have been married for thirty years and have three children?

The return to broader notions of objective fault in divorce and “slowing down” the divorcing process in the covenant marriage legislation represent, as a general trend, the first time in at least two hundred years in any Western country that divorce law has made divorce more difficult rather than easier. Therein lies the historical and cultural significance of the covenant marriage legislation and explains its national and international notoriety. Therein lies the dual threat to notions of “libertinism” disguised in language of “liberty” and to notions of necessary tolerance of pluralistic behavior, what used to be considered anti-social behavior. Therein lies the perceived threat to many divorce lawyers who recognize that covenant marriage could herald the return to the not so good, “good, old days.” In many cases, the “good, old days” meant difficult work gathering evidence of fault in preparation for a trial that might not result in the divorce the client desired, a reduced profit margin per case because

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82. Compare the language used in the newspaper editorial to that of Max L. Stackhouse, Covenant & Commitments: Faith, Family, and Economic Life 159 (1997): “Through covenant they become interlocked structures by which our human propensities to egoism, selfishness, short-sightedness, and carelessness are constrained and the possibilities of altruism, generosity, long-range vision, and engagement are evoked.”
83. “[F]amily standardizing reform [traditional family anchored by husband and wife] threatens the very diversity and notions of individual freedom on which more robust notions of the community and family depend.” Bartlett, supra note 7, at 818 (emphasis added).
84. Even more pronounced are the moral judgments made in the context of tort law. La. Civ. Code art. 2315.
87. La. Civ. Code art. 1996. See also comment (b) for a definition of bad faith that requires proof of intention and maliciousness.
90. Presently, to obtain a divorce under the provisions of Louisiana Civil Code article 102 requires only the filing of pleading forms that can be stored on a computer disk and names
clients simply could not pay the costs of extensive litigation, and, potentially, diminished professional stature because of the daily pursuit of the salacious. Despite expressed concern about the return to a practice of widespread perjury by covenant spouses who want a divorce, there was never proof of such a widespread practice in Louisiana. Of course, as to perjury the judiciary and the attorneys bear some responsibility. Even though perjury should surely be condemned, the fraud upon the court did at least require cooperation of both spouses and precluded the current practice of legalized desertion by one spouse.

Permitting one spouse to effectively destroy a family unit of five persons without good reason and without significant consequences has had a corrosive effect on our society. As evidence mounts of the social destruction in the wake of surging divorce rates and now surging cohabitation rates, responsible policy makers can no longer simply wring their hands in despair and helplessness. Action is required. Covenant marriage legislation, hopefully, is only the beginning of the resurgence of interest in and protection of the institution of marriage—the foundation upon which the “family” is built.

substituted. One hundred and eighty days later, the attorney files another form that also may be stored on a computer disk and names substituted. There need be no hearing to prepare for (La. Code Civ. P. art. 3956) and there is but one defense—reconciliation which requires proof of an intention to resume the life in common. La. Civ. Code art. 104.

Compare the time and effort of the attorney in the preparation of the forms required for a divorce under Louisiana Civil Code article 102 and that required to prove a case of adultery at a trial. The attorney’s time is ordinarily expensive, but his client who is now living separate and apart from the other spouse has almost double the expenses he had before the separation and ultimately, “you can’t get blood out of a turnip.” See also Alan J. Hawkins, Perspectives on Covenant Marriage, 12 The Family in America 1, 4 (Nov. 1998).

But see Samuel, supra note 4: “Covenant marriage will not add much to the expense of divorce in Louisiana. Even without covenant marriage fault is still a factor in determining an award of post-divorce spousal support (i.e., post-divorce alimony), thus fault is already litigated in connection with support.”

Carriere, supra note 3, at 1743-44. The possibility of perjury as to the type of marriage contracted can be solved relatively easily by the requirement that a copy of the marriage certificate be attached to the petition for separation or divorce.


New York is always cited as the example of rampant perjury in divorce cases because New York was and continues to be one of the states with the strictest divorce laws in the country.

See Samuel, supra note 4: “Some of these problems festered in part due to the lenient attitude of lawyers and judges toward divorce at a time when the legislation was strict as to all couples. But when a couple has voluntarily chosen a strict regime of divorce after premarital counseling on the subject, there is no justification for the lawyer or judge to manipulate or allow manipulation of the law or evidence to effect a divorce for such a couple. . . .” The “problem” of perjured testimony is one that addresses itself to the lawyers and the judges.

See Spah, Why Covenant Marriage?, supra note 34.

However, not for the reasons Katharine Bartlett describes in her article, Bartlett, supra note 7, at 816:

This Lecture [Brigitte V. Bodenheimer Memorial Lecture on the Family] is about marriage. That does not mean that I believe marriage is the only appropriate vehicle for
III. **FIRST DISTINGUISHING FEATURE: MANDATORY PRE-MARITAL COUNSELING**

Opponents of divorce law reform often counter legislative attempts to make divorce more difficult by urging more onerous requirements for marriage. Proponents of strengthening marriage typically offer pre-marital counseling as an educational \(^9\) obstacle to a hasty, precipitous decision to marry. The most popular bill to strengthen marriage introduced by Michigan state representative Jesse Dahlman offered the incentive of a reduction in price for a marriage license to a couple who would submit to pre-marital counseling. \(^9\) During the 1998 session, the Florida Legislature passed an act that provides the same sort of incentive as Representative Dahlman’s bill to submit to pre-marital counseling. \(^9\)

For covenant couples, pre-marital counseling is mandatory.

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raising children or nurturing adults; my view is, rather, that marriage is worth strengthening because its popularity and its associations with familial responsibility and commitment to others make it too beneficial a resource to abandon.

Obviously, such a view is reflective of what Professor Bartlett describes at the beginning of her article: "The dissonance between my attachment to tradition and my feminism creates the perspective from which I examine public debates about family and values." *Id.* at 811.

See Midge Decter, *The Madness of the American Family*, Pol’y Rev. 33 (Sept., Oct. 1998) ("In a recent talk, author and social critic Midge Decter asked why the wealthiest and healthiest country on earth has such nutty ideas about the family").

97. Educational options are always favored by the same persons who strenuously oppose any changes in the law which permit autonomy of the individual (license). As a consequence “education” about virtually everything has grown from a “cottage” to a “nationalized” industry. At the same time the public wrings its hands because primary and secondary education in this country have failed in its responsibility to teach our children basic skills.

98. Michigan House Bill No. 5217, 89th Legis., Reg. Sess. (Mich. 1997); S. File No. 2935, 89th Legis., Reg. Sess. (Mich. 1997). The most controversial of her bills was the bill to repeal unilateral no-fault divorce. It was the centerpiece of her legislative package and the first legislative initiative to receive national attention.

Neither measure passed the Michigan legislature and by virtue of term limits Representative Dahlman, a truly courageous female legislator, no longer may continue her quest to end the tragic consequences of no-fault divorce for Michigan citizens.


In addition another provision of the same legislation requires that a course in life management skills (1/2 credit), which would include among the other components *marriage and relationship* skill-based education, be taught to high school students as a graduation requirement. Fla. Stat. ch. 232.6 (eff. Jan. 1, 1999). Unfortunately, the bill does not require that “marriage” and its benefits be extolled, and the legitimate fear based upon past experience is that any curriculum added to the high schools in Florida will treat all “relationships” as of equal value. Thus, conflict resolution skills taught as a part of this curriculum, much like the PARTNERS program developed by the American Bar Association, will relate to all types of relationships, rather than emphasize the use of those skills to prolong and strengthen a couple’s *marriage*.

Another component of the Act is the creation of a Family Law Handbook to be prepared by the Family Law Section of the Florida Bar Association which would detail the rights and obligations of
Mandatory pre-marital counseling insures not only that an "educational" obstacle to hasty marriage is erected, but also that two documents be executed and signed by the couple, the counselor, and a notary attesting to the fact that the counseling did occur. A covenant marriage, consistent with the legal understanding of covenant at common law, represents the rough equivalent of an agreement that requires greater formality and limits defenses to the agreement that may be raised by the signatories. Covenant: religious "overtones," of course. In his book, Covenant & Commitment, Max L. Stackhouse, opines:

The sociotheological idea of covenant is so rich with ethical content that it gives moral meaning to all it touches. . . . [A] covenant shifts the terms of . . . relationships. It is not cut casually, for it entails not only celebration and sacrifice but also the incorporation of new shared duties and rights that nourish life with other meanings, and thus a sense that these duties and rights are based on an enduring law and purpose as established by a higher authority.

Covenant marriage legislation responds to the opponents of divorce law reform by using mandatory pre-marital counseling and the execution of documents in the presence of a notary "to make marriage more difficult" and the commitment more serious.

A. Who Is a Counselor?

Just as they may perform the marriage ceremony, a minister, spouses, including property law and divorce law, and be available in the Clerk of Court's office. Fla. Stat. ch. 741.0306 (eff. Jan. 1, 1999).


101. Black's Law Dictionary (4th ed. 1968) defines covenant as "[a]n agreement, convention, or promise of two or more parties, by deed, in writing, signed, sealed, and delivered, by which either of the parties pledges himself to the other that something is either done or shall be done, or stipulates for the truth of certain facts. . . ."

102. See Comment, supra note 3.

103. See Witte, supra note 1.

104. Stackhouse, supra note 81, at 140.

105. Id. at 142.


107. Ordinarily, the term minister is used to refer to the leader of an individual Protestant church—for example, a Baptist minister. The Southern Baptist denomination adopted resolutions at both their state convention in November, 1997, and at their national convention in June, 1998, endorsing covenant marriage legislation in Louisiana and legislative attempts to adopt similar legislation in other states.

The Methodist Bishop for the region that includes Louisiana issued a statement labeling covenant marriage legislation "unnecessary," "confusing," and "intrusive." Press release from the Louisiana
priest,\textsuperscript{108} rabbi,\textsuperscript{109} or other clergyman of a religious sect may perform the pre-marital counseling required for a covenant marriage. In matters of marriage in the United States,\textsuperscript{110} religious figures have traditionally been authorized by the state to perform marriages which are entitled to recognition under secular law. There has never been a clear separation between church and state in matters of celebration of marriage.\textsuperscript{111} Yet, both for performance of the ceremony or for pre-marital counseling prior to a covenant marriage, the Louisiana legislation offers a secular alternative.\textsuperscript{112} The section of the Revised Statutes that

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Area United Methodist Church (June 27, 1997) (on file with author). See Church Leaders Debate "Covenant Marriage," Interpreter 15 (May-June 1998), a publication of the United Methodist Church. Methodists who are not members of the National United Methodist Church are celebrating and encouraging covenant marriages.

Evangelical Protestant denominations, such as Assemblies of God and Pentecostals, have likewise embraced the concept of covenant marriage, and some individual churches require a covenant marriage license for the marriage to be celebrated in their sanctuary or chapel. The requirement reflects their belief that the covenant marriage more nearly represents their religious view of marriage. The author of the student comment, Comment, supra note 3, at 435 n.69, labels as bias such a morally consistent position.

\textsuperscript{108} The category of priest would include a priest in the Catholic Church. However, the Catholic Bishops of Louisiana issued a pastoral statement in October, 29, 1997, which commended the concern of the legislature for strong and stable marriages but refused to permit their priests to offer instruction on divorce, as the Act requires, contrary to the Church's teaching (on file with the author). See Nolan, supra note 49.

Priest may also include a priest in the Episcopal Church. Unlike the Catholic Bishops, Bishop Charles Jenkins in a statement issued in October, 1997, surprisingly objects to covenant marriage because:

By bringing couples in covenant marriages back to a fault-based divorce system, with its cynicism and occasional collusion for the sake of a divorce, "It goes back to the bad old days regarding divorce and dissolution of a household," [Bishop] Jenkins said. We've been there; it doesn't work. Those old ideas compromised the moral character of couples, they compromised the integrity of judges, courts and attorneys.

\textit{Id.}

\textsuperscript{109} Although no official statement has ever been issued by a Jewish rabbi, the Times-Picayune reported that Jewish leaders already had signaled little support for the new civil contract, but no official statement was ever issued or reported identifying the Jewish leaders. \textit{Id.}

\textsuperscript{110} European practice is quite different and requires a civil ceremony before a civil magistrate for state recognition; a religious ceremony is purely optional. See Katherine Shaw Spaht, Family Law in Louisiana 1-2 (2d ed. 1998). \textit{See also} Witte, supra note 1; Glendon, Abortion and Divorce, supra note 25.

\textsuperscript{111} See Note, supra note 25, at 2504 n.306:

If opponents of the law argued in court that covenant marriage violates the Establishment Clause, the argument would not likely go far as there is evidence that many churches reject covenant marriage . . . The Court [in \textit{Harris v. McRae}] rejected this argument [violation of separation of church and state], holding that "it does not follow that a statute violates the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or all religions.'"

The student author also concluded that covenant marriage laws did not violate the due process or equal protection clauses of the Fourteenth Amendment to the United States Constitution.

describes the secular alternative to a clergyman uses the term *marriage counselor.*\textsuperscript{113} The term is not defined in the covenant marriage legislation, nor elsewhere in the Revised Statutes where the term is used—for example, as a mediator in child custody disputes.\textsuperscript{114} Even though the jurisprudence has yet to define *marriage counselor,\textsuperscript{115} the Louisiana statutes governing the licensing of professional counselors provide insight as to the qualifications for counselor. A “licensed professional counselor” renders “service to the public in the mental health counseling area.”\textsuperscript{116} Mental health counseling encompasses “assisting an individual or group, through the counseling relationship, to develop an understanding of personal problems, to define goals, and to plan actions. . . .”\textsuperscript{117} To be licensed as a professional counselor requires a minimum of three thousand hours of supervised experience during “a minimum of two years of post-master’s degree experience in professional mental health counseling”; passage of a written, and possibly an oral, examination; a graduate degree “the substance of which is professional mental health counseling in content. . . .”\textsuperscript{118} As Professor Carriere accurately observes in her article in the Tulane Law Review, “the state places no restrictions on who may qualify to act as a ‘marriage counselor’; at present, Louisiana does not require one to have a license to assume that title.”\textsuperscript{119} In the footnote, she reports that the Louisiana Association for Marriage and Family Therapy “plans to introduce licensing legislation in the 1999 legislative session.”\textsuperscript{120}

B. Content of the Counseling

The covenant marriage legislation imposes only minimal requirements for the content of the pre-marital counseling which include a discussion of: (1) the


\textsuperscript{115} There have been no reported appellate court cases interpreting the term, *marriage counselor,* in the statute that imposes qualifications for mediators. However, the statute qualifies *marriage or family counselor* with the adjectives licensed or certified. \textit{Id.}


\textsuperscript{118} La. R.S. 37:1107 (1988 and Supp. 1998). The specific requirements, particularly educational, are detailed and fairly onerous. In addition to the eight required areas of study of at least one semester, \textit{Id. at (A)(8)(b)}, one of the two areas encouraged for inclusion in graduate training is “marriage and family studies.” \textit{Id. at (A)(8)(c).}

\textsuperscript{119} Carriere, supra note 3, at 1708.

\textsuperscript{120} \textit{Id.} at n.41.
seriousness of marriage; (2) the intention of the couple that their marriage be lifelong; (3) the agreement of the couple that they will “seek marital counseling in times of marital difficulties”; and (4) the limited grounds for divorce in a covenant marriage [when compared to a “standard” marriage as explained in “The Covenant Marriage Act.”]. 121 The legislature imposed minimal requirements purposefully, as has already been explained, 122 because the object was to invite religion back into the public square to lend its assistance to preserving marriages, not to dictate the manner in which religion had to assist.

The first three elements of content required in the pre-marital counseling appear in the declaration of intent signed by the parties. 123 Explaining that in a covenant marriage the grounds for divorce are limited was a requirement added by amendment in the Senate Committee on Judiciary A. It was the understanding at the time the amendment was offered and passed that the explanation of the law of divorce was to be in a pamphlet prepared by the Attorney General, 124 patterned after a similar pamphlet explaining community property law also distributed to applicants for marriage licenses. 125 The senators knew that virtually all of the counselors utilized by prospective covenant couples would be religious and thus not trained in the law. 126 Suggestions that “a person trained in the law or . . . schooled in the intricacies of the law governing marriage and divorce should explain the differences. . . .” 127 was never seriously entertained by any legislator. If such a requirement were imposed for covenant marriage, then someone trained in the law would have to explain an apartment lease, a waiver form signed in a doctor’s office, and analogously, the information contained in the pamphlet concerning community property law.

Until the covenant marriage legislation required the distribution of the pamphlet, “The Covenant Marriage Act,” nothing explained the Louisiana law of divorce to applicants for marriage licenses. No applicant was informed that either spouse could end a thirty-year marriage by filing a petition and living separate and apart from the other for one hundred eighty days. 128 Now, all of

122. See supra discussion in text at note 55.
126. Nonetheless, the requirement that the counselor explain the grounds for divorce prevented the priests in the Catholic Church in Louisiana from fully participating in a movement designed to strengthen marriage. The tragedy is that by comparison to the “standard” marriage in Louisiana, a covenant marriage more closely conforms to the Catholic Church’s understanding of Christian marriage. At a time when the Church’s annulment practices are under attack Catholics would have benefitted by embracing covenant marriage and promoting it for its faithful. See Shelia R. Kennedy, Shattered Faith (1997) (criticizing the Church’s annulment practices).
127. Comment, supra note 3, at 435. See also similar criticism in Carriere, supra note 3, at 1708-10.
a sudden, critics express concern that couples who wish to commit to a stronger form of marriage, and only those couples, must be fully informed by one trained in the law about grounds for divorce. The Florida legislature enacted legislation in 1998 that requires an applicant for a marriage license receive a pamphlet prepared by the Family Law Section of the Florida Bar Association explaining the Florida law of divorce. The covenant marriage law accomplished this objective for the state of Louisiana without separate legislation.

C. Necessary Documents for Covenant Marriage

Two documents available in the local Clerk of Court’s office must be presented to the Clerk: (1) Declaration of Intent by the couple; (2) an affidavit by the couple and the counselor accompanied by the notary’s signature. As a general matter, the Declaration of Intent signed by the wife and the husband constitutes a special contract ("covenant") between them, not merely a declaration of the couple’s aspirations. However, in practice and in its expression, the clause of the Declaration that states the intention of the couple that their marriage be lifelong is admittedly aspirational because more specific legislation permits grounds for termination of the marriage other than death. Nonetheless, the declaration signed by the couple containing their...

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129. See Florida legislation creating a Family Law Handbook to be distributed in every Clerk of Court’s office in Florida.

130. Two documents are required whether the couple is to be married for the first time or is already married and is converting to a “covenant” marriage; however, the Declaration of Intent signed by a couple not yet married (La. R.S. 9:273(A)(1) (Supp. 1998)) and the Declaration signed by an already-married couple (La. R.S. 9:275(C)(1)(a) (Supp. 1998)) differ.


133. But see Carriere, supra note 3, at 1712: A more likely intent on the part of the legislature was to provide a statement of the aspirations of the parties to a covenant marriage. The commitment to seek marital counseling occurs in the declaration of intent, in the midst of other statements couched as agreements and promises, but conveying aspirations, rather than constituting binding contracts.

Two other authors recognized the obligation as legal but assumed that the obligation was a prerequisite to filing for divorce. See Comment, supra note 3, at 436-38. See also Samuel, supra note 4, at n.20: “Treatment of the counseling agreement as aspirational rather than as a requirement would solve this problem [danger of counseling in physical abuse cases], but La. R.S. 9:307A appears to make counseling a requirement before the judgment of divorce can be obtained.” See infra discussion of Louisiana Revised Statutes 9:307A in text at notes 183-197.

134. See La. R.S. 9:273(A)(1) (Supp. 1998): "We do solemnly declare that marriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live."

135. See La. R.S. 9:307(A) (Supp. 1998). See infra discussion in text at notes 312-320 concerning the inability to dissolve covenant marriage by mutual consent as is possible in an ordinary contract.
expressed intent to achieve the ideal of lifelong marriage communicates a powerful message which should not be under-estimated.

By contrast, the agreement that if difficulties arise during the marriage, the couple will “take all reasonable efforts to preserve [their] marriage, including marital counseling,” constitutes a contractual obligation. Permitting such an agreement departs from the general principle that spouses’ personal obligations during marriage are matters of public order from which they may not derogate by contract. The legislature recognized that public order demanded this exception as a means to legally compel spouses who agree to take reasonable steps to preserve their marriage.

D. Grounds for Annulment of Covenant Marriage

A spouse may annul a covenant marriage for the same reasons as a spouse in a “standard” marriage: a legal impediment, no marriage ceremony, and legal compulsion.

136. See discussion in text at notes 2-16 concerning the benefits of lifelong marriage not only for the children but also for the two spouses. For the best summary of the evidence, see Stanton, supra note 9.

137. The aspirational goal of lifelong marriage in the Declaration deliberately signed and solemnized by the couple reflects the role of law in educating and persuading the public. James Boyd White asserts that “law is most usefully seen not . . . as a system of rules, but as a branch of rhetoric . . . as the central art by which community and culture are established, maintained and transformed.” James Boyd White, Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life, 52 U. Chi. L. Rev. 684, 684 (1985). Mary Ann Glendon expresses the same view and draws upon her knowledge as a comparativist: “The rhetorical method of law making appears not only in the great continental codifications, but also, here and there, in all sorts of contemporary European legislation. It is most especially evident in continental family law.” Glendon, Abortion and Divorce, supra note 25, at 7.


139. La. Civ. Code art. 1906. See infra discussion of the consequences of its recognition as a contractual obligation in the text at notes 182-201. See also a similar discussion in Carrière, supra note 3, at 1711-12, wherein the author assumes in her discussion that the agreement might be a contract and what remedies would be available. Her conclusion is that the remedies may not be meaningful “for achieving the stated goal of the legislation.” Id. at 1712.

140. See La. Civ. Code art. 98 cmt. (e). See also such representative cases as Holliday v. Holliday, 358 So. 2d 618 (La. 1978); Favrot v. Barnes, 332 So. 2d 873 (La. App. 4th Cir.), writ denied, 334 So. 2d 436, rev’d in part on other grounds, 339 So. 2d 843 (La.), and cert. denied, 429 U.S. 961, 97 S. Ct. 381 (1976).

141. Legal compulsion does not necessarily mean specific performance, but legal compulsion means that there are consequences for the spouse who having made the promise fails to perform it. See infra discussion in text at notes 194-201.

142. See La. R.S. 9:274 (Supp. 1998): “A covenant marriage shall be governed by all of the provisions of Chapters 1 through 4 of Title IV of Book I of the Louisiana Civil Code and the provisions of Code Title IV of Code Book I of Title 9 of the Louisiana Revised Statutes of 1950.” Chapters 1 and 2 of Title IV of Book I concern prerequisites for contracting a valid marriage and grounds for nullity of marriage.

143. La. R.S. 9:274 (Supp. 1998). See also La. Civ. Code arts. 88 (existing marriage), 89 (same sex), and 90 (related within the prohibited degrees).
or consent not freely given by a spouse. In the former two instances, the law declares the marriage absolutely null and in the latter instance, relatively null. Nonetheless, there is a potential ground for annulment of a covenant marriage that may exist which does not exist explicitly for a spouse who enters a "standard" marriage: fraud.

A "covenant" marriage contains mixed elements of both status and contract. Whether vices of consent which are available to annul an ordinary contract may be proved to annul a covenant marriage depends upon whether the reference in the legislation to annulment in "standard" marriages means those grounds for annulment are exclusive. Section 274 provides that a covenant marriage "shall be governed by all of the provisions of Chapters 1 through 4 of Title IV of Book I..." Among the chapters that shall govern a covenant marriage are Chapters 1 and 2, which contain the articles on entry into marriage and nullity of marriage. However, Section 274 does not provide that a covenant marriage shall only be governed by those chapters. As a consequence, while conceding that all of the articles that govern entry into marriage and nullity in "standard" marriages also apply to "covenant" marriages, an argument can be made that other articles that apply directly to annulment of ordinary contracts also apply.

Unlike a "standard" marriage, the engaged couple who contract a covenant marriage sign a declaration that includes two relevant statements. First, prospective spouses attest to signing the statement that, "[w]ith full knowledge of what this commitment means, we do hereby declare our marriage will be bound by the Covenant Marriage Act," the pamphlet prepared by the Attorney General. In fact in the Declaration the signatories attest to

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145. La. R.S. 9:274 (Supp. 1998). See also La. Civ. Code art. 93 (consent is not freely given if the result of duress or if given by a person incapable of discernment).
146. See La. Civ. Code art. 94.
148. See infra discussion in text at notes 174-181.
152. The statement that appears in the declaration for couples to be married for the first time (La. R.S. 9:273(A)(1) (Supp. 1998)) does not appear in the declaration to be signed by already married spouses who are converting their marriage to a covenant marriage. See La. R.S. 9:275(C)(1)(a) (Supp. 1998). The reasons should be obvious.
having read the Covenant Marriage Act. To subsequently allege and prove
that a spouse was in error in contracting a covenant marriage after all of the
information is provided in many varied forms presents substantial hurdles.

Just as with error, proving fraud induced a spouse's consent to a
covenant marriage will be difficult as a general proposition, with one notable
exception. In the Declaration the prospective spouses also attest to the
disclosure: "We have chosen each other carefully and disclosed to one another
everything which could adversely affect the decision to enter into this mar-
riage." This statement affirms disclosure of information by each spouse
which could adversely affect the decision to enter into this marriage—a
disclosure of information that one spouse believes if discovered by the other
could result in a broken engagement. For information that could adversely affect
the decision of the other spouse to marry, the statement transforms a potential
"suppression of the truth" into a "misrepresentation," and that transform-
ation has consequences. Withholding information and misrepresenting its
disclosure must be with the intention to "obtain an unjust advantage for one party
or to cause a loss or inconvenience to the other." If the other spouse suffers
an "inconvenience," such as being married to a person whom he would not
have married had he known the truth, then the law may assume the fraudulent
intent of the person withholding the truth.

If the withheld information substantially influenced the other spouse's
consent, then the covenant marriage may be annulled for fraud unless the
other spouse could have "ascertained the truth without difficulty, inconvenience,
or special skill." If the other spouse could have "ascertained the truth
without difficulty," the law assumes that the judgment of the other spouse

156. See La. R.S. 9:273(A)(1) (Supp. 1998): "We have read the Covenant Marriage Act, and
we understand that a Covenant Marriage is for life."
160. La. Civ. Code art. 1953. See also comment (b): "Under this Article, fraud may result not
only from an act, such as a false assertion or suppression of the truth, but also from a failure to act,
such as silence, that is calculated to produce a misleading effect."
161. Id. See also Carriere, supra note 3, at 1728-29: "In contrast to other statements in the
declaration [see discussion in supra notes 131-141 and infra notes 182-260], this is not an aspiration
for the future, but an acknowledgment that an act took place in the past. At least for covenant
marriages, a court seeking free consent should look beyond the ceremonial words to how the other
party elicited them, and fraud should be regarded as vitiating it."
164. See Orr v. Walker, 236 La. 740, 109 So. 2d 77 (1959), for an example of the meaning of
inconvenience (certain rights incapable of monetary appraisal), as distinguished from loss, which is
generally understood to mean pecuniary loss.
influenced his decision more than the withholding of information by his fiancé. Nonetheless, there is one exception to this assumption: "[w]hen a relation of confidence has reasonably induced a party to rely on the other's assertions or representations."\(^{167}\) Thus, even if the other spouse could have ascertained the truth without difficulty, he may have reasonably relied on the representations of the deceitful spouse because of their confidential relationship. Clearly, a "confidential relationship" exists between prospective spouses\(^{168}\) so that the other spouse could reasonably rely on the representation of disclosure made in the Declaration of Intent, even if he could have ascertained the truth without difficulty. The conversion of a suppression of the truth to a misrepresentation through the statement contained in the Declaration of Intent has consequences for proof of fraud, which in all cases need be proved by a simple preponderance of the evidence.\(^{169}\) A misrepresentation makes proof of fraud easier when a confidential relationship exists between the two parties. Under this analysis, the spouse who was misled may annul the "covenant" marriage.\(^{170}\) Because the covenant marriage "contracted" by the spouses is null for fraud, the nullity is relative\(^{171}\) and may be confirmed, either expressly or tacitly,\(^{172}\) upon discovery of the deception by the spouse who was misled.\(^{173}\)

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167. Id. See also comment (b): "Under the exception provided in the second paragraph of this Article, there is fraud even when a party could have readily ascertained the truth without difficulty, inconvenience, or special skill, when a relation of confidence has induced the party to rely on the other's assertions or representations." Notice that *suppression of the truth, silence and inaction* are not included.

168. For the most recent example of a confidential relationship, see La. Civ. Code art. 1483. The ordinary standard of persuasion to annul a last will and testament for undue influence is clear and convincing evidence. However, if a relationship of confidence existed between the wrongdoer and the testator, then the burden of persuasion is reduced to a simple preponderance of the evidence unless the wrongdoer is related to the testator by affinity, consanguinity or adoption. In comment (c) the redactors explain that a confidential relationship generally will affect the burden of proof but that the Article does not lower the standard of proof "where a challenge is made against a confidante who is related to the donor by marriage . . . because in many instances the most likely persons who would be involved would be a spouse or child." (emphasis added). Clearly, husbands and wives enjoy a confidential relationship; therefore, an engaged couple should enjoy a confidential relationship.


170. La. Civ. Code arts. 2031 (relative nullity if lack of free consent), 2032 (five-year liberative prescription to begin with discovery), 2033 (effect of annulment).

Arguably, unlike a relatively null marriage, it could be argued that the covenant spouse who annuls the covenant marriage for fraud may claim damages and attorney's fees. La. Civ. Code art. 1958. A "standard" marriage may be annulled if consent is given under duress or by one incapable of discernment, but the specific Civil Code articles (La. Civ. Code arts. 95, 97, 101) indicate that annulment is the only remedy available. Compare the remedy available if an ordinary contract is annulled for duress. La. Civ. Code art. 1964.


172. See La. Civ. Code art. 95 and comments thereto for analogous treatment of tacit confirmation by cohabitation of the couple.

Yet, despite annulment of the covenant marriage, the spouse who was misled remains in a "standard" marriage, unless fraud can also be invoked to annul a "standard" marriage. By contrast to the vice of consent of duress, the Civil Code does not explicitly provide that if fraud induces consent to marriage the marriage is null. An argument can be made that because a "standard" marriage "is created by civil contract" and the examples of lack of free consent are not necessarily exclusive a spouse may resort to general principles of the law of conventional obligations for relief, including the law affecting consent. However, "[r]elative nullity has not been used to invalidate marriages in which consent was given on the basis of false or inadequate information concerning the spouse." Thus, the court is most unlikely to annul the remaining "standard" marriage upon proof of fraud. In recognition of the practice of the judiciary, Article 93 when enacted in 1987 eliminated "mistake respecting the person" as an instance in which consent to marry was not freely given.

The inconsistency in the jurisprudence of relative nullity has been unimportant under the traditional regime; the ease and speed with which

174. See Samuel, supra note 4: "Nevertheless, in Louisiana I hear the objection that covenant marriage will not be freely chosen, but will be forced upon immature couples by their parents, priests, ministers, or rabbis. A situation of true duress by parents and clergy could be remedied by invalidating the couple's consent to the covenant marriage and treating the marriage as a non-covenant marriage. But when the choice of covenant marriage is a result not of duress, but of religious or moral scruples instilled in the couple from childhood, the choice should be considered free and binding, especially since the marriage will not be absolutely indissoluble." (emphasis added).


177. Louisiana Civil Code article 93 provides that "[c]onsent is not free if given under duress or when given by a person incapable of discernment." The Article does not provide that consent is not free only in those two instances. See also Spaht, supra note 176, at 1145.

178. La. Civ. Code arts. 1927-1965. See Spaht, supra note 176, at 1145: "An argument can be made that article 93 does not declare that the reasons for defective consent are exclusive. Therefore, an aggravated case involving a mistake in physical identity could be resolved by resort to the general articles on error. A justification for resorting to those articles is that article 86 defines marriage as a relationship created by civil contract. The words civil contract were used for two reasons: (1) To demonstrate the historical assertion of jurisdiction over marriage by secular authorities and (2) To permit analogy to the law of conventional obligations when appropriate."


180. La. Civ. Code art. 93 cmt. (e), as enacted in 1987 La. Acts No. 886, § 1: "[T]his Article omits reference to 'mistake respecting the person' as a cause of invalidity. The jurisprudence strictly interpreted that language as referring only to mistakes of physical identity. . . . As so limited, the omitted language was never applied to invalidate a marriage in Louisiana."
the victim of imposition could obtain a no-fault divorce made claims of relative nullity a rare legal event. 181

IV. SECOND DISTINGUISHING FEATURE: AGREEMENT TO PRE-DIVORCE COUNSELING

If we experience marital difficulties, we commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling. 182

A. Declaration of Intent as Contract

Covenant couples in their Declaration of Intent agree to take reasonable steps to preserve their marriage; and this agreement, which is a limited exception to the general principle that spouses’ personal obligations are matters of public order, 183 constitutes a contractual obligation. 184 The intention of the legislature in including this statement in the Declaration was not simply to provide an “aspirational statement,” 185 which explains why the counselor must discuss “the obligation” 186 to seek marital counseling in times of marital difficulties. . . .” 187

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181. Carriere, supra note 3, at 1728.
183. La. Civ. Code arts. 98 (see also comment (e)), 1968. See also cases cited in supra note 179.
184. La. Civ. Code art. 1906: “A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished.” (emphasis added).
185. Carriere, supra note 3, at 1712:
A more likely intent on the part of the legislature was to provide a statement of the aspirations of the parties to a covenant marriage. The commitment to seek marital counseling occurs in the declaration of intent, in the midst of other statements couched as agreements and promises, but conveying aspirations rather than constituting binding contracts.
See Samuel, supra note 4: “Treatment of the counseling agreement as aspirational rather than as a requirement would solve this problem, but LA R.S. 9:307A appears to make counseling a requirement before the judgment of divorce can be obtained.”
186. Obligation is defined in La. Civ. Code art. 1756: “An obligation is a legal relationship whereby a person, called the obilior, is bound to render a performance in favor of another, called the obligee. . . .” See also La. Civ. Code art. 1760 cmt. (b) (obligation without preceding adjective means “civil” obligation which can be enforced by legal action). See also La. Civ. Code art. 1758 (effect of obligation).
By contrast, the aspirational statement in the Declaration of Intent that a covenant marriage is for life is treated differently in the provision that mandates the content of pre-marital counseling. The counselor “shall include . . . communication of the fact that a covenant marriage is a commitment for life. . . .” La. R.S. 9:273(A)(2)(a) (Supp. 1998) (emphasis added).
The legislature intended that this obligation be legally enforceable through contractual remedies, rather than as a necessary prerequisite to obtaining a separation or divorce. This intention is evident because of the failure of the legislation to be more explicit concerning the effect of a failure to take reasonable steps (efforts). The construction of the sentence in both lettered paragraphs of Section 307 mentions counseling in the introductory clause as preliminary to a covenant spouse obtaining a judgment of divorce or separation. However, when the same sentence in its main clause addresses the obtaining of the judgment and includes the word only, the sole requirement for the judgment is proof of one of the grounds listed. The procedural mechanism for raising the counseling prerequisite would be either a dilatory or peremptory exception, but neither seems applicable to the action for separation or divorce in a covenant marriage. Because the legislation does not use the word only to describe the preliminary counseling, the exception could not be peremptory. Likewise, because the obligation to take reasonable steps will not be enforced by specific performance, the dilatory exception appears inappropriate because such an exception assumes that whatever prevents the maturity of the action can be cured. Even though the obligation to take reasonable steps does not constitute a necessary prerequisite to the action for divorce or separation, the availability of contractual remedies at least restores some legal remedy to the spouse who has fulfilled her promises and desires to preserve the marriage.

188. La. R.S. 9:307(A) (Supp. 1998): "Notwithstanding any other law to the contrary and subsequent to the parties obtaining counseling, a spouse to a covenant marriage may obtain a judgment of divorce only upon proof of..." (emphasis added).
189. See infra discussion in text at notes 218-235 that reasonable steps to preserve the marriage may include steps that are not marital counseling.
190. See supra text at note 188.
192. Id. art. 927.
193. A peremptory exception under Louisiana Code of Civil Procedure article 927 is no cause of action. Without the strength of only to support the argument that no judgment of divorce or separation can be rendered in a "covenant" marriage without counseling first, there is little basis for arguing that there is no cause of action.
194. See infra discussion in text at notes 238-245.
195. A dilatory exception can be raised under Louisiana Code of Civil Procedure article 926 if the action is premature. The argument would be that "counseling" under Louisiana Revised Statutes 9:307(A), (B) is a prerequisite to the filing of an action for divorce or separation and thus that the action is premature until compliance with the obligation to seek counseling. However, because the obligation may not be enforced by specific performance, the obligation may not ever be fulfilled.
196. By virtue of the simple phrase contained in Section 307 and the fact that there is no specific mechanism for counseling as a required prerequisite for filing a petition for divorce, a persuasive argument can be made that counseling is not a preliminary requirement for divorce in a covenant marriage. But see Samuel, supra note 4, at n.20.
See Carriere, supra note 3, at 1712: "Moreover, if the state were to require counseling as a preliminary to separation or to divorce, it might, under Boddie v. Connecticut, have to subsidize the counseling for the indigent."
197. See infra discussion in text at notes 238-260. The author disagrees with the observation
As an aspect of the Declaration of Intent that is a matter of contract rather than status, the agreement to take reasonable steps to preserve the marriage is subject to the more general rules of conventional obligations. Therefore, the agreement to take reasonable steps also may be dissolved by mutual consent unless the obligation is a matter of public order. The agreement to dissolve a contract is itself a contract; and if the reasonable steps to preserve the marriage is a matter of public order that once agreed to cannot be altered by the parties, then the agreement cannot be dissolved by mutual consent. Considering the purpose of the covenant marriage legislation to strengthen marriage, a strong argument can be made that once covenant spouses agree to take steps to preserve their marriage in the Declaration the agreement, as a matter of public policy, cannot be altered by the parties.

The spouses' agreement to take reasonable steps "must be performed in good faith." Good faith is not defined in the Civil Code nor is the term sufficiently defined in the jurisprudence. The judiciary appears to determine "good faith" within the context of the specific contract, and in at least one case the court seemingly equated failure to perform in "good faith" with conduct of the obligor that bordered on "bad faith." In Louisiana Power & Light Co. v. Mecom, the court held that the duty of good faith does not require a party to a contract to remind the other party of his contractual duties. Based upon these cases, the spouse who desires to preserve the marriage does not fail to perform the agreement in "good faith" if she fails to remind the other party of

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by Professor Jeanne Carriere in her article, Carriere, supra note 3, at 1711-12: "However, whether a meaningful remedy exists is doubtful. . . . Damages, the more usual remedy for the breach of a contract of such a personal nature, are equally pointless for achieving the stated goal of the legislation. . . ." (emphasis added). The legislation has more than one goal and restoration of power to the spouse who desires to preserve the marriage is one of them. The availability of damages is simply another weapon in her arsenal.

199. See La. Civ. Code art. 1983. The covenant marriage itself, which includes issues of status that are matters of public order (i.e. termination by divorce), may not be dissolved by mutual consent. See infra discussion in text at notes 318-320.
201. See supra discussion in text at notes 42-46.
204. See, e.g., Grisaffi v. Dillard Dep't Stores, Inc., 43 F.3d 982 (5th Cir. 1995); Delta Truck & Tractor, Inc. v. J.I. Case Co., 975 F.2d 1192 (5th Cir. 1992); CNB v. Audubon, 566 So. 2d 1136 (La. App. 2d Cir. 1990).
205. Bad faith is defined in comment (b) to Louisiana Civil Code article 1997 as an act that is intentional and malicious. In Delta Truck & Tractor, Inc. v. J.I. Case Co., 975 F.2d 1192, 1204 (5th Cir. 1992), the court found that a contractual party had breached its duty to act in good faith as a matter of law: " . . . IH sold its agricultural equipment business to Case knowing that the transaction would result in the termination of IH dealers without cause. . . . IH deliberately structured the transaction so as to leave the terminated IH dealers with little or no recourse against either IH or Case."
206. 357 So. 2d 596 (La. App. 1st Cir. 1978).
his duty to take reasonable steps to preserve the marriage. He, on the other hand, does fail to perform the contract in “good faith” if he engages in intentional and malicious conduct that prevents taking reasonable steps to preserve the marriage. More often than not, the spouse who no longer desires to be married will have breached the obligation by his non-performance, and his failure to perform the contract in “good faith” will be academic. Nonetheless, for some cases in which a spouse argues that he took “reasonable steps to preserve the marriage,” but his conduct belies “good faith”, the court may award damages.

A spouse may rescind this agreement to take reasonable steps to preserve the marriage for the vices of consent-error, fraud, or duress. In an effort to eliminate the possibility of error or fraud, the counselor must discuss the obligation to seek marital counseling in times of marital difficulties as a part of the pre-marital counseling. The truthful disclosure by the counselor and his discussion of the obligation to take reasonable steps to preserve the marriage attested to by the notary provide insurance against error or fraud. Error will be difficult to allege and prove if after such counseling the spouse who is seeking relief signed the Declaration of Intent which contained his agreement to take reasonable steps to preserve his marriage. Even if there were a misrepresentation about the statement contained in the document, fraud may be difficult to prove since the truth arguably could have been ascertained by simply reading the document. The Senate Committee amendment that required this obligation to be explained both in the pamphlet and in the counseling session proves the intention of the legislature that the couple have all of the information necessary to make a decision deliberately and knowledgeably.

One criticism of the legal efficacy of the agreement to “counseling” is that “coercive marital counseling” does not work. The two systems, one in

212. See La. Civ. Code art. 1954 (no fraud if could have ascertained the truth without difficulty).
213. “Reasonable steps” does not necessarily mean only marital counseling. See infra discussion in text at notes 218-235.
214. Carriere, supra note 3, at 1712-13:

The Los Angeles Conciliation Court of the 1950s permitted a spouse who felt that his marriage was in difficulty to petition for a conciliation hearing, at which the other spouse’s attendance could be compelled. The goal of the court was to effect reconciliation by means of counseling that led to a detailed “reconciliation agreement,” itself enforceable through use of the court’s contempt power to impose fines and even imprisonment. Even though at least one spouse probably wanted to save the marriage, California’s experiment with compulsory conciliation was apparently a failure. [n.71 at 1712 cites J. Herbie DiFonzo, Beneath the Fault Line: The Popular and Legal Culture
California and the other an experiment in New Jersey, do not resemble the binding agreement of the spouses to a covenant marriage. In the first place, the contractual agreement to take reasonable steps to preserve the marriage will not in the ordinary case result in compelling a spouse’s attendance at counseling, i.e., specific performance. In the second place, the law does not impose this obligation upon every spouse whose marriage is experiencing difficulty, as in California and New Jersey. The obligation is only imposed upon every spouse who promised to take reasonable steps to preserve his marriage after being informed of the nature of the obligation he undertook. Being bound by one’s promises voluntarily made is qualitatively different from being required to submit to “counseling” by sole imposition of the law.

B. Agreement to Take All “Reasonable” Steps

The spouses agree to take all “reasonable” steps to preserve their marriage, including marriage counseling. Nothing in the agreement or the legislation suggests that marriage counseling is the exclusive “reasonable” step, in fact the inference is quite the opposite. By simply offering marital counseling as an illustrative example, the legislature in no way intended to limit the spouses to a particular type of “step.” Reasonable steps to preserve the marriage could include sessions with family or friends during which the couple discusses the difficulties in their marriage. Within the religious community support groups of all types exist which could be consulted in an effort to preserve the marriage, such as Sunday School classes, Bible study groups, and mentoring couples. “Steps” could likewise include living in separate bedrooms in the same house (“cooling off”), separate buildings on the same piece of property, or in separate dwellings while the spouses discuss the marital disharmony. Whether the “steps” are “reasonable” will depend upon the circumstances. What may be “reasonable” when one spouse has abandoned the other may not be reasonable if one spouse has physically abused the other.

As previously observed, the contractual obligation to take reasonable steps to preserve the marriage must be performed in good faith. It can be

in Twentieth Century America (1997), which concludes that there are no reliable statistics.] A similar experiment in New Jersey likewise failed. Beginning in September 1957, the New Jersey Legislature established “quasi-mandatory marriage counseling” for those seeking divorce in two districts of the state. After three years, the program ended with a failure rate of 97.3 percent.

215. Id.
216. See infra discussion in text at notes 238-245.
217. Analogously, Samuel, supra note 4, opines: “But when a couple has voluntarily chosen a strict regime of divorce after premarital counseling on the subject, there is no justification for the lawyer or judge to manipulate or allow manipulation of the law or evidence to effect a divorce for such a couple.”
218. See supra discussion in text at notes 202-207.
argued that should one spouse agree to marital counseling but only for one session because he is intent upon divorcing, or should the spouse also insist that he choose the counselor, it may be that he has breached his obligation by not performing it in good faith.\textsuperscript{220} The requirement that the obligation be performed in good faith permits the court to examine the motives of a spouse even in instances where the spouse has mechanically fulfilled his obligation to attend marital counseling. Should the court determine that the insistent spouse has not performed his obligation in good faith the other spouse may be awarded damages.\textsuperscript{221}

Of ultimate importance is that the "steps" to be taken are steps that attempt to "preserve the marriage"; and, as has been observed elsewhere,\textsuperscript{222} therapists often fail to consider the family as a unit when marital difficulties arise. Therapists, consisting of psychiatrists, psychologists, social workers, and marriage counselors,\textsuperscript{223} are trained to devote their professional efforts to maximizing the individual spouse's fulfillment and happiness.\textsuperscript{224} As regards their alleged "venal" motive of a lucrative professional opportunity offered as experts in family cases,\textsuperscript{225} some therapists sensing a shifting cultural trend now endorse "marriage education and enrichment"\textsuperscript{226} as a new field of professional opportunity. The authors of the covenant marriage legislation anticipate that many covenant couples who later experience marital difficulties will seek assistance from the same individual who provided their pre-marital counseling. In virtually all cases, that individual will be a religious figure: a minister, priest or rabbi. Counseling by a religious figure should\textsuperscript{227} stress

\begin{footnotes}
\item[220] See supra discussion of the jurisprudence in text at notes 202-207.
\item[221] Id. See also infra discussion in text at notes 238-260.
\item[222] Carriere, supra note 3, at 1713-14. See also Gallagher, Whitehead, supra note 80; Whitehead, supra note 16; William J. Doherty, How Therapists Threaten Marriages, The Responsive Community, Summer 1997, at 31; Peter Kramer, Divorce and Our National Values, N.Y. Times, Aug. 29, 1997, at 23A.
\item[223] "The present lack of licensing for marriage counselors in Louisiana adds a further danger to the marriages of receptive couples who in good faith entrust themselves to an untrained mountebank." Carriere, supra note 3, at 1714. See supra discussion in text at notes 113-120.
\item[224] Carriere, supra note 3, at 1713-14:
One reason given for the alleged hostility toward marriage is the philosophical dedication of therapists to their clients' individual fulfillment and happiness, rather than to saving their marriages. . . . In the unlikely event that the accusations that marriage counselors in general encourage divorce were true, the obligation to seek counseling in a covenant marriage might increase, rather than decrease divorce. (Emphasis added). But see Kramer, supra note 222.
\item[225] "But a venal, as well as a philosophical, motive for advocating divorce has been attributed to marriage counselors: divorcing couples and family courts make extensive use of psychological expertise, creating a 'bonanza' for the helping professions." Carriere, supra note 3, at 1713.
\item[226] Among such therapists is Diane Sollee, Director of Coalition for Marriage, Family and Couples Education. She organized the Second Annual Smart Marriages/Happy Marriages Conference in Washington, D.C. held July 8-12.
\item[227] The author is not willing to state unequivocally that the counseling by a religious figure will emphasize preservation of the marriage because of the statements about covenant marriage by
\end{footnotes}
preservation of the marriage and emphasize the importance of the family unit, rather than concentrate upon one spouse’s individual happiness. What’s more, the religious figure will undoubtedly not be morally neutral; thus, he will not hesitate to assign blame to the spouse who, for example, committed adultery, abandoned the other spouse for no good reason, physically or sexually abused the spouse or children, or committed a felony.

Even though counseling is not a mandatory prerequisite to filing for divorce, commentators have criticized the agreement to take “reasonable” steps to preserve the marriage as subjecting victims of domestic violence to potential loss of life. Assuming that domestic violence is as widespread a phenomena as some writers suggest, the agreement only binds the victim to take “reasonable” steps to preserve the marriage. In most cases of domestic violence where the spouse has been the victim, joint counseling would not be reasonable. No obligation to preserve the covenant marriage assumed by the victim of violence requires her to risk her life. Reasonable steps to preserve the marriage could include her individual counseling through a battered women’s program and a separate intervention with the batterer who also submits to additional therapy. Interestingly, one story of a Louisiana covenant spouse who was physically abused by the other offers hope that under controlled circumstances even joint counseling may be accomplished with beneficial consequences. With additional protection provided her, and upon the advice of her attorney, the victim spouse attended a joint marital counseling session with

at least one leader of a religious denomination. See statements by Episcopal Bishop Charles Jenkins in the Times-Picayune, supra note 49.

228. “Second, the neutral moral stance of marital counselors, according to conservative commentators, encourages divorce by failing to assign blame to the spouse responsible for the breakdown of the marriage.” Carriere, supra note 3, at 1713.

The conservative commentators to whom Carriere refers are Whitehead, supra note 16, and Gallagher, Whitehead, supra note 80.

229. See supra discussion in text at notes 188-197.

230. Carriere, supra note 3, at 1714: “Whatever hypothetical benefits mandated counseling offers, they are more than offset by its most serious drawback: the obligation to obtain counseling, if treated as a mandatory step prior to divorce for those in a covenant marriage, may endanger battered spouses.” (emphasis added). The subsection of Carriere’s article in which this statement appears is entitled, “Risking Lives to Save Marriages.” See also Samuel, supra note 4, at n.20.

231. Carriere, supra note 3, at 1714: “This is not a negligible group; domestic violence is an experience common to [up] to one half of all American women—and approximately two thirds of women who are separated or divorced,” according to Martha Mahoney [Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 Mich. L. Rev. 1, 3 (1991)]. Mahoney’s calculations underreport domestic violence because, first, she examined only female victims and, second, a recent report by the Justice Department indicates that occurrences have been startlingly underestimated.”

232. “The Louisiana Legislature has recognized the danger that separation poses to spouses and children and has sought to protect these victims through the Post-Separation Family Violence Relief Act.” Carriere, supra note 3, at 1715. The Post-Separation Family Violence Relief Act is contained in Louisiana Revised Statutes 9:361-69.
the abusing spouse conducted by the couple's minister. The minister did not hesitate to blame the husband for the couple's marital difficulties. By virtue of his moral authority to instill shame and inflict humiliation upon the abusing spouse in the presence of others, the minister performed a service that benefitted the victim, society and the abuser.233 Should the victim be sued by the batterer for breach of her obligation to take “reasonable” steps to preserve the marriage, her defense would be the unavailability of “reasonable” alternative steps in light of the degree of violence perpetrated by the batterer. Furthermore, by analogy the victim could argue that the bad faith of the abusing spouse prevented her performance.234 His bad faith consisted of the intentional and malicious act235 of physical abuse which threatened her life and thus prevented her performance.

C. Content of the Pre-Divorce Counseling

The core of the content of pre-divorce counseling, as already mentioned,236 consists of “reasonable steps to preserve the marriage.” That agreement of the spouses as to the aim of pre-divorce counseling determines the contours of the counseling; its content is not specified by the legislation. Clearly, the spouses commit to reasonable steps to preserve the marriage; thus, counseling that emphasizes the fulfillment and happiness of the individual to the exclusion of the other members of the family would not conform to the spouses’ agreement. Religious figures who counsel are more likely to emphasize the preservation of the marriage. Some denominations, such as the Catholic Church, or other faith-based organizations, such as Marriage Savers, offer programs with a remarkable success rate.237

233. In a footnote in her article in the same section in which she so severely criticizes the “counseling” agreement in a covenant marriage, Professor Carriere observes: “It is difficult to understand the logic by which assigning blame to a party dissatisfied with her or his marriage is viewed as a means of preventing marital breakdown; it seems that it would supply an added source of grievance and an added impetus to end the marriage. Of course, if the blame is deserved, as in the case of a battering spouse, then such a result (assuming safe separation from the batterer) could benefit both the victim and society.” Carriere, supra note 3, at 1714 n.80 (emphasis added).

234. La. Civ. Code art. 2003: “An obligee may not recover damages when his own bad faith has caused the obligor's failure to perform. . . . If the obligee's negligence contributes to the obligor's failure to perform, the damages are reduced in proportion to that negligence.”

In addition if the abuser had failed to perform his obligation to take reasonable steps, the victim could raise the defense of nonperformance. La. Civ. Code art. 2022.


236. See supra discussion in text at notes 222-228.

237. The Catholic program, Retrouvaille, an outgrowth of Marriage Encounter, has a very successful track record in preserving marriages. For information about Marriage Savers and Retrouvaille, see Michael J. McManus, Marriage Savers (1995).
D. Remedies for Breach of Agreement to Take Reasonable Steps

The law characterizes the obligation to take reasonable steps to preserve the marriage if marital difficulties arise as an obligation to do subject to a suspensive condition. Upon fulfillment of the condition (marital difficulties), the obligation is enforceable. If one spouse breaches the obligation, which in the ordinary case will be by nonperformance, the other may seek legal redress during the marriage. Because the obligation to take reasonable steps is an obligation to do, the court would ordinarily award damages rather than specific performance, although specific performance is within the discretion of the court. Professor Carriere accurately observes that "compelling an unwilling party to attend marriage counseling, either as an exercise of state power in a family law action or as specific performance in contract, appears self-defeating if the goal is to reconcile the couple."

Nonetheless, the spouse affected by the other’s breach may seek damages, both pecuniary and non-pecuniary. Pecuniary damages consist of damages to compensate for pecuniary loss sustained and the profit of which the spouse was deprived by the other’s breach. Pecuniary loss sustained may include, if causally related to the breach, increased expenses for maintaining two households rather than one during the period of separation or expenses

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240. "The difficulty of proving that marital difficulties existed may be bootstrapped by the court, because the presence of the couple in the courtroom would be evidence enough that they do." Carriere, supra note 3, at 1711.
241. A breach may occur, according to Louisiana Civil Code article 1994, if a spouse fails to perform by nonperformance, defective performance, or delay in performance.
242. Id.
244. La. Civ. Code art. 1986: “Upon a failure to perform an obligation that has another object, such as an obligation to do, the granting of specific performance is at the discretion of the court.” See also comment (c): “If the obligation which the obligee has failed to perform is an obligation to do, the granting of specific performance lies with the discretion of the court, to be exercised in a manner consistent with the principle that the obligor's personal freedom ordinarily may not be encroached upon.” (emphasis added).
245. Carriere, supra note 3, at 1711.

Causation, of course, is a serious issue in the breach of a contractual object like that in the Declaration of Intent. For analogous jurisprudence, see Sanders v. Gore, 676 So. 2d 866 (La. App. 3d Cir. 1996) (breach of promise to marry; promise to marry against public policy because married to someone else at time promise made); Glass v. Wilts, 551 So. 2d 32 (La. App. 4th Cir. 1989) (breach of promise to marry; failed to prove breach caused damages).
necessitated by attempts to obtain the other spouse's compliance with the obligation. In the former case a causal connection could be proved if "reasonable steps" would have included living together while steps to preserve the marriage were pursued. Profit of which the spouse was deprived would ordinarily not include lost future profits because of the difficulty of proving causation with sufficient precision. Furthermore, the ultimate recovery of these pecuniary damages will depend upon whether the other spouse who refuses to take reasonable steps to preserve the marriage fails to perform in "good faith" or "bad faith," the latter defined as a failure to perform that is both intentional and malicious. Circumstances surrounding the failure to perform ordinarily prove the breach was intentional. However, to constitute bad faith the breach must also be malicious, designed to injure the offended spouse. Proof of malice may or may not be difficult depending upon the existing evidence. Evidence of particular importance is that contemporaneous with the failure to perform, such as the response of the obligor to entreaties by the obligee to attend counseling sessions.

The aggrieved covenant spouse may recover nonpecuniary loss because the nature of the agreement is "intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract" the other spouse knew, or should have known "that his failure to perform would cause that kind of loss." "That kind of loss" refers to "damage of a moral nature which does not affect a 'material' or tangible part of a person's patrimony," but damage that is more than "mere worry or vexation." Examples of the type of loss suffered by the aggrieved spouse if

249. Such expenses might include rent or house note, ordinary living expenses (i.e. food, furnishings, staples, telephone, utilities, etc.), and other extraordinary expenses related to living separately from the spouse who desires to preserve the marriage.


One possible claim to lost future profits might succeed if the breaching spouse obtained a separation of property judgment after living separate and apart from the plaintiff for six months. See La. Civ. Code art. 2374(D). If the plaintiff spouse could prove that living together was a reasonable step to take to preserve the marriage but that the other spouse had refused, the plaintiff might be able to recover her one-half interest in what would have been community property but for the judgment of separation of property. Ultimate recovery would depend upon the strength of the plaintiff's argument about living together as a reasonable step and the extent of her recovery upon proof of how long that living together would have been a reasonable.

251. La. Civ. Code art. 1996: "An obligor in good faith is liable only for the damages that were foreseeable at the time the contract was made."

252. La. Civ. Code art. 1997: "An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform."


256. Id. cmt. (b).

257. Id. cmt. (e).
the other breaches his obligation include embarrassment, mental anguish, humiliation, and psychological damage.\textsuperscript{258} As to these damages, Article 1999 affords the court "much discretion."\textsuperscript{259} The sum awarded for these non-pecuniary damages need not be nominal.\textsuperscript{260}

E. A Component that Survives a Migratory Divorce

A covenant marriage represents a status combined with permissible contractual agreements between the spouses. Being married or divorced is a matter of status;\textsuperscript{261} however, the obligation to "take reasonable steps to preserve the marriage, including marital counseling" is a matter of contract.\textsuperscript{262} For purposes of jurisdiction and conflict of laws, the distinction is important. Whether a covenant spouse may leave Louisiana, establish a domicile in Texas and then sue for divorce under Texas law is generally accepted as a matter of the law relating to status.\textsuperscript{263} Thus, a covenant spouse who wishes to divorce under laws less stringent than those to which he committed himself may travel to Texas and if he establishes a domicile,\textsuperscript{264} may obtain a divorce under the less restrictive law of Texas. Professor Carriere accurately describes the result of two United States Supreme Court decisions in Williams v. North Carolina:\textsuperscript{265} "Covenant marriage partners do have another option that makes quick divorce, even unilateral quick divorce, a possibility: divorce in a different jurisdiction."\textsuperscript{266}

Nonetheless, even if a covenant spouse’s status as married or divorced may be governed by the law of the new domicile (Texas), the other spouse may argue that a breach of the obligation to take reasonable steps to preserve the marriage is a matter of contract.\textsuperscript{267} Under the provisions of Louisiana’s long-arm statute,\textsuperscript{268} the covenant spouse who remained in Louisiana could seek damages from her spouse now domiciled in Texas for breach of his obligation to take all

\textsuperscript{258} See, e.g., Sanders v. Gore, 676 So. 2d 866 (La. App. 3d Cir. 1996) (damages for breach of promise to marry); Glass v. Wiltz, 551 So. 2d 32 (La. App. 4th Cir. 1989) (damages for breach of promise to marry).

\textsuperscript{259} La. Civ. Code art. 1999: “When damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages.”

\textsuperscript{260} Id. cmt. (b).


\textsuperscript{262} See supra discussion in text at notes 138-141, 183-188.

\textsuperscript{263} See supra authorities cited in note 261.

\textsuperscript{264} See supra note 261.

\textsuperscript{265} Domicile is residence in fact with an intention to remain permanently or indefinitely. See infra discussion in text at notes 138-141, 183-188.

\textsuperscript{266} See infra note 261.

\textsuperscript{267} Carriere, supra note 3, at 1731.

\textsuperscript{268} See infra discussion in text at notes 138-141, 183-188.

reasonable steps to preserve the marriage.\textsuperscript{269} Even though the first paragraph of the long-arm statute does not provide explicitly for personal jurisdiction in such a case, the second paragraph permits the exercise of personal jurisdiction over the Texas domiciliary "on any basis consistent with the constitution of the state and of the Constitution of the United States."\textsuperscript{270} Under the relevant federal\textsuperscript{271} and state\textsuperscript{272} jurisprudence, Louisiana has specific jurisdiction\textsuperscript{273} over the Texas covenant spouse if he has meaningful minimum contacts with Louisiana and the maintenance of the suit "does not offend traditional notions of fair play and substantial justice."\textsuperscript{274}

The plaintiff, who by the same suit may seek support for herself and any children of the marriage,\textsuperscript{275} bears the burden of proving the other spouse's minimal contacts with Louisiana.\textsuperscript{276} The spouse who is a domiciliary of Texas had contacts with Louisiana which include: execution of the Declaration of Intent in Louisiana after mandatory pre-marital counseling by a duly authorized counselor, performance of the ceremony in Louisiana, residence in Louisiana after the covenant marriage, and a former spouse and children who remain domiciled in Louisiana to whom the defendant continues to owe an obligation of support. Once the plaintiff proves minimal contacts, the burden shifts to the nonresident defendant "to prove the exercise of jurisdiction 'would be so unreasonable in light of traditional notions of fair play and substantial justice as to overcome the presumption of reasonableness....'"\textsuperscript{277} It will be difficult for the nonresident defendant to prove that the exercise of personal jurisdiction over him would be unreasonable since Louisiana specifically recognizes jurisdiction

\textsuperscript{269} See supra discussion in text at notes 238-260.
\textsuperscript{272} See Anderson v. Interamerican Mfg., Inc., 693 So. 2d 210 (La. App. 4th Cir. 1997); Coastal Credit Co., Inc. v. CSS, Inc., 685 So. 2d 464 (La. App. 3d Cir. 1996); Teknika Electronics Corp. v. SES/LA, 673 So. 2d 1129 (La. App. 3d Cir. 1996).
\textsuperscript{273} In interpreting the due process clause, the United States Supreme Court has recognized a distinction between two types of personal jurisdiction—general and specific jurisdiction. . . . When a state exercises personal jurisdiction over a defendant in a suit arising out of or related to the defendant's contacts with the forum, the state is exercising specific jurisdiction over the defendant. (Emphasis added.) Teknika Electronics Corp. v. SES/LA, 673 So. 2d 1129, 1133 (La. App. 3d Cir. 1996).
\textsuperscript{274} Id. at 1133-34.
\textsuperscript{275} La. R.S. 13:3201(A)(6) (1991), 1988 La. Acts No. 273, § 1: "A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from any one of the following activities performed by the nonresident. . . . Non-support of a child, parent, or spouse or a former spouse domiciled in this state to whom an obligation of support is owed and with whom the nonresident formerly resided in this state." See Wicker v. Wicker, 597 So. 2d 1273 (La. App. 3d Cir. 1992).
\textsuperscript{276} Coastal Credit Co., Inc. v. CSS, Inc., 685 So. 2d 464 (La. App. 3d Cir. 1996).
\textsuperscript{277} Id. at 467 (quoting from deReyes v. Marine Management and Consulting, Ltd., 586 So. 2d 103, 107 (La. 1991)).
over him when he has failed to support his spouse or his child.\textsuperscript{278} Trying the related issues of support and damages for breach of the covenant marriage agreement in one action in a Louisiana court serves the general concern for efficient and just resolution of disputes arising between covenant spouses.\textsuperscript{279}

V. THIRD DISTINGUISHING FEATURE: LIMITED AND MORE TIME-CONSUMING GROUNDS FOR DIVORCE AND RESURRECTION OF LEGAL SEPARATION

Despite recognition that the covenant marriage law utilizes pre-marital and pre-divorce counseling in an attempt to strengthen marriage, critics\textsuperscript{280} and supporters\textsuperscript{281} of the legislation focus on the defining component—limitations on divorce. Critics are not deterred by the predicate element of consent of the parties,\textsuperscript{282} they insist that “government” prevent a more binding commitment. Some admit that their principal concern is that “what is voluntary today is mandated tomorrow,” although recent attempts to eliminate unilateral no-fault divorce in this country have been singularly unsuccessful.\textsuperscript{283} Yet, at a time when the divorce proponents breathed a collective sigh of relief, Louisiana passed the covenant marriage law, referred to alternatively as “a stealth anti-divorce weapon”\textsuperscript{284} and as a “skunk.”\textsuperscript{285} The historic significance of its passage explains the indignant reaction: the covenant marriage legislation represents the first time, as a general trend, in two hundred years in any Western country that divorce has become more difficult rather than easier.\textsuperscript{286}

If a spouse agrees to a covenant marriage, divorce requires proof of fault in the nature of adultery, conviction of a felony and a sentence of imprisonment at...
hard labor or death, abandonment (for one year), physical or sexual abuse of a
La. Civ. Code arts. 102, 103.
and a period of time living separate and apart thereafter.\footnote{In 1979 Louisiana Revised Statutes 9:301 was amended to permit a no-fault divorce when the
spouses have lived separate and apart for one year.}
In addition to the fault grounds for divorce, either spouse may obtain a divorce upon proof of
La. Civ. Code arts. 102, 103.
La. Civil Code article 138 (effective before the 1979 legislative session) included the following as grounds for separation from bed and board: adultery, conviction of a felony and a sentence to imprisonment at hard labor or death, habitual intemperance and cruel treatment that rendered the common life together insupportable, public defamation, abandonment, attempt on the life of the other spouse, fleeing from justice after having been charged with a felony, and intentional nonsupport of a spouse in destitute or necessitous circumstances.}

By comparison to grounds for divorce in a "standard" marriage,\footnote{La. Civ. Code arts. 102, 103.
La. Civ. Code art. 138 (repealed Jan. 1, 1991).} divorce in a covenant marriage is more
difficult or more time consuming.

Although the grounds for divorce and separation from bed and board superficially resemble the law in effect until 1979,\footnote{See Spaht, supra note 110, at 146-49.}
significant differences exist. First and foremost, physical or sexual abuse of a spouse or a child was
never grounds for divorce in Louisiana until 1997, and this conduct is grounds for divorce only in a covenant marriage. In a "standard" marriage in Louisiana, the victim of spousal abuse must seek a "no-fault" divorce based upon living separate and apart for six months. To refuse to pass judgment on this conduct and to grant a "no-fault" judgment instead appears indefensible. The batterer should be adjudged guilty of the act or acts of violence which society condemns in a civil proceeding that permits proof by a simple preponderance of the evidence. Furthermore, the battered spouse should not have to wait for six months or longer, married to but separated from the abuser, if "reasonable" steps were taken to preserve the marriage without success.\footnote{La. Civ. Code art. 138(5) (repealed Jan. 1, 1991).
Secondly, abandonment before 1991 was simply a ground for legal separation and did not require proof of a period of time during which the abandoning spouse constantly refused to return.\footnote{La. R.S. 9:307(A)(6) (Supp. 1998).
La. Civil Code articles 102, 103.}
Third, before repeal in 1991,\footnote{Often the period of time during which the spouses live separate and apart as required by
Louisiana Civil Code articles 102, 103, is the most dangerous time for an abused spouse. Passage
of the Post-Separation Family Violence Relief Act (La. R.S. 9:361-69 (Supp. 1998)) recognized the
post-separation period as a particularly vulnerable time period.}
there were eight grounds for separation from bed and board based upon fault,\footnote{Louisiana Civil Code article 138 (effective before the 1979 legislative session) included the following as grounds for separation from bed and board: adultery, conviction of a felony and a sentence to imprisonment at hard labor or death, habitual intemperance and cruel treatment that rendered the common life together insupportable, public defamation, abandonment, attempt on the life of the other spouse, fleeing from justice after having been charged with a felony, and intentional nonsupport of a spouse in destitute or necessitous circumstances.} grounds which had expand-
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ed to ten by adding two additional “no-fault” grounds. In a “covenant” marriage there are only six grounds for separation from bed and board, which do not include, for example, public defamation, an attempt on the life of the other spouse, or intentional non-support of the other spouse who is in destitute or necessitous circumstances. Fourth, a judgment of divorce after legal separation required proof of having lived separate and apart for six months, without regard to whether there were minor children of the marriage.

Covenant marriage legislation expresses unambiguously the legislature’s concern for the effect of divorce on children, a sentiment not so clearly communicated by prior divorce law.

Because of the superficial similarities to the law of separation and divorce in the 1970’s, critics have argued that the covenant marriage legislation “substantially replicates a version of the Louisiana divorce law that was in place during the period when the divorce rate was increasing [1970s]; its few changes enhance the availability of speedy divorce. It offers this regime [covenant marriage] as an alternative to the civil code regime that has been in place during a period of declining divorce rates.”

Divorce rates significantly increased during the period of 1968-1979 principally because of the enactment of easy “no-fault” divorce laws which “broke the dam” of pending domestic cases. Professors Margaret Brinig and F.H. Buckley demonstrate in their

For a description of the unilateral and the mutual no-fault grounds for separation from bed and board, see Spaht, supra note 110, at 148.


See other grounds for separation from bed and board that existed before Jan. 1, 1991, in supra note 296.


“The divorce rate had its sharpest rise in the United States from 1962 to the 1980s, following a minor counterrtrend from 1950 to 1962 . . . between 1968 and 1979, it rose to its highest point, 5.3 divorces per 1000 people.” Carriere, supra note 3, at 1721.

Id. The additional grounds for immediate divorce based upon fault added by covenant marriage legislation are abandonment for one year and physical or sexual abuse of a spouse or child of the parties.

Id.

“The claim of a causal relationship between the divorce rate and divorce law, except in the extreme circumstance of a nationwide ban on divorce, is highly dubious.” Id. Professor Carriere cites as authority for this proposition, Ellman & Lohr, supra note 18, at 722-23. In Ellman & Lohr’s article the authors concentrate upon the methodology utilized by Brinig & Crafton, supra note 26, to prove that “no-fault” divorce raises the opportunity costs of divorce for victims of spousal abuse. Professor Ellman, who is also the Chief Reporter for the American Law Institute’s project entitled “Principles of the Law of Family Dissolution,” is an outspoken critic of a restoration of objective fault to the marital relationship. See Ellman’s other articles cited in supra note 80.

Despite the claim that there is only an insignificant correlation between the enactment of “no-fault” divorce and divorce rates, at least two more recent articles demonstrate that there is such a correlation. See Brinig & Buckley, supra note 26 (no-fault divorce significantly increased divorce rates because the costs of filing for divorce decreased; furthermore, higher divorce rates persisted in no-fault states); Friedberg, supra note 26 (unilateral divorce raised divorce rates significantly; states with more strongly unilateral divorce laws had greater increases in the divorce rates): “The rise in
article No-Fault Laws and At-Fault People that even after the introduction of "no-fault" laws higher divorce rates persisted in "no-fault" states.\footnote{305} Despite assertions about Louisiana's divorce rate being only slightly less than the national rate,\footnote{306} Louisiana is the only state which fails to report consistently the number of divorces to the National Center for Health Statistics.\footnote{307} That inability to establish the divorce rate in Louisiana has created significant obstacles to the current five-year empirical study of the effect of Louisiana's covenant marriage legislation on the state's divorce rate.\footnote{308} Even using old or unreliable Louisiana divorce statistics, the phenomenon of a spike in the divorce rate during the 1970s can easily be explained as the result of almost universal enactment of easy unilateral divorce in the 1970's.\footnote{309} Furthermore, the level or slightly declining national divorce rate occurring since the 1991 enactment of Louisiana's easier divorce scheme ignores the alarming increase in cohabitation rates during the same period of time. Cohabitant relationships terminate without affecting divorce statistics.\footnote{310} The precipitous increase in cohabitation rates do not bode

the 1960's and 1970's looks especially stark compared to the low level in the 1950's, but it also was steeper than the century-long trend.\" \textit{Id.} at 608 n.2.

\footnote{305}{Brinig & Buckley, \textit{supra} note 26.}
\footnote{307}{See tables in Friedberg, \textit{supra} note 26, at 614, note b by Louisiana.}
\footnote{308}{Steve Nock, sociology professor at the University of Virginia, is the director of the research team conducting the study entitled, \textit{"Is Louisiana's Covenant Marriage Law the Solution to America's Divorce Problem?"} The team includes Laura Sanchez and Jim Wright, sociology professors at Tulane University. The Gallup Organization began conducting the telephone survey in the summer of 1998 after the questionnaire was designed by the team after consultation with an advisory committee larger in number and with focus groups. The results were released in November: 63\% agreed covenant marriage will strengthen family life; 58\% agreed that covenant marriage will be better for children; 59\% agreed that covenant marriages will last longer; 95\% agreed that divorce is a very or somewhat serious problem (press release on file with author).

Another study of the effect of grass-roots politics utilizing the covenant marriage legislation as an example is being conducted by Professor Katherine Rosier of Louisiana State University.

\footnote{309}{"During the past twenty years, the United States has experienced a period of rapid change in the laws governing divorce. Touched off in 1969 by California's adoption of the nation's first divorce code that dispensed entirely with traditional fault-based divorce grounds and completed in 1985 when South Dakota added a no-fault provision to its list of fault based grounds, the concept that marriage failure is itself an adequate reason for marital dissolution has been accepted by every state." Kay, \textit{supra} note 61, at 6.}

\footnote{310}{Gallagher, Whitehead, \textit{supra} note 80.}

Maggie Gallagher is, of course, not the only person drawing the connection. In the National Weekly Edition of The Washington Times, (June 29-July 5, 1998) at 11, the paper reported on a gathering at the Heritage Foundation:

American society must revive the institution of marriage, said Heritage Foundation analyst Robert Rector.

The falling teen birthrates aren't as important as the leveling off of the "illegitimacy ratio," or percent of births that occur out of wedlock each year, he said.
well for our nation's children whose best welfare, as has been observed earlier,\(^{311}\) depends upon the traditional two-parent home where the biological parents are committed to each other expressed through marriage.

Termination of a covenant marriage necessarily affects status;\(^ {312}\) termination of a covenant marriage is not a matter governed by the principles of contract. Section 274 of Title 9 imposes upon a "covenant" marriage\(^ {313}\) the means of termination of a "standard" marriage under Civil Code article 101.\(^ {314}\) Causes for termination of a "standard" marriage are exclusive.\(^ {315}\) The judiciary has always distinguished marriage from an ordinary contract\(^ {316}\) as a relationship conferring status.\(^ {317}\) Thus, speculation that a "covenant" marriage may be dissolved by mutual consent\(^ {318}\) like an ordinary contract\(^ {319}\) overlooks not only the provisions of Section 274 but also those of Section 273 which instruct the counselor to discuss: "... the exclusive grounds for legally terminating a covenant marriage by divorce or by divorce after a judgment of separation from bed and board."\(^ {320}\)

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For three decades, the percent of births born to women outside wedlock has grown "remorselessly," charting the "collapse of the American family," he said. "Women aged 18-25 still had the most babies," he said. "They just didn’t marry."

To capitalize on this trend, society should promote marriage as well as programs that help couples build and retain healthy relationships and be good parents, said Mr. Rector.

See also Poponce and Whitehead, supra note 21.

311. See supra discussion in text at notes 6-26.

312. See supra discussion in text at notes 261-266.

313. La. R.S. 9:274 (Supp. 1998): "A covenant marriage shall be governed by all of the provisions of Chapters 1 through 4 of Title IV of Book I of the Louisiana Civil Code and the provisions of Code Title IV of Code Book I of Title 9 of the Louisiana Revised Statutes of 1950."


317. La. Civ. Code art. 86. Marriage is a relationship although created by civil contract.

318. See the commentary by Professor William Crawford accompanying Prec. Form 361, in Pleadings & Judicial Forms Ann. at 25: "The 'covenant' part of the covenant marriage, apart from the C.C. art. 87 requirements, is a form of contract in addition to the C.C. 87 contract of marriage and should not be viewed as a rule of public order. . . . If the covenant contract is not a rule of public order, then that contract may be mutually rescinded by the parties to the covenant. Furthermore, if the covenant were rescinded then the ordinary divorce procedures but not separation, would be available to the parties. . . ." (emphasis added). Such a conclusion is not consistent with the law of marriage or the provisions of the covenant marriage legislation.


Louisiana’s assertion of judicial jurisdiction to render a separation from bed and board in a covenant marriage is narrower than the state’s assertion of jurisdiction to divorce couples in either a “standard” or a covenant marriage. For jurisdiction to render a legal separation, Louisiana requires that, in addition to the Louisiana domicile of either plaintiff or defendant, the ground for separation (i.e. adultery, abandonment, physical or sexual abuse) occurred in Louisiana or while the matrimonial domicile was in Louisiana. To render a divorce in either a “standard” or covenant marriage, the law only requires that either the plaintiff or defendant be domiciled in Louisiana. The restrictive jurisdictional statute poses the historical issues of where does the abandonment or the living separate and apart occur and when is the matrimonial domicile in Louisiana. Even though the statutory assertion of jurisdiction is narrow, the Revised Statute section also adopts the chivalrous notion of permitting a “returning spouse” access to Louisiana courts if she was domiciled in Louisiana prior to the time the cause of action occurred, the cause of action occurred outside of Louisiana, and she is domiciled in Louisiana at the time the action is filed. This jurisdictional provision likewise had a predecessor.

These two provisions asserting Louisiana’s jurisdiction in a separation action seem unnecessarily restrictive and inconsistent with the policies of the covenant marriage legislation. If jurisdiction in a separation action were coextensive with jurisdiction to render a divorce, the law would provide more protection to the “innocent” covenant spouse by providing greater access to Louisiana courts. The “innocent” spouse to a covenant marriage should be permitted easy access to Louisiana courts, especially for a legal separation, in an effort to assure

321. For a discussion of issues of interstate jurisdiction and conflict of laws, see supra discussion in text at notes 261-279. These issues arise in the context of migratory divorce, where one spouse to a “covenant” marriage in either Louisiana or Arizona travels to another state and seeks a divorce under the law of the state of the spouse’s new domicile.

The author addresses the issues of conflict of laws as relates to the status of the covenant couple and those provisions of a covenant marriage that are contractual in greater depth in a forthcoming article to be published in Creighton Law Review in 1999.

For a discussion of issues of migratory divorce, see Carriere, supra note 3, at 1731-43.

See also La. Civ. Code art. 3522, cmt. (d): “Thus, to equate jurisdiction with choice of law with regard to that issue [right to divorce], as is done in Article 3521, seems to be not only acceptable but also efficient.”


324. La. Code Civ. P. art. 10(A)(7). See also id. art. 10(B).


enforcement of the contractual provisions of her covenant marriage. Assurance comes in the form of guaranteed application of Louisiana law, especially since Louisiana would have personal jurisdiction over the absent covenant spouse. No court in another state would be as well equipped to interpret and apply the Louisiana law of covenant marriage. As importantly, it is illogical to restrict access to a legal separation in instances where access to divorce is not so restricted. Louisiana’s assertion of jurisdiction, if it is to be consistent with the overall policy of covenant marriage, should encourage separation from bed and board, which preserves the marriage, in preference to divorce.

A. Fault Grounds for Legal Separation or Divorce

1. Adultery and Conviction of a Felony

A spouse in a “covenant” marriage, just as in a “standard” marriage, may seek a divorce for the other spouse’s adultery or conviction of a felony if the sentence imposed is imprisonment at hard labor or death. Adultery, defined in the cases to include at the least oral sex as well as sexual intercourse with penetration, has always been considered the most serious violation of a spouse’s marital obligations. The possibility of the wife’s adultery introducing a “bastard” into the husband’s blood line in combination with the sharing of one’s sexual potential as an expression of the deepest human intimacy made adultery the most reprehensible of conduct within the marital relationship. The jurisprudence interpreting the meaning of commission of a felony will apply,

328. This issue as well as other conflict of laws issues will be addressed in the author’s article to be published in Creighton Law Review, forthcoming in 1999. The effects of a Louisiana covenant marriage litigated in a Louisiana court will be determined by Louisiana law. It is far better for the effects of a covenant marriage to be determined in Louisiana by a Louisiana court more familiar with the legislation and the policies favoring its enactment.


332. See Menge v. Menge, 491 So. 2d 700 (La. App. 5th Cir. 1986); Alphonso v. Alphonso, 422 So. 2d 210 (La. App. 4th Cir. 1982). See also Bonura v. Bonura, 505 So. 2d 143 (La. App. 4th Cir. 1987).

333. La. Civ. Code art. 98 (spouses owe each other fidelity, support and assistance).


of course, to the identical ground for divorce or separation from bed and board in a "covenant" marriage. 336

2. Abandonment for One Year

Abandonment, once grounds for a legal separation in Louisiana 337 and still relevant for purposes of final periodic support, 338 requires evidence that a spouse has left the matrimonial domicile, without lawful cause, and "constantly refuses to return." 339 Jurisprudence recognized that abandonment could be "constructive" without the necessity of a spouse "quitting" the matrimonial domicile. For example, if he changed the locks on the doors of the matrimonial domicile or otherwise prevented the other spouse from entering, the judiciary recognized that the action constituted a "constructive" abandonment. 340 Ordinarily, proving a spouse left the matrimonial domicile is not difficult. The issue that proves the most troublesome is whether the spouse left "without lawful cause." Although the jurisprudence is not entirely consistent, 341 courts generally permit proof of a constant refusal to return by evidence that the other spouse has not returned prior to the divorce or separation litigation. 342

Lawful cause to leave which precludes the offense of abandonment includes proof that the spouses' agreed to live separate and apart even if that agreement is implied from conduct, 343 or that the spouse who remained at the matrimonial domicile was guilty of fault justifying the departure of the other spouse. 344


340. See, e.g., Gipson v. Gipson, 536 So. 2d 586 (La. App. 1st Cir. 1988). "Indeed, some decisions seem to require of the plaintiff only that he prove (1) the defendant's departure (2) without cause, and not (3) that he made any effort to urge the defendant to return to the common dwelling. See, e.g., Beck v. Beck, 341 So.2d 580 (La. App. 2d Cir. 1977). Indeed, it seems these decisions impose upon the defendant the duty to return at least before trial of the issue of abandonment begins, if not by the time of the initiation of the suit against him." Katherine Shaw Spaht, Louisiana Family Law Course by Robert Anthony Pascal 143-44 (4th ed. 1986).

341. For example, Mercer v. Mercer, 671 So. 2d 937 (La. App. 3d Cir. 1996). However, a strong argument can be made that the court should be reluctant in a "covenant" marriage to find that lawful cause includes an agreement to separate on the basis of conduct. See also Broussard v. Broussard, 462 So. 2d 1386 (La. App. 3d Cir. 1985) (agreement was voluntary).

342. See, e.g., Bruce v. Bruce, 696 So. 2d 661 (La. App. 1st Cir. 1997); Brehm v. Brehm, 685 So. 2d 377 (La. App. 5th Cir. 1996), writ denied, 688 So. 2d 505 (1997); Caldwell v. Caldwell, 672 So. 2d 94 (La. App. 5th Cir.), writ denied, 679 So. 2d 1351 (1996); Harrington v. Montet, 634 So.
Fault in a “standard” marriage that justifies one spouse’s departure from the matrimonial domicile is conduct that constitutes grounds for legal separation or divorce prior to January 1, 1991,345 the same definition of fault for purposes of final spousal support.346 In a “covenant” marriage fault that constitutes lawful cause should consist of grounds for a legal separation or divorce in a “covenant” marriage—such as adultery, commission of a felony, physical or sexual abuse of the spouse or a child of the parties, habitual intemperance or cruel treatment that renders their common life together insupportable.347 In effect for a “covenant” marriage, fault for purposes of lawful cause to abandon a spouse, has been redefined with the identical contours of separation or divorce grounds in a “covenant” marriage. To the extent that additional grounds for separation existed prior to January 1, 1991,348 and do not fall under the rubric of cruel treatment,349 they are not “lawful cause” for abandonment in a “covenant” marriage.

Unlike the prior ground for separation, abandonment in a “covenant” marriage must exist for a one-year period.350 As a consequence, the third element of abandonment, “has constantly refused to return,” should be easier to prove, at least its constancy. However, what may be more difficult to prove, in a conscious departure from prior jurisprudence, is that the other spouse has constantly refused to return during the entire one-year period. Refusal implies a request, or at the very least a demonstrated willingness to receive the abandoning spouse into the matrimonial domicile. Prior to 1958 this refusal was


For an excellent discussion of the conflict in circuit courts of appeal in the early 1980s about the meaning of “lawful cause”, see Durand v. Willis, 470 So. 2d 947 (La. App. 3d Cir. 1985). Some cases appear to accept as proof of lawful cause conduct that is less serious than the conduct required to obtain a separation or divorce.

345. The grounds for a separation from bed and board before January 1, 1991, are listed in supra note 296.


See also La. Civ. Code art. 111, cmt. (c).


349. Public defamation, attempting to kill the other spouse, and intentional nonsupport of a spouse in destitute or necessitous circumstances would in the ordinary case be considered cruel treatment. If such conduct rendered the life together insupportable, it would be grounds for a separation from bed and board in a “covenant” marriage. See La. R.S. 9:307(B)(6) (Supp. 1998). If a spouse was charged with a felony and fled from justice, prior to January 1, 1991, the other spouse was entitled to a separation. Whether or not the circumstances of being charged with a felony and fleeing from justice falls under the rubric of cruel treatment will determine if all previously existing grounds for separation are incorporated in lawful cause for the purposes of abandonment in a “covenant” marriage.

proved by a judicial summons directed to the abandoning spouse and his failure to obey the summons by returning to the matrimonial domicile.\textsuperscript{351} Thereafter, the legislation permitted proof of abandonment "as any other fact in a civil suit."\textsuperscript{352} This change led to some judicial decisions "running counter to the historic purpose of the suit for abandonment,"\textsuperscript{353} which was "more an effort to have the errant spouse return and renew the conjugal life than to put an official end to it."\textsuperscript{354} With the enactment of "covenant" marriage legislation, the object of which is to strengthen marriage by counseling and a more difficult and time-consuming divorce process, abandonment for the first time in Louisiana became a ground for divorce \textit{but only if it lasted for a period of one year}. Considering the purpose of the legislation and the seriousness with which abandonment is treated, the judiciary should require proof of a request by the abandoned spouse and then a failure to return by the other.\textsuperscript{355} Furthermore, constancy within the one-year period implies more than one request for the other spouse's return and the last such request within a reasonable time immediately prior to the expiration of the one year period.

During the one-year period of abandonment while the spouses are physically living apart, either spouse may seek limited incidental relief: child custody, child support and spousal support.\textsuperscript{356} The same criteria apply to the granting of such incidental relief as apply to their award pending separation or divorce.\textsuperscript{357} Thus, a court considering a request for spousal support during this period should apply the criteria for the award of interim spousal support: "the needs" of the claimant spouse, the "ability of the other party to pay, and the standard of living of the parties during the marriage."\textsuperscript{358} The award of spousal support while the couple is physically separated serves the same purpose as an interim award—"to maintain the status quo without unnecessary economic dislocation..."\textsuperscript{359} Other incidental relief that may be requested by a spouse in a proceeding for

\textsuperscript{351} See Spaht, \textit{supra} note 342, at 143-44.
\textsuperscript{353} Spaht, \textit{supra} note 342, at 143.
\textsuperscript{354} \textit{Id.}
\textsuperscript{355} Samuel, \textit{supra} note 4: "But when a couple has voluntarily chosen a strict regime of divorce after premarital counseling on the subject, there is no justification for the lawyer or judge to manipulate or allow manipulation of the law or evidence to effect a divorce for such a couple. . . ."
\textsuperscript{356} See also Green v. Green, 567 So. 2d 139 (La. App. 2d Cir. 1990).
divorce but which is not explicitly available before filing suit includes special injunctive relief, except for an injunction in family violence cases; use and occupancy of the family home or use of community movables or immovables; or use of personal property. During the one-year period the community of acquets and gains continues to exist. However, either spouse may seek a judgment of separation of property after the couple has been physically separated for six months, the judgment terminates the community regime.

3. Physical or Sexual Abuse of a Spouse or Child of the Parties

For the first time in Louisiana history physical or sexual abuse of a spouse or a child of the parties, which includes children who are not children of the marriage, is a ground for divorce but only in a covenant marriage. Before January 1, 1991, a spouse could obtain a separation from bed and board for cruel treatment which always included physical cruelty toward a spouse as long as the cruelty rendered the common life together insupportable. Cruelty by a spouse directed at a child of the parties if in the presence of the offended

363. La. R.S. 9:366 (1995): "All separation, divorce, child custody, and child visitation orders and judgments in family violence cases shall contain an injunction as defined in R.S. 9:362. Any violation of the injunction, if proved by the appropriate standard, shall be punished as contempt of court, and shall result in a termination of all court ordered child visitation." (emphasis added).
366. La. Civ. Code art. 2374(D): "When the spouses have lived separate and apart continuously for a period of six months, a judgment decreeing separation of property shall be granted on the petition of either spouse." Id. art. 2356: "The legal regime of community property is terminated by . . . judgment of . . . separation of property. . . ."
367. This remedy assumes, of course, that other grounds for separation of property do not exist, such as mismanagement of community property. See La. Civ. Code art. 2374(A).
368. The term clearly includes stepchildren of the spouse who is guilty of physical or sexual abuse. Compare Ariz. Rev. Stat. § 25-903 (4) (West 1998), which makes physical or sexual abuse of any child or relative of either spouse permanently living in the matrimonial domicile grounds for divorce in a covenant marriage.
369. La. R.S. 9:307(A)(4) (Supp. 1998). See also the relaxation of grounds for divorce after legal separation when there are minor children of the marriage if abuse of a child was the basis for the legal separation (La. R.S. 9:307(B)(4) (Supp. 1998)). Louisiana Revised Statutes 9:307(A)(5)(b) (Supp. 1998) reduces the period of time in such case from one year and six months to one year.
spouse also constituted cruel treatment since the presence of the offended spouse meant it was intended to harm her. By comparison, the covenant marriage legislation expanded the offensive conduct to include sexual or physical abuse of the child without requiring that the abuse be in the presence of the other spouse. In addition the legislation elevated the seriousness of the societal offense\(^\text{370}\) to a ground for divorce. What a mockery the law makes of divorce from the abuser in a “standard” marriage by pronouncing that the breakup of the marriage was no one’s fault.\(^\text{371}\) The abused spouse in a covenant marriage need not wait 180 days or six months to seek a divorce but can file for a divorce immediately\(^\text{372}\) with the concomitant societal judgment about the abuser’s conduct.

Physical and sexual abuse are terms used in the Post-Separation Family Violence Relief Act as part of the definition of “family violence.”\(^\text{373}\) The definition of “family violence” under the Act explicitly includes acts beyond physical or sexual abuse, such as any offense against the person,\(^\text{374}\) but also clarifies that the term does not include “reasonable acts of self-defense utilized by one parent to protect himself or herself or a child in the family from the family violence of the other parent.”\(^\text{375}\) Louisiana courts have had occasion to interpret the meaning of “sexual abuse,” which includes touching a child in her vaginal area,\(^\text{376}\) encouraging the child to touch and kiss the adult in the groin area,\(^\text{377}\) and penetration evidenced by adhesions of the hymen discovered during

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371. La. Civ. Code arts. 102, 103(1). Even Professor Carriere in a footnote in her article, Carriere, supra note 3, at 1714 n.80 states: “It is difficult to understand the logic by which assigning blame to a party dissatisfied with her or his marriage is viewed as a means of preventing marital breakdown; it seems that it would supply an added source of grievance and an added impetus to end the marriage. Of course, if the blame is deserved, as in the case of a battering spouse, then such a result . . . could benefit both the victim and society.” (emphasis added).

372. Proof of physical or sexual abuse in a civil proceeding for divorce need be by a simple preponderance of the evidence, not beyond a reasonable doubt as required in a criminal prosecution of the abuser. For a recent example, see Thibodeaux v. Thibodeaux, 668 So. 2d 1269 (La. App. 5th Cir. 1996) (for purposes of alimony, court found husband had slapped wife despite fact he was acquitted on assault charge).


374. Id.: “‘Family violence’ includes but is not limited to physical or sexual abuse and any offense against the person as defined in the Criminal Code of Louisiana, except negligent injuring and defamation, committed by one parent against the other parent or against any of the children.”


376. See Bearden v. Bearden, 645 So. 2d 1189 (La. App. 2d Cir. 1994) (daughter described to mother that father had touched her and demonstrated by placing her finger inside both her vaginal and anal regions); State Dep’t of Social Services in the Interest of A.D., C.D., & D.D., 628 So. 2d 1288, 1293 (La. App. 3d Cir. 1993) (one daughter admitted to “vague, nonspecific sexual contact” but the other indicated to the court that her father touched her in the vaginal area).

377. Kiefer v. Yellon, 646 So. 2d 1073 (La. App. 5th Cir. 1994) (conduct also included father’s rubbing his penis on child until ejaculation).
physical examination. Physical abuse includes striking a spouse in the face, pushing, punching, shoving, biting, or kicking a spouse, throwing water in spouse's face and then throwing her to the floor, grabbing a spouse by the neck and choking her; grabbing a spouse's hair and banging her head against the inside of a car; putting a gun in a spouse's face and threatening to kill her; and severely shaking and whipping a child which leaves bruises.

Broader notions of objective fault as grounds for divorce restore a higher standard of morality in conduct within the marital relationship. Although far more incidents of violence occur in non-marital relationships, a covenant marriage makes the abuser legally accountable to society. Covenant marriage restores on behalf of society a standard of morality within the marital relationship which society is willing to apply to the conduct of married partners. Covenant marriage not only condemns certain marital misbehavior but also admonishes a couple that only the strongest reasons justify termination of the marriage, particularly if there are children. Communicating society's ideal in the form of a choice can only strengthen the cultural perception of marriage and perhaps save it from extinction.

4. Cruelty (Mental) and Habitual Intemperance as Grounds for Legal Separation Only

Unlike Arizona, Louisiana covenant marriage legislation limits cruel treatment, other than physical or sexual abuse, to grounds for separation upon proof that the cruelty in question renders the spouses' life together insupport-
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able. The legislation, just as its predecessor, includes "excesses," "outrages," and "ill-treatment" in addition to cruel treatment. All such conduct was aggregated under the rubric mental cruelty. A survey of cases interpreting the terms reveals that mental cruelty can include the refusal of sexual relations or sexual excess, failure to adequately perform housecleaning and the preparation of meals, religious fervor and constant proselytizing, harassment beyond mere nagging and griping, serious monetary irresponsibility, or an accumulation of such offenses. Intemperance clearly refers to alcohol and drug use, whether stimulants or depressants, which if habitual, constant and repetitive rather than intermittent or isolated, may also be grounds for a separation from bed and board.

In either case, however, the cruelty or habitual intemperance must be such that it renders the common life together insupportable. The requirement that the offensive conduct render the life together insupportable introduces a subjective factor intended to focus attention on the sensibilities of the offended spouse and the social milieu of the couple. The measure of insupportability should not be the same for all persons; for the same act will render the common life insupport-

392. Id.: "On account of habitual intemperance of one of the married persons, or excesses, cruel treatment, or outrages of one of them toward the other, if such habitual intemperance, or such ill-treatment is of such a nature as to render their living together insupportable."
393. One such excellent survey although now dated was James F. Pierson, Jr., The Degree of Cruelty Necessary to Justify Separation from Bed and Board in Louisiana, 16 La. L. Rev. 533 (1956), which considered the meaning of the terms for purposes of the ground for separation from bed and board.

Cases are still decided interpreting the terms for purposes of determining fault under Louisiana Civil Code article 111 (final periodic spousal support).
396. See Lamb v. Lamb, 460 So. 2d 634 (La. App. 3d Cir. 1984), writ denied, 462 So. 2d 1249, 1250 (1985) (because of couple's financial ability to afford a maid, wife's ineptitude in cleaning and preparing meals not fault).
401. Michelli v. Michelli, 655 So. 2d 1342 (La. App. 1st Cir. 1995); Roland v. Roland, 519 So. 2d 1177 (La. App. 1st Cir. 1987). There may be a question as to whether a gambling addiction is habitual intemperance or cruel treatment. See Olivier v. Abunza, 266 La. 456, 76 So. 2d 528 (1954).
able for some couples, but not for others.403 Each case should be considered on its own merits, but this individualization of cases "must not be made a basis for abusing the law through laxity in its application."404 The court "should use extreme prudence, having due regard for the possibility of the continuance of the spouses' life in common,"405 particularly since the marriage is a covenant marriage voluntarily chosen by the spouses.406

5. Grounds for Divorce After a Legal Separation

An "innocent" spouse may choose to seek a separation from bed and board rather than a divorce407 for reasons as various as religious conviction or the desire to maintain spousal support at a higher level.408 Should a spouse choose to obtain a separation from bed and board the length of time that must elapse between the judgment of separation from bed and board and the divorce differs depending upon whether there are minor children of the marriage.409 If there are minor children of the marriage, as a general rule, the spouses must live separate and apart for one year and six months after the legal separation410 before either spouse may file suit for divorce.411 By contrast, if there are no minor children of the marriage, the spouses need live separate and apart for only one year after the legal separation before either may file for divorce.412 The

404. Spaht, supra note 342, at 142.
405. Id.
406. See Samuel, supra note 4, at n.20.
407. The grounds for divorce in a covenant marriage are almost identical to those for a separation from bed and board. The only difference is that habitual intemperance or cruel treatment that renders the common life together insupportable is only a ground for legal separation. See supra discussion in text at notes 389-390.
408. La. Civ. Code art. 113: "the court may award a party an interim periodic allowance based on the needs of that party, the ability of the other party to pay, and the standard of living of the parties during the marriage. The obligation to pay interim periodic support shall not extend beyond one hundred eighty days from the rendition of the judgment of divorce, except for good cause shown." (emphasis added).

410. Accurately described in the legislation as one year and six months "from the date the judgment of separation from bed and board was signed." La. R.S. 9:307(A)(6)(a) (Supp. 1998). To the same effect, see identical phraseology in La. R.S. 9:307(A)(6)(b) (Supp. 1998).
distinction in grounds for divorce after a legal separation emphasizes the existence of minor children of the marriage, supporting the claim that covenant marriage legislation was "for the sake of the children." In troubled marriages where there are children of the marriage, "slowing down" the process of divorce in an effort to permit steps to be taken is a realistic response if the goal is to preserve the covenant marriage. If there are no minor children of the marriage, the legislature lacks the compelling concern to preserve the marriage that it has if there are such children.

Despite the obvious concern for the preservation of a covenant marriage when there are minor children, there is an exception to the slowdown if "abuse of a child [need not be child of the marriage] is the basis for which the judgment of separation from bed and board was obtained...." If abuse of a child was the ground for legal separation, then the threat posed to the child by the additional six-month period outweighs the policy permitting more time for the spouses to take steps to preserve the marriage. The focus of the covenant marriage legislation remains on the child of the marriage: preserve the marriage for the sake of the child unless the marriage poses an actual, realistic threat to the safety and psychological health of the child.

6. Defenses:

The introductory section of the legislation describing a covenant marriage declares that "[o]nly when there has been a complete and total breach of the

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413. See supra authorities cited in note 9.
414. Proponents of covenant marriage hope that the two year period will be long enough to effect a reconciliation by giving counseling an opportunity to succeed, or if reconciliation is impossible, will be long enough to force the spouse who wants an immediate divorce to offer an adequate financial inducement to the innocent spouse to sue for an immediate divorce should the innocent spouse have grounds for such a divorce. . . .
416. Id.
418. The defense of reconciliation should be available to covenant spouses although the defense does not appear in a form identical to Louisiana Civil Code article 104: "The cause of action for divorce is extinguished by the reconciliation of the parties." Furthermore, Article 104 is excluded from the provisions of Louisiana Revised Statutes 9:274 that provides a covenant marriage shall be governed by certain chapters of the Civil Code Title IV which apply to "standard" marriages. Article 104 appears in Title V of Book I. Nonetheless, reconciliation is mentioned specifically in La. R.S. 9:307(A)(5) (Supp. 1998) (living separate and apart for two years without reconciliation); La. R.S. 9:307(A)(6)(a) and (b) (Supp. 1998) (one year or one year and six months living separate and apart without reconciliation after a judgment of separation); La. R.S. 9:307(B)(5) (Supp. 1998) (same as La. R.S. 9:307(A)(5) (Supp. 1998)); La. R.S. 9:309(A)(2) (Supp. 1998) (status of judicially separated covenant spouses until reconciliation); La. R.S. 9:309(B)(2) (Supp. 1998) (community property regime reestablished upon reconciliation). Living separate and apart because the fault of one spouse has offended the other spouse is analogous to living separate and apart because of a judgment of
marital covenant commitment may the *non-breaching party* seek a declaration that the marriage is no longer legally recognized.\(^{419}\) This general definition of an element of covenant marriage, grounds for termination, is modified by the more specific provisions that thereafter govern divorce in a covenant marriage.\(^{420}\) For example, the sentence begins by stating that "[o]nly when there has been a complete and total breach of the marital covenant. . . ." may the non-breaching party seek relief. However, the more specific provision that governs divorce in a covenant marriage permits a spouse to obtain a divorce if the spouses have been living separate and apart for two years,\(^{421}\) which does not involve a complete and total breach of the marital covenant by one spouse.\(^{422}\) As a general rule of interpretation, the more specific provision prevails if there is a conflict; but in this instance the more specific section prevails because it begins with "[n]otwithstanding *any other law to the contrary*. . . ."\(^{423}\) The explanation for the discrepancy in definition and the more specific section on grounds for divorce lies in the legislative history: the bill as introduced contained only two grounds for an immediate divorce in a covenant marriage, both of which (adultery and abandonment for one year) involve a complete and total breach of a spouse's marital obligations.\(^{424}\)

Adultery and abandonment, however, are not the only grounds for an immediate divorce under the covenant marriage legislation which represent a separation from bed and board. La. R.S. 9:309(A)(2) (Supp. 1998). Consistently with the spirit of a covenant marriage reflected in all of the statutory provisions governing its creation and existence, the *offended spouse* may terminate the marriage for reasons of fault on the part of the other spouse. If the spouse is no longer offended because he or she has forgiven the offense by the other, reconciliation should be a defense to an action to terminate a covenant marriage for fault.

The defense of excuse due to mental or emotional illness is probably available, although the defense itself created by the judiciary at the height of Americans' acceptance of psychological excuses for offensive behavior ought to be reexamined. See *Brehm v. Brehm*, 685 So. 2d 377 (La. App. 5th Cir. 1996), writ denied, 688 So. 2d 505 (1997); *Doane v. Benenate*, 671 So. 2d 523 (La. App. 4th Cir. 1996).


420. For a related discussion, see *supra* text at notes 185-186, 312-320.


422. The obligations of the marital covenant include fidelity, support and assistance. La. Civ. Code art. 98. Living separate and apart does not expressly violate the obligations of fidelity, support and assistance. In fact, comment (f) to Article 98 addresses the spouses' obligation to live together: "Under this revision the spouses are free to live together as necessary to fulfill their obligation mutually to support, assist, and be faithful to each other."

Living separate and apart as a grounds for divorce contemplates an agreement by the spouses to live apart, or two spouses guilty of a total breach of marital obligations, so that neither or both can be accused of violating the obligation contained in Article 98, such as the positive obligation of fidelity (to share one's sexual potential with the other) or the obligation of assistance (to assist each other in cooperative endeavors of married life). Living separate and apart is to be distinguished from abandonment which does involve a breach of the obligation to live together so as to fulfill the obligations of fidelity and assistance.


424. See *Carriere*, *supra* note 3, at 1715 n.91; *Samuel*, *supra* note 4.
spouse’s total breach of his marital obligations. Conviction of a felony and physical and sexual abuse also involve conduct that constitutes a complete and total breach of one’s marital obligations. Thus, the four “fault” grounds for an immediate divorce ultimately included in the covenant marriage legislation or the additional “fault” ground for a legal separation concern a spouse’s conduct that breaches his marital obligations. For the offenses that constitute “fault,” the more specific provision is consistent with the general definition: only the non-breaching party may seek legal relief. So what happens if both parties have engaged in conduct that constitutes “fault” grounds for separation and divorce and thus breached their marital obligations?

The query raises the possibility of the familiar defense of recrimination and the ameliorating principle, comparative rectitude. Recrimination as a judicially recognized defense was derived from the underlying principle of the law of separation and divorce that relief was available only to the offended spouse. Recrimination “had no role, and was not invoked, in a suit for separation or divorce based on living separate and apart.” If invoked by the defendant as a defense to a suit for separation or divorce by the plaintiff, the defendant had to prove “fault” by the plaintiff. To be successful the defendant had to prove not only the “fault” of the plaintiff, but also the degree of seriousness of plaintiff’s “fault.” If the defendant was successful in proving that plaintiff was at “fault” and that plaintiff’s “fault” was equal to that of his, then plaintiff’s suit was dismissed. The result, of course, of a successful invocation of the defense was that neither spouse could obtain a separation or divorce for “fault” of the other. If the defendant could not prove that the “fault” of the plaintiff was equal to or greater in degree than his own, then plaintiff prevailed and was entitled to a judgment.

Even if the defendant was successful and plaintiff’s suit was

427. “For instances in which the doctrine of recrimination was applied, see J.F.C. v. M.E., 6 Rob. 135 (1843); Maranto v. Maranto, 297 So.2d 704 (La. App. 1st Cir. 1974); and Schillacci v. Schillacci, 310 So.2d 179 (La. App. 4th Cir. 1975).” Spaht, supra note 110, at 203.
See also Wheelahan v. Wheelahan, 557 So. 2d 1046 (La. App. 4th Cir.), writ denied, 559 So. 2d 1379 (1990).
428. Spaht, supra note 110, at 203.
429. The most obvious example of a proper invocation of comparative rectitude is when one spouse has been guilty of habitual intemperance or cruel treatment which are only grounds for legal separation (see supra discussion in text at notes 389-406) and the other, guilty of grounds for divorce, such as physical or sexual abuse or adultery.
430. “If the offenses were of entirely different orders of degrees of seriousness, the spouse guilty of the lesser fault was entitled to relief by invoking the principle of comparative rectitude. Eals v. Swan, 221 La. 329, 59 So.2d 409 (1952). The obvious purpose of comparative rectitude was to
dismissed, either spouse could thereafter seek a "no-fault" divorce after living separate and apart for the requisite period of time.

The defense of recrimination with its corollary principle of comparative rectitude was legislatively overruled in separation actions and judicially overruled in divorce suits. Does the definition of a covenant marriage resurrect the defense of recrimination in a suit for divorce by a covenant spouse? What effect would its resurrection have on the covenant couple? If additional fault grounds for divorce had simply been added to the list of grounds for divorce in a "standard" marriage under Civil Code article 103, a strong argument could be made that the jurisprudence had abolished the defense. However, by creating a new tier, or type, of marriage that emphasizes relief exclusively for the "innocent" spouse, the legislature may have expressed an intention to permit the principles inherent in a remedy for "fault" to be asserted. Comparative fault, developed as a modification of contributory negligence, is well established in Louisiana tort law, which is based upon the duty of a person whose "fault" causes damage to another to repair it. However, the development of comparative rectitude to temper the perceived harshness of the defense of recrimination in divorce actions overlooked the fact that comparative rectitude was unnecessary to afford relief to the parties. As long as the law provided a "no-fault" ground for divorce, either spouse could ultimately obtain a termination of the marriage.

During the same session that the covenant marriage law was passed, the legislature rejected comparing the "fault" of the two spouses when deciding entitlement of the claimant spouse to final spousal support. Thus, it may be that the legislature's intent is to authorize implicitly the defense of recrimination in an action for divorce in a covenant marriage without the historically complimentary doctrine of comparative rectitude. The legislature may believe that justice requires that a divorce for "fault" be reserved for the "innocent"
spouse (not comparatively innocent). If neither spouse is "innocent," then they both must wait the statutory time period of two years before either may obtain a divorce. Relief is available after the expiration of the two-year period which is a humane outcome. However, neither spouse is entitled to relief that adjudges one of them guilty of offensive conduct which broke up the marriage.

B. No-Fault Grounds for Legal Separation or Divorce: Two Years Living Separate and Apart

The covenant marriage bill as introduced did not include a "no-fault" ground for divorce, which explains why the definition of covenant marriage ignores the possibility that such a marriage could terminate without a total breach of a spouse's marital obligations. Living separate and apart for three years was added to the bill by amendment in the Senate Committee on Judiciary A, but the time period required for living separate and apart was reduced to two years in conference committee before final passage of the bill. Living separate and apart remains a ground for divorce in a "standard" marriage, but the statutory time period is significantly shorter, six months. Nonetheless, jurisprudence interpreting "living separate and apart continuously" applies to both provisions. The two-year period of living separate and apart restores, as Professor Carriere observes, the ground for divorce under Louisiana law from 1938-
1979. What is new is that the same statutory period of living apart constitutes a ground for separation from bed and board,\textsuperscript{441} thus affording to a spouse who for religious reasons would never seek a divorce a ground for legal separation even if each spouse was guilty of offensive toward the other.

C. Effect of Covenant Marriage on Incidental Demands in Divorce or Separation Proceedings

Although a “covenant” spouse can claim the same incidental relief as a spouse in a “standard” marriage, a strong argument can be made that the very existence of a covenant marriage should have greater bearing upon certain incidental relief. A “covenant” marriage should have particular impact upon incidental demands which consider the relevancy of conduct of a spouse or of the strength of the spouses’ commitment. Spousal support, both the interim periodic support allowance\textsuperscript{442} and final support,\textsuperscript{443} as well as child custody are examples of such incidental relief.

An interim allowance awarded to a spouse based upon her needs, his ability to pay and their standard of living during the marriage serves the purpose of maintaining the status quo.\textsuperscript{444} In a covenant marriage, at the option of the “innocent” spouse, the status quo as married and the obligation to take steps to preserve the marriage may last as long as two years. The “innocent” spouse who is in need should be awarded a sum to maintain her as nearly as possible at the level of their marital standard of living throughout the entire two-year period. Additionally, if the facts justify its extension, the award should continue for an additional one hundred eighty days after the divorce.\textsuperscript{445} The purpose of the interim period in a covenant marriage\textsuperscript{446} is to assure that all reasonable steps designed to preserve the marriage have been taken. Maintaining the status quo during the “interim” period in hopes of preserving the marriage guarantees the optimum climate for the serious work of reconciliation. Protection against

\textsuperscript{442} La. Civ. Code art. 113.
\textsuperscript{444} La. Civ. Code art. 113, cmt. (b): “The purpose of an interim allowance is to maintain the status quo without unnecessary economic dislocation until a determination of the amount of final support can be made and until a period of time for adjustment elapses that does not exceed, as a general rule, one hundred eighty days after the judgment of divorce.” \textit{See also} Arrendell v. Arrendell, 390 So. 2d 927 (La. App. 2d Cir. 1980).
\textsuperscript{445} La. Civ. Code art. 113: “The obligation to pay interim periodic support shall not extend beyond one hundred eighty days from the rendition of judgment of divorce, except for good cause shown.” \textit{See also} comment (e).
\textsuperscript{446} In many cases of “covenant” marriage the interim period will be marked by living separate and apart rather than the period that elapses after suit for divorce is filed. \textsuperscript{446} See La. R.S. 9:308(A), (D) (Supp. 1998) (covenant marriage). \textit{See also} La. Civ. Code art. 105; La. R.S. 9:291 (1991) (standard marriage).
traumatic economic dislocation to the extent possible, particularly for the "innocent" spouse, is justified because covenant spouses solemnly and deliberately promised a more binding commitment. The existence of a covenant marriage justifies a generous interim allowance for the maximum time allowable.

For final periodic support, the court must consider the factor of fault of the claimant prior to the filing of a proceeding to terminate the marriage. The promises of the covenant couple made after counseling and reflection should be treated as extremely serious; and if one spouse breaches those promises, he should suffer the consequences. Under the jurisprudence prior to 1991, if a spouse obtained a judgment of separation from bed and board on the basis of the fault of the other spouse, the judgment was determinative of whose pre-separation fault caused the dissolution of the marriage. Thus, if a covenant spouse obtains a judgment of separation from the other spouse on the basis of his adultery, the judgment is conclusive as to whose fault caused the separation. The husband may not introduce evidence of his wife's fault prior to the judgment of separation, only evidence of her fault, if any, between the judgment of separation and filing suit for divorce. If the wife is in need based upon the criteria in Article 112 and the husband is able to pay, the court should award her final periodic support. An obvious advantage of obtaining a legal separation on the ground of the other spouse's fault is to determine for purposes of final support whose fault caused the separation.

Even though the jurisprudence previously distinguished between a judgment of separation on grounds of fault and a judgment of divorce for identical reasons, the judiciary should reconsider that distinction in the context of a "covenant" marriage. In Lagars v. Lagars, the Louisiana Supreme Court concluded: "[W]hen there has been no judicial separation, a spouse claiming post-divorce alimony in an action for divorce based on adultery is entitled to alimony, if in need, if the claimant spouse obtains a judgment of divorce in his or her favor, unless the other spouse affirmatively defends and proves that the claimant spouse

La. Civ. Code art. 111, cmt. (c):
A condition for the award of final periodic support is the claimant's freedom of fault prior to the filing of a proceeding to terminate the marriage. Fault continues to mean misconduct the [that] rises to the level of one of the previously existing fault grounds for legal separation or divorce. However, unlike prior law this Article is explicit that the fault of the claimant that precludes an award of spousal support must have occurred prior to the filing of the "proceeding to terminate the marriage"—for example, prior to the institution of an action for divorce.

(Citations omitted).

448. See Samuel, supra note 4, at n.20.
450. La. Civ. Code art. 112. See also id. art. 111.
451. Id.
452. 491 So. 2d 5 (La. 1986).
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was at fault. We reach this conclusion because when there has been no judicial separation, the divorce is the first fault determination between the parties, and the judgment of divorce based on the adultery of the non-claimant spouse carries with it the implication that the claimant spouse was not at fault.\footnote{453} Lagars was decided after the Louisiana Supreme Court abrogated the defense of recrimination and its corollary principle, comparative rectitude.\footnote{454} Therefore, it was possible for a spouse to obtain a divorce from the other spouse on the ground of adultery yet also be guilty of fault. Lagars simply shifted the burden of proof to the spouse against whom the judgment of divorce had been rendered to prove the “alimony-barring” fault of the claimant spouse. If, as has been argued previously,\footnote{455} the defense of recrimination is resurrected,\footnote{456} then the covenant spouse who obtains a judgment of separation or divorce on the ground of the fault of the other spouse is “innocent” and not at fault. Both judgments should have preclusive effect: a judgment of separation, determinative of whose fault caused the separation;\footnote{457} a judgment of divorce, whose fault caused the breakup of the marriage.

Fault of a covenant spouse which constitutes grounds for a separation or divorce should also be considered relevant in decisions relating to child custody, particularly the factor of moral fitness.\footnote{458} The purpose of covenant marriage after all was to strengthen marriage, and one of the means to accomplish that objective was society’s collective judgment about unacceptable conduct within the marital relationship. The covenant marriage law offers spouses the opportunity to bind themselves to a stronger commitment than the law is willing to impose. By voluntarily undertaking this commitment, permitted because in the interest of children to be born of the union, a covenant spouse accepts society’s judgment about his behavior during the marriage. He should also expect consequences should his behavior breach the obligations he solemnly undertook, especially consequences as to his relationship with his children.

VI. CONCLUSION

The Western tradition has learned, through centuries of experience, to balance the norms of marital formation, maintenance, and dissolution. . . . The lesson in this is that rules governing marriage formation

\footnote{453} Id. at 8.
\footnote{454} See supra discussion in text at notes 419-434.
\footnote{455} Id.
\footnote{456} The discussion in the text at supra notes 419-434 argues for the resurrection of the defense of recrimination without the corollary of comparative rectitude so that consistently with the definition of a covenant marriage (La. R.S. 9:272 (Supp. 1998)) only the non-breaching party could obtain a termination of the marriage.
\footnote{457} The covenant spouse against whom the judgment of separation was rendered would only be permitted to introduce evidence of the claimant’s fault committed between the judgment of separation and filing suit for divorce.
and dissolution must be comparable in their stringency. . . . Loose formation rules demand loose dissolution rules, as we see today. To fix "the modern problem of divorce" will require reforms of rules at both ends of the marital process.459

Covenant marriage legislation accomplishes the balancing of norms of formation, maintenance, and dissolution. It more stringently regulates the formation of marriage by mandating pre-marital counseling and the execution and filing of documents which require the participation of the counselor and a notary public.460 By virtue of the contractual provisions in the Declaration of Intent, covenant marriage legislation imposes the duty upon spouses to maintain their marriage, if possible, by taking reasonable steps to preserve it.461 Last but surely not least, covenant marriage legislation contains more stringent rules for dissolution by divorce.462

Marriage has been described by Maggie Gallagher as the only truly heroic act most of us can attempt.463 Easy divorce denies us that opportunity for heroism. Covenant marriage extends the invitation to Louisianans to be heroic, to make a choice that represents a measure of self-sacrifice.464 Furthermore, [a]t the present juncture in history, what may really matter is that the Louisiana legislature has recognized the harm done by the tide of no-fault divorce in America, and by a large majority has voted to begin the process of reversing this tide. . . . Having been to the brink with marital instability, Americans are now starting to address the basic legal framework which has helped to undermine the institution of marriage. Britain and other European countries could follow this example, rather than wait until things get as bad as they are in America.465

And, to think, Louisiana started the retreat from the precipice.

459. Witte, supra note 1, at 217-18.
460. La. R.S. 9:273(A) and (B) (Supp. 1998). See supra discussion in text at notes 97-137.
463. Gallagher, Whitehead, supra note 80, at 265: "To dare to pledge our whole selves to a single love is the most remarkable thing most of us will ever do. With the abolition of marriage that last possibility for heroism has been taken from us."
464. Louisianans, at least, can no longer ignore the dissonance between the marriage of our cultural imagination and marriage as it actually exists; they have a choice. It may be that, as Dr. Peter Kramer, clinical professor psychiatry at Brown University, opines: "contrary to claims on behalf of Louisiana's Covenant Marriage, it is out of touch with our traditional values: self-expression, self-fulfillment, self-reliance." As Christopher Wolfe has confirmed, "[t]he ideal of autonomy, an autonomy so broad as to preclude fixed, permanent, lifelong commitments, is the foundation of our contemporary marriage laws. It is a substantive moral ideal."