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Does the Dissolution of Covenant Marriages Mirror Common Law England's Subordination of Women?

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NOTES

DOES THE DISSOLUTION OF COVENANT MARRIAGES MIRROR COMMON LAW ENGLAND'S SUBORDINATION OF WOMEN?

INTRODUCTION

On July 15, 1997, the Louisiana Legislature passed a covenant marriage law,¹ designed to strengthen the family and decrease divorce rates. This law limits the means of ending undesirable unions by curtailing the causes for divorce. The limitations placed on parties who wish to dissolve a covenant marriage are reminiscent of the restricted means of ending English common law marriages during the sixteenth and seventeenth centuries. Both laws provide a narrowly defined method to dissolve marriages, while also placing women in subordinate positions in the community after divorce. Both the covenant marriage law in Louisiana and the English common law reflect societal attempts to preserve the marital unit, resulting in a weakened social status for women financially, psychologically, and socially once a divorce is finally obtained. One could question whether society has come full circle, in that women are returning to subordinate positions in society under the covenant marriage law, positions similar to those they held 300 years ago during the Tudor and Stuart reigns.

An examination of common law England's matrimonial and divorce laws is necessary to this investigation of covenant marriages because English common law is a basis for twentieth century American divorce law.² Modern fault divorces originated from the common law concept that marriage was a sacrament and should not be ended, except in extreme situations.³ American no-fault divorce laws provide for divorce upon a party's showing of irreconcilable differences which create an irreparable breakdown of the marriage⁴—a theory similar to the Puritan and Protestant beliefs

1. See *infra* Part V (discussing covenant marriage). A covenant marriage is an alternative to the no-fault divorce. The entrance into and the exit from a covenant marriage are made more difficult than with a traditional marriage. Parties agree that their marriage is a covenant which may not be broken, despite difficulties they may encounter. Only a complete breach of the marital covenant may permit a dissolution of the marriage. See *id.*

2. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* 6 (1985).

3. See *id.*

4. See *id.* at 15.

that incompatibility should be grounds for divorce. Louisiana legislators integrated both fault and no-fault ideals into the new law, intensifying the parallels between the English common law and the covenant marriage law.

Despite similarities between the two laws, substantial differences exist. Women in the twentieth century, even within a covenant marriage, have more equality, freedom, and protection than their predecessors had during the sixteenth and seventeenth centuries. The covenant marriage law in Louisiana, like proposed legislation in other states, simply limits the ease with which divorces may be obtained and contains provisions which adversely affect women. As such, the covenant marriage is not a full return to the completely subordinate position that women endured during the Tudor and Stuart periods.

I. INTRODUCTION TO TUDOR AND STUART SOCIETY

During the sixteenth and seventeenth centuries, the belief in the permanence of marital unions strongly influenced marriage and the composition of the family.⁵ Societal values placed an emphasis upon religion, whereby marriage was a sacrament that could not be broken.⁶ Church officials wanted to keep marriages together because they believed that separations did not adhere to church law.⁷ "A consummated marriage had the immutable character of divine law and was held, by God's own ordinance, absolutely indissoluble."⁸

Before the Reformation in England,⁹ Roman Catholicism was the official religion of England. Under its precepts, followers could not dissolve a marriage if it had been consummated.¹⁰ A few exceptions existed, including a flaw in the marriage ceremony, consanguinity, or the existence of a prior valid union.¹¹ After England's break with Catholicism, following the Reformation, practitioners of the newly founded Church of England also interpreted the Gospel as stating that marriage was an indissoluble

5. See LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530-1987, at 2 (1990) [hereinafter ROAD TO DIVORCE].

6. See MARTIN INGRAM, CHURCH COURTS, SEX AND MARRIAGE IN ENGLAND, 1570-1640, at 145 (1987).

7. See *id.* at 4.

8. O.R. MCGREGOR, DIVORCE IN ENGLAND: A CENTENARY STUDY 2 (1957).

9. The English Reformation progressed throughout the years of 1534 to 1597. See ROAD TO DIVORCE, *supra* note 5, at 301.

10. See COLIN S. GIBSON, DISSOLVING WEDLOCK 10 (1994).

11. See *id.* The exceptions mentioned are not an exhaustive list.

union.¹² In situations when divorce was necessary, the ecclesiastical, or church courts, granted either a permanent separation with no remarriage or an annulment.¹³

External pressures also influenced the belief in long-standing marriages without divorce. Families often arranged marriages for alliances, with no concern for the parties involved in the marriage.¹⁴ The family members' interference kept spouses together due to the importance placed upon public appearances.¹⁵ Couples did not want to suffer the embarrassment of admitting to their families that they had problems within their marriages.¹⁶ Family members also forced unhappy parties, especially wives, to remain in the union because of the potential harm to alliances or to the family name which could result from a divorce.¹⁷

The continuation of unhappy marital unions was also perpetuated by the subordinate position of women in society.¹⁸ During this period, society viewed women as being similar to children, lacking solid sense.¹⁹ The husband maintained legal dominion over his wife, and she had no independent rights.²⁰ This patriarchal order placed women in positions where they were often viewed as

12. *See id.*

13. *See id.* But *see id.* at 11 (noting that King Henry VIII was capable of obtaining a divorce with remarriage due to his political power which dominated the newly established ecclesiastical courts. Henry asserted that consanguinity mandated his divorce from Catherine of Aragon. She had previously been married to his brother, Arthur, and Henry argued that his subsequent marriage to Catherine resulted in incest.).

14. *See* LAWRENCE STONE, *BROKEN LIVES: SEPARATION AND DIVORCE IN ENGLAND 1660-1857*, at 13 (1993) [hereinafter *BROKEN LIVES*]; *see also* MARY ASTELL, *SOME REFLECTIONS UPON MARRIAGE* 18 (4th ed. 1970) (stating that friendship should be the basis for a marriage but also noting that most marriages during the Tudor and Stuart periods lacked it).

15. *See* *BROKEN LIVES*, *supra* note 14, at 13.

16. *See id.*

17. *See* Barbara Harris, *Marriage Sixteenth Century Style: Elizabeth Stafford and the Third Duke of Norfolk*, 1982 *J. SOC. HIST.* 371, 372. This article describes the Norfolk marriage, a union contracted to increase wealth, power, and connections; the families did not consider the mutual happiness of the parties to be married. When Elizabeth Stafford became discontent with her husband's adulterous ways, she challenged the double standard of the day which allowed men to have affairs and openly protested her husband's behavior. She wrote to her brother for help, but he sided with Norfolk, advising her to appreciate her status as the Duchess. He also reminded her that "the main purpose of her marriage was not her personal happiness, but the social, political, and economic advancement of her kin." *Id.* at 374.

18. *See* *BROKEN LIVES*, *supra* note 14, at 13.

19. *See* RANDOLPH TRUMBACH, *THE RISE OF THE EGALITARIAN FAMILY* 151-52 (1978). Many men held women to be either "domestic drudges or the slaves of [their] pleasure." *Id.* at 151; *see also* ASTELL, *supra* note 14, at 30 (describing women as being slaves to men once they married).

20. *See* TRUMBACH, *supra* note 19, at 151.

property.²¹ In fact, the husband controlled his wife's property, and in the eyes of the law, they were regarded as one person.²²

A final reason for the maintenance of marital unions arose from the difficulty in obtaining divorces in court. During the Stuart and Tudor periods, two types of "divorces" existed. Divorces *a vinculo matrimonii*, known as annulments, constituted separations with remarriage possibilities—a modern day divorce.²³ In theory, secular courts did not grant real divorces with unfettered remarriage possibilities until Parliamentary divorces during the late seventeenth century.²⁴ However, church courts granted annulments, which permitted remarriage.²⁵ Nonetheless, annulments could be obtained only through extremely limited grounds.²⁶ The second type of divorce was a divorce *a mensa et thoro*, a separation from bed and board,²⁷ whereby couples received permanent legal separations, but they could not remarry.²⁸

II. MARITAL AVENUES OF ESCAPE

The avenues of escape from unhappy marriages were extremely limited during the sixteenth and seventeenth centuries.²⁹ The ecclesiastical courts maintained jurisdiction over all aspects of matrimonial law, including divorces, throughout the majority of this period.³⁰ However, only about ten percent of marital disputes actually went to court for trial, due to the stigma attached to the divorce proceedings.³¹ Church courts only heard cases comprised of extremely unstable marriages.³² The ecclesiastical courts did not listen to cases in which partners were having simple marital spat;

21. See INGRAM, *supra* note 6, at 143; see also Henry Smith, *A Preparative to Marriage, in A PREPARATIVE TO MARRIAGE, AND TWO OTHER SERMONS* 1, 62 (1591) (discussing the view that the man was the head of the family and what "the husband saith, that his wife must obey him because he is her better").

22. See RALPH A. HOULBROOKE, *THE ENGLISH FAMILY 1450-1700*, at 97 (1984).

23. See GIBSON, *supra* note 10, at 10.

24. See MCGREGOR, *supra* note 8, at 3; ROAD TO DIVORCE, *supra* note 5, at 46.

25. See GIBSON, *supra* note 10, at 10.

26. See INGRAM, *supra* note 6, at 145-46.

27. See, e.g., *id.* at 146-47 (describing a separation from bed and board).

28. See GIBSON, *supra* note 10, at 12.

29. See INGRAM, *supra* note 6, at 145.

30. See *id.* at 3.

31. See BROKEN LIVES, *supra* note 14, at 11; ROAD TO DIVORCE, *supra* note 5, at 167. Lawrence Stone noted that if a husband wished to avoid the publicity attached to a judicial separation, he could produce an unofficial separation from his wife. The tiresome wife would be "imprisoned" in a secluded country home or in a private madhouse. Such remedies did not exist for wives who were displeased with their husbands' behavior. See *id.*

32. See INGRAM, *supra* note 6, at 148.

fight based upon incompatibility were not viewed as a sufficient cause for divorce.³³ Rather, judges believed these problems should be resolved by the parties, outside of the judicial system.³⁴

As noted, the judiciary sanctioned only two types of separations: divorces *a mensa et thoro* and annulments.

A. Annulments

Annulments, which had remarriage possibilities, were granted in limited situations in which an impediment to the marriage existed, making it unnatural to continue.³⁵ Parties obtained annulments rarely because of the small number of circumstances to which they applied. Causes for annulments included bigamy, a failure to consummate the marriage, duress in the formation of the marriage, consanguinity, and the existence of a pre-contract, a prior contract to marry another person.³⁶

B. Separations from Bed and Board

The second method of divorce during the Tudor and Stuart periods consisted of a divorce *a mensa et thoro*, a separation from bed and board.³⁷ This divorce was easier to obtain and more common. Spouses lived in separate households, yet the marriage was not officially terminated. Therefore, remarriage was not permitted.³⁸ The marriage remained valid until one of the spouses died.³⁹ The ecclesiastical courts did not permit remarriage in such divorces in hope of a reconciliation between the parties.⁴⁰ They also wanted to decrease evidence tampering at trial.⁴¹

33. See *id.* at 180.

34. See, e.g., *id.* (noting that ecclesiastical courts did not interfere in couple's everyday squabbles). Examples of incompatibility not worthy of a divorce included clashes of temperament, spouses having different lifestyles, and complaints made by the wife.

35. See GIBSON, *supra* note 10, at 10.

36. See *id.*

37. See INGRAM, *supra* note 6, at 146. These terms are synonymous and will be used interchangeably throughout the remainder of this Note.

38. See *id.*

39. See *id.*

40. See *id.* at 185.

41. See *id.* It was feared one party would tamper with the evidence at trial if remarriage possibilities were dangled in front of the couple. Evidence tampering at trial was limited as parties could only divorce with strong evidence and through long trials, during which, problems with the evidence could be discovered. See *id.* This idea is similar to the modern concept of collusion, when parties to a divorce invent a reason or a fault which could facilitate the divorce process. See *id.*

1. *Grounds*

During the sixteenth and seventeenth centuries, only major causes of marital disharmony arrived in front of the spiritual courts.⁴² Three grounds for divorces *a mensa et thoro* existed during this period: life threatening cruelty, adultery, and desertion.⁴³ While incompatibility was a major cause of marital tensions, it was not a cause for divorce.⁴⁴

Life threatening cruelty was a common cause for separation suits.⁴⁵ The common law permitted the beating of wives, so women had to prove "abuse sufficient to endanger their well-being or even their life."⁴⁶ The case of *Boteler v. Boteler* demonstrated the level of abuse women endured before being able to obtain separations. Cruelty escalated throughout the Boteler marriage and culminated in extreme acts of abuse.⁴⁷

[H]e repeatedly beat and kicked her, often on the breast, or the belly when she was pregnant. . . . He twice threw a chamber-pot at her, and once a chair. Once he dragged her by her smock along the ground about the house, and several times he threatened her with his sword.⁴⁸

Only when the abuse reached such a high level, as in the *Boteler* marriage, could a divorce be granted to a woman during the sixteenth and the seventeenth centuries.⁴⁹

Physical assault constituted only one type of life threatening cruelty. Life threatening cruelty also included sexual cruelty, such as rape or forcing a woman to have intercourse in the presence of

42. See *id.* at 181.

43. See *BROKEN LIVES*, *supra* note 14, at 16.

44. See *INGRAM*, *supra* note 6, at 182.

45. See *id.* at 183.

46. *Id.* (citation omitted). But see WILLIAM HEALE, *AN APOLOGIE FOR WOMEN* 43 (Garland Publishing, Inc. 1978) (1609). William Heale did not support the legality of wife beating because it decreased the respect women were due. See *id.* Rather, he believed women should be corrected with words and they were "never to be dealt withal with violent handes." *Id.* Upon marriage, society viewed men and women as one flesh so Heale felt men should not beat women because it would be comparable to beating themselves. While he advocated better treatment for women within marriage, he did not assert that women and men were equals. See *id.*

47. See *BROKEN LIVES*, *supra* note 14, at 33-37.

48. *Id.* at 34.

49. See *INGRAM*, *supra* note 6, at 180. It was ordinarily the wife who was abused by her husband. Wives, however, could abuse their husbands with harsh words or by hitting and scratching them. However, these cases were rare. Moreover, husbands rarely sued their wives for a separation based upon cruelty because they feared being ridiculed by a society which believed husbands should control their wives. See *id.*

servants, and such abuse could serve as another grounds for divorce.⁵⁰

Furthermore, mental cruelty also existed in marriages during the sixteenth and seventeenth centuries.⁵¹ However, women had difficulties proving mental cruelty, as no definitive evidence could be presented in court. It was therefore not a convincing cause for divorce.⁵²

Adultery was another cause for divorces *a mensa et thoro*. However, "[a]dultery underlay only a minority of separation suits"⁵³ because wives were told to be patient and to forgive their wayward husbands.⁵⁴ Throughout the judicial system, adultery was considered a much more serious offense for women than for men;⁵⁵ society blamed wives more for their infidelities. Englishmen justified divorces for unfaithful wives by claiming the Bible established this precedent.⁵⁶ Husbands cited the Bible for the proposition that husbands and wives were made of one flesh.⁵⁷ When an adulterer joined with another, the marital bond broke because the husband and wife separated due to the infidelity.⁵⁸

The ecclesiastical courts permitted divorce for adultery because of the shame brought upon the husband when his wife's adulterous actions became public knowledge.⁵⁹ "This is one reason they usually give for Divorce; namely, To secure our own Integrity and Honour, and keep off the suspicion of being privy to the Sin."⁶⁰ Husbands also justified divorces due to a wife's infidelity because of the fear that an illegitimate child would be born, subsequently

50. See *BROKEN LIVES*, *supra* note 14, at 35. In the *Boteler* case, the court considered marital rape when granting the divorce. However, marital rape was not a recognized crime. See *WEITZMAN*, *supra* note 2, at 3.

51. See *ROAD TO DIVORCE*, *supra* note 5, at 198-99.

52. See *id.* (noting that women had to wait until the late eighteenth century before mental cruelty was considered by the courts as a sole cause for divorce).

53. *INGRAM*, *supra* note 6, at 182.

54. See *LAWRENCE STONE, THE FAMILY, SEX, AND MARRIAGE IN ENGLAND 1500-1800*, at 501-02 [hereinafter *FAMILY, SEX, AND MARRIAGE*].

55. See *BROKEN LIVES*, *supra* note 14, at 15-16.

56. See *A Treatise Concerning Adultery and Divorce*, in *ADULTERY AND THE DECLINE OF MARRIAGE* 12-13 (Randolph Trumbach ed., Garland Publishing, Inc. 1984) [hereinafter *Treatise Concerning Adultery*].

57. See *id.*

58. See *id.*

59. See *id.* at 15.

60. *Id.* See also *TRUMBACH*, *supra* note 19, at 155-56 (noting that a husband could sue his wife's lover for criminal conversion whereby he would obtain damages for the use of his wife's body by another. A wife had no such suit available to her.); *BROKEN LIVES*, *supra* note 14, at 23 (discussing the detention order where a husband could detain his wife in his home if she was induced to leave by her lover. Such a defense also did not exist on the wife's part.).

corrupting the family line.⁶¹ No aristocrat wanted his title to be inherited by an illegitimate son and therefore used the court system to protect it. Adultery suits against husbands by wives were possible, but were not usually successful because of the double standard of the day—the idea that men had the right to commit adultery with no repercussions, but not women.⁶²

A final cause for a separation from bed and board was malicious desertion. If one spouse abandoned the other spouse for over seven years, the abandoned party was free to remarry, as the first spouse was assumed to be dead.⁶³ However, if the first spouse returned, courts considered the first marriage valid, not the second.⁶⁴ Thus, the divorce was never truly permanent, since the possibility of reversing the decision always existed. Husbands whose wives had deserted them could also forcibly bring their wives home,⁶⁵ instead of trying to divorce them.

2. *Recourse*

Strict criteria existed for separations from bed and board, another attempt to keep marriages together. Parties had to cohabit as a married couple for several years before filing for divorce—evidence to the judges that they had made an effort to work out their differences.⁶⁶ Moreover, judges had to find that the divorce was necessary.⁶⁷ The above criterion greatly limited the number of divorces during the sixteenth and seventeenth centuries.⁶⁸ "[B]etween 1570 and 1659 we find forty-nine known cases of notorious marital quarrels, separations *a mensa et thoro*, or annulments among the peerage, which is about 10 per cent of all marriages."⁶⁹

61. See *Treatise Concerning Adultery*, *supra* note 56, at 15-16.

62. See ROAD TO DIVORCE, *supra* note 5, at 193.

63. See *id.*

64. See *id.* at 194-95.

65. See BROKEN LIVES, *supra* note 14, at 18; see also INGRAM, *supra* note 6, at 181 (explaining that either a deserted husband or a deserted wife could sue for restitution of conjugal rights, in effect, forcing the party who deserted the marriage to recommence living with the deserted spouse. These suits, however, were not common as the ecclesiastical courts lacked enforcement power.).

66. See INGRAM, *supra* note 6, at 185-86.

67. See *supra* text accompanying notes 35-64 (discussing the limited causes for a divorce). Because urgency was needed for a divorce, judges granted them only for fault causes, not for incompatibility between the parties. See *id.*

68. See LAWRENCE STONE, THE CRISIS OF THE ARISTOCRACY, 1558-1641, at 661 (1965) [hereinafter CRISIS OF THE ARISTOCRACY].

69. *Id.*

During this period, women suffered financially and psychologically as a result of divorces *a mensa et thoro*.⁷⁰ Isolation remained one of the greatest difficulties for separated wives⁷¹—often cut off from polite society, shunned from social gatherings, and forced to live alone due to the embarrassment and stigma brought upon them by divorce.⁷² Furthermore, mothers lost contact with their children as a consequence of their separations.⁷³ Husbands could deprive their wives of any chance to speak to their children after the divorce occurred.⁷⁴ Additionally, after a divorce, children tended to side with their fathers because they controlled the purse-strings and were still accepted in polite society.⁷⁵ In standing by their fathers, children secured their place in society and maintained a solid reputation.⁷⁶ However, their actions further isolated their mothers.⁷⁷

Women also suffered from financial hardships as a result of divorces *a mensa et thoro*.⁷⁸ The ecclesiastical courts supported a wife's right to maintenance in a separation from bed and board.⁷⁹ The courts upheld this practice because when a woman married, her real and personal property came under her husband's control.⁸⁰ Moreover, after a divorce, the husband maintained control over all of the family's assets, including his ex-wife's property.⁸¹ Unless a

70. See *id.*

71. See *id.*

72. See *id.*; see also Harris, *supra* note 17, at 375. The author describes the Duchess of Norfolk as living like a prisoner after her separation because "no gentlemen nor gentlewoman dare not come at me." *Id.*

73. See ROAD TO DIVORCE, *supra* note 5, at 5.

74. See *id.* (describing fathers as having complete control over the children and being capable of denying their wives any access to them); see also WEITZMAN, *supra* note 2, at 218 (stating that common law England recognized the father as the guardian of children, not the mother. Society viewed children as property of the father, so only he had a right to the custody of the children). But see ROAD TO DIVORCE, *supra* note 5, at 171 (noting that women who committed adultery were deemed to be unfit mothers, and they therefore lost both moral and legal rights to custody. Stone's statement demonstrates that some historians believe women had a legal right to child custody, a belief which is not greatly supported by other academics.).

75. See Harris, *supra* note 17, at 375-76.

76. See *id.*

77. See *id.*; see also ROAD TO DIVORCE, *supra* note 5, at 171.

78. See GIBSON, *supra* note 10, at 17.

79. See *id.* Maintenance was viewed as a type of personal allowance paid by the ex-husband, used to pay a wife's daily needs, not long term expenses. Judges decided the amount yearly, and the husband paid the support periodically. The court did not set a payment schedule. See *id.*

80. See ROAD TO DIVORCE, *supra* note 5, at 13.

81. See Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 860 (1988); see also ROAD TO DIVORCE, *supra* note 5, at 4 (noting that husbands had great control over their wives' property).

woman obtained her own settlement from her family,⁸² she was completely dependent on her spouse for money after the divorce—without his support she would have no income.⁸³ However, during this period, the majority of women did not have their own settlements.⁸⁴ Therefore, when they became involved in separation cases, the judges knew the women would need to be given some means to support themselves.⁸⁵

The amount of settlement varied. Judges determined the maintenance based upon the wife's innocence or guilt in the causes of the breakdown of the marriage, as well as her husband's worth in estates and investments.⁸⁶ Maintenance usually amounted to around one-third of the husband's income,⁸⁷ but the conduct of both parties influenced the final amount.⁸⁸ Judges, however, were normally sympathetic towards guilty husbands and did not make them pay huge sums in maintenance.⁸⁹ Besides maintenance, the ecclesiastical courts could also order husbands to pay their wives' past and future debts,⁹⁰ including personal expenses, such as clothing bills. While these payments helped compensate women for their loss of property at the divorce, once again, enforcement was

All the income from her real estate was retained by her husband, as well as all future legacies which might come to her. All her personal property, including her future earnings from a trade and her business stock and tools, were liable to seizure by her husband at any moment. She was unable to enter into a legal contract, to use credit to borrow money, or to buy or sell property. All her savings belonged to her husband.

Id.

82. See GIBSON, *supra* note 10, at 16.

83. See *id.*

84. See *id.*

85. See *id.* at 15-16.

86. See *generally id.* (explaining that maintenance was never granted to wives who had committed adultery or who continued living in adulterous relationships); see also ROAD TO DIVORCE, *supra* note 5, at 169 (noting that women who had affairs during their separations from bed and board could lose their alimony support).

87. See BROKEN LIVES, *supra* note 14, at 13.

88. See GIBSON, *supra* note 10, at 16; see also Brinig & Carbone, *supra* note 81, at 860-61 (noting that maintenance continued only so long as the wife remained chaste and single during her separation from her husband).

89. See GIBSON, *supra* note 10, at 16; see also LENA C. ORLIN, PRIVATE MATTERS AND PUBLIC CULTURE IN POST-REFORMATION ENGLAND 135-36 (1994). The author depicts the separation between Lady Elizabeth Lyttleton and Sir Francis Willoughby. Elizabeth received maintenance, but it was not sufficient to move about in polite society. She begged her husband to readmit her into his household, emphasizing her rehabilitation in attitude. Elizabeth had learned that without the security of her husband's finances, women in England held tenuous positions in society and encountered both social and financial difficulties. See *id.*

90. See LAWRENCE STONE, UNCERTAIN UNIONS: MARRIAGE IN ENGLAND 1660-1753, at 15 (1992).

difficult to achieve.⁹¹ In the same vein, a wife's court costs could also be imputed to her husband.⁹²

One problem with the alimony system during the Tudor and Stuart periods revolved around the ecclesiastical courts' inability to enforce payments.⁹³ The courts did not deem maintenance to be a debt owed by the husband to the wife and was therefore not enforceable in the common law courts.⁹⁴ Thus, only the spiritual courts could enforce the payments, and their sole recourse against recalcitrant husbands was excommunication.⁹⁵ Yet, that process was seldom employed because the courts often sided with the husbands.⁹⁶ Subsequently, women who became separated remained at their husbands' mercy for living expenses, as they had no way to ensure payment.⁹⁷

III. CHANGES BROUGHT ABOUT BY THE REFORMATION

The divorce *a mensa et thoro* provided a small window of opportunity for those who desired a true divorce.⁹⁸ After the Reformation in England in 1529, Puritan and Protestant reformers introduced new beliefs about marriage, divorce, and women.⁹⁹ Despite these new ideas, the ecclesiastical courts maintained a monopoly on marriage laws¹⁰⁰ and did not deviate from their beliefs about divorce. It was not until the mid-seventeenth century that the reformers' ideas culminated in concrete results—Parliamentary divorces, private separations, and a more relaxed view of marriage as a civil contract, not an indissoluble sacrament.¹⁰¹ The reformers believed that if marriage was not a sacrament, then the marital relationship could be permanently ended with a divorce.¹⁰²

The Protestant and the Puritan reformers introduced radical ideas about marriage and the position of women in society.¹⁰³ Both groups adhered to the view that marriage was not an indissoluble

91. See GIBSON, *supra* note 10, at 16.

92. See ROAD TO DIVORCE, *supra* note 5, at 187.

93. See BROKEN LIVES, *supra* note 14, at 13.

94. See GIBSON, *supra* note 10, at 17.

95. See *id.*

96. See *id.*

97. See *id.*

98. See CRISIS OF THE ARISTOCRACY, *supra* note 68, at 661.

99. See, e.g., MCGREGOR, *supra* note 8, at 5 (noting that some reformers believed marriages should be dissoluble).

100. See ROAD TO DIVORCE, *supra* note 5, at 308.

101. See *id.* at 301, 319.

102. See MCGREGOR, *supra* note 8, at 5.

103. See ROAD TO DIVORCE, *supra* note 5, at 301.

sacrament, but rather, was a civil contract which could be ended under certain circumstances.¹⁰⁴ The reformers' common belief was that "[G]od hath ordained remedies for every disease, so He hath ordained a remedie for the disease of marriage . . . divorcement He which made marriage did not make it inseparable, for then marriage would be a servitude."¹⁰⁵ Remarriage for the innocent spouse would be permitted for certain fault causes of divorce, such as adultery, cruelty, and desertion.¹⁰⁶

Puritan reformers, a religious group which was more radical than the Protestants, demanded divorce on the grounds of "irreconcilable incompatibility and mutual hatred."¹⁰⁷ Puritans did not require a concrete reason, such as a fault ground, for a divorce, and they believed marriage fell under civil, not spiritual, authorities.¹⁰⁸

Both Protestant and Puritan reformers worked toward creating greater equality between men and women.¹⁰⁹ It was believed both men and women were equally bound to one another in marriage, so both parties should be capable of suing for a divorce—"an equal right and power in both parties, so as the woman may require it as well as the man; and he as well as she."¹¹⁰ Additionally, the Protestants asserted that women occupied a higher position in society than was previously believed.¹¹¹ A woman was no longer "a mere instrument for carnal desires,"¹¹² she had importance in marital unions too. This change helped begin a slight amelioration

104. See *id.* at 301, 303; see, e.g., CHILTON L. POWELL, *ENGLISH DOMESTIC RELATIONS 1487-1653*, at 75 (1917) (stating that divorce should be allowed for adultery and desertion).

105. Smith, *supra* note 21, at 107-08. Henry Smith did posit that marriage was a partnership, and while it could be ended, a couple should try to work through their difficulties. This principle is similar to the covenant marriage. See *id.*; *infra* Part V.

106. See Martin Bucer, *Concerning Divorce*, in 3 *THE PROSE WORKS OF JOHN MILTON* 274, 303 (J.A. St. John ed., 1848). Bucer, a Protestant reformer, believed a wronged husband would be able to remarry directly after the divorce, and that the innocent wife could remarry after one year, ensuring she was not pregnant. See *id.* Cf. *ROAD TO DIVORCE*, *supra* note 5, at 347 (noting that certain Protestants only wanted remarriage possibilities for an innocent husband who had an adulterous wife).

107. *ROAD TO DIVORCE*, *supra* note 5, at 348; see also John Milton, *The Doctrine and Discipline of Divorce*, in 3 *THE PROSE WORKS OF JOHN MILTON* 169, 191-92 (J.A. St. John ed., 1848) (noting that marriage was an institution designed to end loneliness and bring happiness to its participants. When irreconcilable differences arose in a marriage, happiness and peace would not be achieved, creating the need for a marital dissolution).

108. See Milton, *supra* note 107, at 263-64 (criticizing the jurisdiction of the ecclesiastical courts and pushing for civil or political control of marriages).

109. See William Perkins, *Christian Economy: Or, A Short Survey of the Right Manner of Erecting and Ordering a Family According to the Scriptures*, in *DAUGHTERS, WIVES, AND WIDOWS* 151, 171 (Joan L. Klein ed. & Thomas Pickering trans., 1992) (1609).

110. *Id.* at 171.

111. See *FAMILY, SEX, AND MARRIAGE*, *supra* note 54, at 330.

112. D.R. ROGERS, *MATRIMONIAL HONOUR* 171 (1642).

of women's position in society. The seventeenth century also saw a rise in the position of women due to the increase in the size of the dowry paid by the bride's parents to the groom.¹¹³ This progression augmented the economic stakes in marriages, as the wives' monetary contributions gave women some leverage in the marriage.¹¹⁴ Husbands became slightly more wary of alienating their wives for fear that their families would retrieve part of the dowry.¹¹⁵

Despite the reformers' more enlightened views toward women, the aristocratic society continued to regard women as inferior creatures throughout the remainder of the sixteenth and the beginning of the seventeenth centuries. The idea of coverture, the joining of the wife's identity to the husband's at marriage, remained strong, so that women still occupied subordinate positions in marriage.¹¹⁶ While wives received larger marriage portions and had some personal control over these portions, their husbands still maintained the absolute authority in the marriage.¹¹⁷ Additionally, women's supposed financial independence was thwarted by the fact they had little actual control over their real property.¹¹⁸ It was assumed the husband would follow his wife's wishes as to the disposition of the property, but no law forced him to abide by her decisions.¹¹⁹ Women, therefore, remained legally impotent.¹²⁰ While women appeared to have more equality in marriage, nonetheless, their larger dowries failed to free them entirely from their husbands' control.

The results of the Protestant and Puritan reformers' ideas culminated in the middle of the seventeenth century, during the reign of Oliver Cromwell, the Lord Protector and a Puritan.¹²¹ Informal private separations became popular throughout this period, due to the continued limited means by which divorces were obtained in the ecclesiastical court systems.¹²² Under Cromwell, civil magistrates, or justices of the peace, gained control of divorce

113. See FAMILY, SEX AND MARRIAGE, *supra* note 54, at 330.

114. See *id.*

115. See *id.* at 331.

116. See WEITZMAN, *supra* note 2, at 3.

117. See FAMILY, SEX, AND MARRIAGE, *supra* note 54, at 332-33.

118. See Susan M. Okin, *Patriarchy and Married Women's Property in England*, 17 EIGHTEENTH CEN. STUD. 121, 129-31 (Winter 1983-84).

119. See *id.* at 133.

120. See *id.*

121. See *id.*

122. See BROKEN LIVES, *supra* note 14, at 20. Private separation agreements usually awarded the wife maintenance for life. Subsequently, she indemnified her husband against any of her future debts. See *id.*

cases and negotiated separation agreements between couples.¹²³ Parties did not have to navigate the established judicial system, nor did they need to obtain a separation agreement from an ecclesiastical court.¹²⁴

By 1670, requests for acts of divorce had begun to arise under the jurisdiction of Parliament.¹²⁵ These private acts permitted remarriage after a divorce and created an avenue of escape for aristocratic men who were concerned about the legitimacy of their heirs.¹²⁶ "These very early Acts were generally concerned with the danger that a wife's adultery posed to a nobleman lacking a son to inherit title and wealth."¹²⁷ Men were therefore the usual petitioners. "Of the 325 parliamentary divorces, only four were granted to women, who . . . had to prove adultery aggravated by a further matrimonial 'offence',"¹²⁸ such as bigamy.¹²⁹ Parliamentary divorces were not well regarded by society, as it was considered disgraceful that a woman drove her husband to petition Parliament for a divorce because of her infidelities.¹³⁰

Women maintained a slightly better financial position in society after a Parliamentary divorce than after a separation from bed and board.¹³¹ Despite the stigma, the House of Commons believed that no matter how horribly a wife had acted during her marriage, her husband could not leave her destitute.¹³² If a woman brought money to her husband at the time of their marriage, she would most likely receive a support settlement which reflected the

123. See ROAD TO DIVORCE, *supra* note 5, at 149-50. But see *id.* at 307 (noting that the ecclesiastical courts retained jurisdiction in England until 1857. Private separations were just another option for couples.).

124. See *id.* at 149-50.

125. See generally GIBSON, *supra* note 10, at 26-32 (discussing Parliamentary divorces); see, e.g., ROAD TO DIVORCE, *supra* note 5, at 316 (noting the procedure for a Parliamentary divorce). To obtain a Parliamentary divorce, petitioners had to first file for a separation from bed and board in the ecclesiastical courts. Then, the petitioner would file in Parliament. The Norfolk divorce case was the first case in which a petitioner failed to first obtain a separation from bed and board from the ecclesiastical courts. Despite the controversy, Parliament granted Norfolk his divorce, partly due to the influence he wielded in the House of Lords. See *id.*

126. See GIBSON, *supra* note 10, at 29.

127. *Id.*

128. MARY ABBOTT, FAMILY TIES: ENGLISH FAMILIES 1540-1920, at 36 (1993).

129. See *id.*; see also ROAD TO DIVORCE, *supra* note 5, at 317-18 (discussing the *Anglesea* divorce case in which the wife filed suit in Parliament for a separation from bed and board due to her husband's cruelty). Women also petitioned Parliament for other causes of action, such as a refund of their marriage portion after a divorce had occurred. See *id.*

130. See ABBOTT, *supra* note 128, at 36.

131. See GIBSON, *supra* note 10, at 32.

132. See *id.*

size of this dowry.¹³³ Moreover, the settlement in a Parliamentary divorce was based upon the husband's property, not his future potential income.¹³⁴ "The husband's financial circumstances might deteriorate, but the Commons' insistence upon secured maintenance at divorce assured the wife of future payment."¹³⁵

Another financial benefit of the Parliamentary divorce revolved around the change in the structure of maintenance. Women received secured maintenance after a Parliamentary divorce—payments whereby women were guaranteed a set sum of money, at set intervals for life.¹³⁶ Ecclesiastical courts, however, upheld periodic alimony where the husbands were required to pay a fixed amount, but not by any set time during the year.¹³⁷ Therefore, a wife could go for long periods of time without any support from her husband, subsequently leaving her financially dependent on him, despite her freedom from the marriage.¹³⁸

By the end of the seventeenth century, matrimony remained a fairly stable institution, and few people broke their marital bonds.¹³⁹ Couples who did encounter marital problems continued to face very limited means of recourse available to them. Even after the introduction of progressive ideas by the Protestant and Puritan reformers, English society still did not completely embrace the idea of permanent separations with remarriage.¹⁴⁰

IV. HISTORY OF U.S. DIVORCE LAW

Similarities exist between common law England and twentieth century America due to the fact that English common law is a basis for American matrimonial and divorce law.¹⁴¹ Modern American fault divorces originated from the common law concept that marriage is a sacrament¹⁴² and should not be ended, except in extreme situations.¹⁴³ American no-fault divorce laws were derived from the belief that incompatibility should be grounds for

133. *See id.*

134. *See id.*

135. *Id.* But see ROAD TO DIVORCE, *supra* note 5, at 160, 345 (noting that after a Parliamentary divorce, as well as after a private separation, the husband did not need to pay the wife's debts, as he did in an ecclesiastical separation from bed and board).

136. *See* GIBSON, *supra* note 10, at 32.

137. *See id.* at 17.

138. *See id.*

139. *See* ROAD TO DIVORCE, *supra* note 5, at 350-51.

140. *See id.*

141. *See* WEITZMAN, *supra* note 2, at 7.

142. *See id.* at 6.

143. *See id.* at 7.

divorce¹⁴⁴—an ideal promulgated by Protestant and Puritan reformers during the seventeenth century. Louisiana legislators integrated both fault and no-fault ideals into the covenant marriage law; consequently, a brief overview of the effects of both fault and no-fault divorces on women is necessary.

Divorce in the United States originated as a fault based system,¹⁴⁵ designed to keep spouses together “unless the conduct of one spouse was so incompatible with the continuation of the marriage that it released the other spouse from his or her marital obligations.”¹⁴⁶ Legislators adopted English common law causes for divorce, including adultery, cruelty, and desertion.¹⁴⁷ However, legislators did not embrace incompatibility as a divorce cause until the 1970s, as society wished to keep marriages together and believed incompatibility as a divorce cause would lead to too many divorces.¹⁴⁸

In the United States, society viewed divorce as a failure of the marital union, and the divorce laws strengthened this idea by assigning guilt to the party who broke the union through fault-based actions.¹⁴⁹ If a couple wanted to obtain a divorce, evidence of one party's misconduct was necessary.¹⁵⁰ “Under the fault regime, as marital fault sufficient to provide grounds for divorce was difficult to establish, a wife who did not want a divorce could, in many cases, prevent her husband from obtaining one by contesting the action.”¹⁵¹ Thus, the “innocent” spouse maintained leverage throughout both the divorce and the settlement proceedings due to the “guilty” spouse's violation of the marriage contract and the “guilty” spouse's need for the other spouse's consent for the divorce.¹⁵² Additionally, financial awards were linked to fault, giving the “innocent” party “a decided economic advantage,”¹⁵³ as only the innocent party could receive alimony.¹⁵⁴ An innocent wife could therefore be in a better financial position by trading her

144. See *id.* at 15.

145. See Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-fault Divorce Laws*, 49 STAN. L. REV. 607, 608 (1997).

146. Brinig & Carbone, *supra* note 81, at 896 (citation omitted).

147. See Bradford, *supra* note 145, at 608.

148. See WEITZMAN, *supra* note 2, at 6, 14.

149. See KAREN WINNER, *DIVORCED FROM JUSTICE* 31 (1996).

150. See *id.*

151. Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *DIVORCE REFORM AT THE CROSSROADS* 75, 78 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (citation omitted).

152. See generally WEITZMAN, *supra* note 2, at 1-14.

153. *Id.* at 13.

154. See *id.* at 12.

ability to hinder the divorce for a better financial settlement from her spouse.¹⁵⁵

Studies have shown that while women generally suffered from a decreased economic status after a divorce, they received more property under fault divorces than under no-fault divorces,¹⁵⁶ and they also obtained greater and more enduring monetary awards.¹⁵⁷ However, under the fault based regime, society and judges viewed women as being incapable of providing for themselves, needing to remain dependent on their ex-husbands for support, even after the divorce.¹⁵⁸

As a result of the adversarial and acrimonious nature of divorce, legislators initiated a no-fault divorce law in California in 1970.¹⁵⁹ Fault was no longer a concern. Rather, incompatibility and irreconcilable differences became the basis, a legally recognized ground, for divorce.¹⁶⁰ The adoption of no-fault divorces in California produced a transformation "of marriage from an indissoluble union consecrated by God to an exchange of promises primarily involving the two individuals and their children."¹⁶¹

Proponents for no-fault divorces believed the new system would strengthen the position of women in society as they would be treated as financial equals to their husbands.¹⁶² No-fault divorces abolished the previous practice of women receiving permanent maintenance from their husbands.¹⁶³ This past practice had perpetuated the stereotype that women were not capable of supporting themselves after a divorce, without adequate maintenance from

155. See *id.* at 14 (noting that it was generally men who wanted a divorce and who obtained it by offering to pay their wives more money in either alimony or property settlements); see also Garrison, *supra* note 151, at 78. Cf. June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 Hous. L. Rev. 359, 404 (1994) (explaining that during the fault divorce period, a much greater number of men than women could afford divorces because women would be denied any spousal support and would encounter financial difficulties after the divorce if they were at fault and separated from their husbands).

156. See Garrison, *supra* note 151, at 79.

157. See *id.* But see Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 130, 133 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (finding that in 1968 California, under the fault regime, fewer than 20% of divorced women received any alimony whatsoever) (citation omitted). Women fared poorly after a fault divorce, as few obtained support from their former husbands. See *id.*

158. See WINNER, *supra* note 149, at 31.

159. See WEITZMAN, *supra* note 2, at 15.

160. See *id.*; WINNER, *supra* note 149, at 31. Even in common law England, incompatibility and irreconcilable differences were often causes for marital difficulties. However, they were never a formally recognized grounds for divorce. See *supra* text accompanying notes 43-44.

161. Brinig & Carbone, *supra* note 81, at 884.

162. See WEITZMAN, *supra* note 2, at 31.

163. See WINNER, *supra* note 149, at 35.

their husbands.¹⁶⁴ After the institution of no-fault divorce, legislators aimed to make women financially capable of providing for themselves, once they obtained the skills necessary to function in the job market.¹⁶⁵

The results of no-fault divorces have varied, with both benefits and drawbacks. Since the introduction of no-fault divorce, divorces are easier to obtain, and parties no longer need to demonstrate fault to obtain a divorce.¹⁶⁶ This standard of proof is extremely helpful for spouses who were abused by their husbands and who are scared to testify about the abuse or who have no direct evidence of such abuse.¹⁶⁷ Besides solving the proof dilemma, no-fault divorces help women whose emotional needs were not met in their marriages, as well as those who were not able to divorce previously because they failed to meet the standard of proof for the fault based divorce.¹⁶⁸

Despite the benefits, serious financial drawbacks exist for women who proceed through no-fault divorces. Under no-fault laws, consent of only one party is needed for a divorce; if the other party does not agree, nothing can be done to stop the judicial process.¹⁶⁹ This unilateral divorce procedure¹⁷⁰ makes it easy for a husband to walk out on his wife with little warning,¹⁷¹ leaving her to fare on her own financially, sometimes with no job skills or health insurance.

Problems also exist with respect to alimony and property settlements. Under no-fault laws, women cannot introduce evidence of their husbands' abuse or adultery to bolster their monetary settlements, as was possible under the fault regime.¹⁷²

164. See WEITZMAN, *supra* note 2, at 32.

165. This treatment of divorcing partners as equals developed gradually, precipitated in large part by *Orr v. Orr* which held that both a husband and a wife can be required to pay alimony, dependent upon the financial needs of both parties. See *Orr v. Orr*, 440 U.S. 268 (1979). See also WINNER, *supra* note 149, at 35; WEITZMAN, *supra* note 2, at 167 (noting that alimony awards in no-fault divorces became rehabilitative, designed to give parties time to learn a job skill so they could function without alimony). Wives, housewives, and mothers were supposed to learn a skill and return to the work force immediately after the divorce, so they could provide for themselves, without financial help from their ex-husbands. See *id.* Subsequently, after the institution of no-fault divorces, "[t]he overall frequency of alimony awards did drop significantly. . . . Thus, between 1968 and 1972, the percentage of wives awarded alimony dropped from 20 to 15 percent." *Id.*

166. See WEITZMAN, *supra* note 2, at 14.

167. See Michelle Mahoney, *Finding Fault with No-Fault*, DENV. POST, March 11, 1997, at E1, available in 1997 WL 6067364.

168. See Carbone, *supra* note 155, at 403.

169. See WEITZMAN, *supra* note 2, at 16.

170. See *id.* at 26-28.

171. See *id.* at 20.

172. See WINNER, *supra* note 149, at 35.

This limitation results in a "devastating economic impact on women and children because it eliminates the leverage that women had when husbands fled under the fault-based system."¹⁷³ Moreover, because little or no weight is placed upon a husband's misconduct when deciding the divorce settlement, abuse and other faults may be perpetuated throughout society as men are not being "punished" for these wrongs.¹⁷⁴

Most women suffer as a result of no-fault divorces. They either receive equitable awards, calling for a proportional split of the marital property with their husbands, or they receive an equal split with their husbands, if they live in a community property state.¹⁷⁵ These divisions are inherently unfair. They do not include intangible items, such as advanced education, degrees, and career development, as marital property which would be divided at the divorce.¹⁷⁶ "Because women typically forgo these less tangible acquisitions in order to support husbands and maintain a family life, it is women who are harmed by the law's failure to specifically recognize these assets as marital property."¹⁷⁷ Thus, women require a settlement which reflects a standard of living equal to their husbands' and one which they had become accustomed to during their marriage. Such a settlement should include intangible items.¹⁷⁸

However, judges fail to consider that many women worked at home¹⁷⁹ during their marriages, expecting to share with their husbands the marital assets and money acquired. No-fault divorces do not recognize these expectations and do not create an equal standard of living between both households after the divorce.¹⁸⁰ This adverse economic impact on women culminates when their rehabilitative alimony phases out, as they are expected to find new

173. Martha Heller, Note, *Should Breaking-up Be Harder to Do?: The Ramifications a Return to Fault-Based Divorce Would Have upon Domestic Violence*, 4 VA. J. SOC. POL'Y & L. 263, 264 (1996) (citation omitted).

174. See generally WEITZMAN, *supra* note 2, at 28-31. Under the no-fault divorce system, a guilty spouse is not punished, as in the fault system, by being barred from receiving alimony. Similarly, an innocent spouse is not rewarded for his or her good conduct by receiving a larger amount of alimony. Without having a reward system for good behavior, negative behavior may be augmented due to the lack of existing sanctions. See *id.* at 29.

175. See, e.g., TERRY ARENDELL, *MOTHERS AND DIVORCE: LEGAL, ECONOMIC, AND SOCIAL DILEMMAS*, 26-29 (1986) (discussing the different types of property settlements).

176. See *id.* at 27.

177. *Id.*

178. See generally WEITZMAN, *supra* note 2, at 74-75, 103-04, 334. Nonetheless, judges want both spouses' incomes to be comparable and often disregard intangible items. In reality, property awards often hurt women because under the no-fault regime, property is awarded either equally or equitably. See *id.* at 108.

179. See MARTHA A. FINEMAN, *THE ILLUSION OF EQUALITY* 21 (1991).

180. See WEITZMAN, *supra* note 2, at 380.

careers outside of the home.¹⁸¹ Additionally, the rehabilitative alimony usually does not last long enough, nor is it large enough, to cover the women's expenses until they are completely trained for a career outside of the home because such training is often difficult and burdensome.¹⁸²

Studies have found that in numerous cases, women suffered more from financial difficulties after a no-fault divorce than after a fault divorce. Lenore Weitzman reported a 73% decline in women's standard of living after a divorce, while men experienced a 42% increase in their standard of living.¹⁸³ Most studies discovered that "[t]he economic consequences of divorce are especially adverse for women. . . . payments are rarely frequent or sizable enough to make up for an appreciable amount of the labor income lost through the departure of the husband."¹⁸⁴

Research done by Weitzman demonstrates that several groups of women suffer financially the most after a divorce.¹⁸⁵ Her study indicates that "the pattern of support and property awards tends to impoverish the long-married woman [undergoing a no-fault divorce] while it provides the long-married man with an ongoing comfortable standard of living."¹⁸⁶ Older women who have been married for a long time

not only face a severely diminished income [from the loss of their husbands' income], they also have less potential for supplementing the money they receive from their ex-husbands with money from employment or other sources. They thus remain more dependent on their former husbands, and are more likely than any other group of women to suffer from the courts' unequal allocation of the husband's income at divorce.¹⁸⁷

181. See *supra* note 165 and accompanying text.

182. See Bradford, *supra* note 145, at 615.

183. Weitzman, *supra* note 2, at 338. But see Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 528 (1996) (finding that women's standard of living fell only 27% after a divorce, while men's standard of living increased 10%); Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce*, 25 DEMOGRAPHY 641, 641 (1988) (finding that the economic status of women only fell about 30% in the first year after divorce); Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485, 488 (1985) [hereinafter *Economic Consequences*] (finding that women's post-divorce incomes are 70% of their pre-divorce income, while men's post-divorce incomes are 93% of their pre-divorce income).

184. *Economic Consequences*, *supra* note 183, at 495. Duncan and Hoffman also recognize that most men find themselves in better positions after a divorce because they maintained control of their labor income and no longer need to pay large amounts of child support and alimony to their ex-wives, as they did under the fault divorce regime. See *id.*

185. See WEITZMAN, *supra* note 2, at 324-25.

186. *Id.* at 334.

187. *Id.*

Housewives and mothers are also harmed by the use of no-fault divorces.¹⁸⁸ Women who care for children need greater financial resources to pay for their children's care.¹⁸⁹ They also need maintenance to supplement their own support if they remain at home to supervise their children.¹⁹⁰

Besides financial drawbacks, women also suffer psychological problems as a result of no-fault divorces. The restricted income women often encounter after a divorce precludes them from participating in activities which they once could afford, isolating them from friends and society.¹⁹¹ Some women build friendship networks around their husband's jobs.¹⁹² When they divorce, they inevitably lose those friends because they feel uncomfortable socializing with them.¹⁹³ Finally, women disassociate themselves from married friends with whom they formally socialized with as part of a couple because they consider themselves out of place, being without a "date."¹⁹⁴

V. THE LOUISIANA COVENANT MARRIAGE LAW

Marriage in the 1990s is no longer an "exchange of lifetime promises," but rather "terminable at will."¹⁹⁵ This view of marriage was a major impetus for the passage of the covenant marriage law in Louisiana.¹⁹⁶ Certain legislators felt that the institution of

188. *See id.* at 371-72.

189. *See id.*

190. *See id.* at 381, 365. Some reformers believe that equality between the genders cannot be obtained until men and women are equally situated. Lenore Weitzman wrote:

As long as women are more likely than men to subordinate their careers in marriage, and as long as the structure of economic opportunity favors men, and as long as women contribute to their husband's earning capacities, and as long as women are likely to assume the major responsibilities of child rearing, and as long as we want to encourage the care and rearing of children, we cannot treat men and women as "equals" in divorce settlement.

Id. at 365.

191. *See id.* at 335; *see also* ARENDELL, *supra* note 175, at 129-30. In one of Arendell's studies, over "three-quarters of the women told of losing former friends, usually during or immediately after a divorce. . . . By divorcing, they had lost their social as well as their economic moorings." *Id.* at 129.

192. *See* WEITZMAN, *supra* note 2, at 335.

193. *See id.*

194. *See id.*

195. Carbone, *supra* note 155, at 380.

196. *See Today* (NBC television broadcast, Aug. 15, 1997), available in 1997 WL 11222538 (interview with Tony Perkins, proponent of the Louisiana covenant marriage law).

marriage was corrupted and needed to be changed.¹⁹⁷ On July 15, 1997, the Louisiana Legislature passed a covenant marriage law whereby parties to a marriage have the option to enter into a covenant marriage, instead of the traditional, no-fault marriage¹⁹⁸ used in Louisiana.¹⁹⁹ The new law does not alter current, no-fault divorce law.²⁰⁰ It is simply an alternative in which parties declare their marriage to be a covenant which should not be broken, despite difficulties.²⁰¹ Only when a complete breach of the marital covenant occurs, can the non-breacher seek a divorce.²⁰² Louisiana was the first state to pass a covenant marriage law, but seventeen other states²⁰³ are considering similar bills.²⁰⁴ Most of these states have

197. See *Covenant Marriage Implementation: Hearings Before the House of Representatives Civil Law and Procedures Comm'n.*, 1997 Reg. Sess. (La. 1997) [hereinafter *House Hearings*] (statement of Representative Tony Perkins, proponent of the Louisiana covenant marriage law).

198. See LA. CIV. CODE ANN. art. 102 (West 1998). Louisiana is a no-fault state, and divorce is allowed upon proof of a separation period of six months. See *id.*

199. Some critics believe the legislation is bringing Louisiana back to the days of fault divorce where collusion was used to achieve a divorce, compromising the integrity of the parties. See Bruce Nolan, *Bishops Back off Covenant Marriage*, THE NEW ORLEANS TIMES-PICAYUNE, Oct. 30, 1997, at A1, available in 1997 WL 12674773.

200. See LA. CIV. CODE ANN. art. 2356 (West 1998). Louisiana is a community property state, and spouses are financially equal with respect to the property acquired during the marriage, even if one spouse stays at home and cares for the children and the other earns the salary. At divorce, all marital property is divided equally between the spouses, regardless of fault. See generally ARENDELL, *supra* note 175, at 26-29. However, what constitutes marital property often limits a mother's or housewife's award since intangible items, such as care for the children, are not included. Moreover, women are most often the parties who sacrifice their income-earning potential to stay at home. See *id.*

201. See *Covenant Marriage Implementation: Hearings Before the Senate Jud. Comm'n.* A, 1997 Reg. Sess. (La. 1997) [hereinafter *Senate Hearings*] (statement of Representative Tony Perkins, proponent of the Louisiana covenant marriage law).

202. See LA. CIV. CODE ANN. art. 272 (West 1998).

203. See Americans for Divorce Reform, *Covenant Marriage Links* (visited Oct. 13, 1998) <<http://www.divorcereform.org/cov.html>>. The seventeen states include Alabama, California, Georgia, Indiana, Kansas, Minnesota, Mississippi, Missouri, Ohio, Oklahoma, Nebraska, South Carolina, South Dakota, Tennessee, Virginia, Washington, and West Virginia. Arizona passed its own covenant marriage law on May 18, 1998, and it took effect on August 21, 1998. See 1998 Ariz. Legis. Serv. 25-901 (West); see also Mike McCloy et al., *Tougher Wedding Option, Covenant Marriage Gains*, ARIZ. REPUBLIC, May 19, 1998, at A-1, available in 1998 WL 7772430; Richard Ruelas, *Marriage Law Lures Couples, Seminar Explores Covenant Nuptials*, ARIZ. REPUBLIC, Aug. 23, 1998, at B-1, available in 1998 WL 7792650. However, the Arizona law is considered a "watered down version" of the Louisiana law. *States Don't See Cure-alls in 'Covenant Marriage' Bills*, TUCSON CITIZEN, June 16, 1998, at 4-A, available in 1998 WL 13136890. Under the Arizona law, if both parties wish to end the marriage, they may do so without finding a fault cause or without living separate and apart for two years, thereby making the dissolution of the marriage easier to achieve. See 1998 Ariz. Legis. Serv. 25-903, 25-904 (West). Couples may secure a divorce through several means: proving a fault cause, living separate and apart for over two years, petitioning for a decree of legal separation upon a showing of one spouse's "habitual intemperance or ill treatment of the other spouse . . . of such a nature to render their living together

patterned their legislation after Louisiana, but slight differences exist.

Louisiana State Representative Tony Perkins proposed the covenant marriage bill for several reasons. He wished to strengthen the family by making marriage a life-long relationship, thereby creating security for both parties and their children.²⁰⁵ Ideally, parties to a marriage would truly get to know one another before committing to such a union,²⁰⁶ decreasing the chance that a divorce based upon incompatibility would be needed. Louisiana legislators also designed the law to decrease the number of divorces by making it more difficult to obtain one.²⁰⁷ The divorce process is slowed, forcing parties to reflect on their disputes and work out their difficulties. "We basically created a cooling-off period before

insupportable" and then living separate and apart for one year, or having both spouses agree to a dissolution of the covenant marriage. *Id.* at 25-903. While the Arizona law has provisions which appear to make divorces easier to obtain (divorce for fault causes with no waiting periods), the habitual intemperance provision only applies to the ill treatment of a spouse. Subsequently, the poor treatment of children does not qualify for the decree of legal separation, if the treatment does not constitute abuse. *See id.* In addition, the agreement clause which allows the spouses to end the marriage upon their agreement practically negates the purpose behind a covenant marriage, as the union may be easily dissolved without a waiting period or counseling. Furthermore, one party could be coerced into agreeing to the dissolution of the marriage, practically a return to the previously used fault based system of divorce. *See* Ira M. Ellman, *Senate Bill Revives Horror of Fault Divorce*, ARIZ. REPUBLIC, March 6, 1998, at B-5, available in 1998 WL 7755404.

204. As Louisiana passed the landmark covenant marriage law more than a year ago, this Note will focus primarily on the Louisiana law, with some comparisons made to the Arizona law. However, an in-depth study of Arizona's law is outside the scope of this Note.

205. *See Senate Hearings*, *supra* note 201 (statement of Representative Tony Perkins, proponent of the Louisiana covenant marriage law). Representative Perkins designed a longer separation period for families with children hoping that with the extra time the couple would be able to work out their differences so that the family unit would be preserved for the child. One of Representative Perkins' reasons for the law includes decreasing the number of children that come from broken homes. *See* LA. CIV. CODE ANN. art 370 (A) (6) (West 1998); *infra* note 215. Note that the Louisiana Senate created an amendment (which was included in the law) whereby if the abuse of the children was the cause for the judgment for separation, then the separation period need only last one year in order to release the child from the abusive environment. *But see* Ariz. Legis. Serv. 25-903, 25-904 (West). Under the Arizona covenant marriage law, couples need not undergo any type of waiting period in the case of adultery, a felony conviction, physical or sexual abuse, drug or alcohol abuse, or abandonment. Because no waiting requirement exists, their covenant marriage law appears quite similar to past fault divorces. While couples would need to wait at least one year for a divorce based on irreconcilable differences, except for in situations of agreement by both spouses, any fault divorce would be easily attainable. Such an easily obtained divorce could increase the chance of collusion and could place women back into the position they held after fault divorces. *See supra* text accompanying notes 145-148 (discussing fault based divorces).

206. *See* LA. CIV. CODE ANN. art. 273 (West 1998).

207. *See Senate Hearings*, *supra* note 201 (statement of Representative Tony Perkins, proponent of the Louisiana covenant marriage law).

this very sacred of contracts can be broken."²⁰⁸ A final policy reason behind the Louisiana covenant marriage law is the protection of the parties to the marriage. If the parties grow apart, the covenant marriage prevents one spouse from simply leaving the marriage, a possibility under the Louisiana no-fault divorce law.²⁰⁹

The covenant marriage law sets forth stringent requirements for those interested in obtaining such a marriage. Pre-marital counseling with a member of the clergy, a rabbi, a marriage counselor, etc. is mandatory.²¹⁰ The counseling is designed to alert the couple to the heightened commitment of the covenant marriage. Both parties are required to sign a sworn affidavit stating that they plan to adhere to the covenant marriage, understand its responsibilities, and agree to seek counseling when difficulties arise.²¹¹ Besides the affidavit, the parties must also sign a declaration of intent to contract into a covenant marriage.²¹² Finally, when difficulties actually arise during the marriage, the couple must seek counseling and try to work through the problems before they resort to a divorce.²¹³

The process to obtain a covenant marriage is a bifurcated system, similar to the Parliamentary divorce,²¹⁴ as a judgment of separation from bed and board must be obtained before an actual divorce is granted. After the couple obtains the judgment of separation, they have either a year or an eighteen month separation

208. *Id.* (statement of Senator Guidry).

209. *See id.* (statement of Representative Tony Perkins, proponent of the Louisiana covenant marriage law); *see also Today*, *supra* note 196 (interview with Tony Perkins who states that a covenant marriage eliminates unilateral divorces where women are kicked out of marriages without warning). Note that the Arizona law weakens this safeguard. Mutual agreement between the spouses is enough to end the union under the Arizona law, and no waiting period exists. *See* 1998 Ariz. Legis. Serv. 25-903(8) (West). However, under the Louisiana covenant marriage law, even if both parties to the marriage agree that the union should be dissolved, they still must go through the waiting period.

210. *See* LA. CIV. CODE ANN. art. 273(A)(2)(a) (West 1998).

211. The affidavit must be notarized by the counselor, ensuring that the couple actually went to a counselor and was notified of all of the provisions of the covenant marriage. *See id.* at art. 273(A)(2)(a), 273(A)(2)(b), 273(A)(3)(a); *Senate Hearings*, *supra* note 201 (statement of representative Tony Perkins).

212. *See* LA. CIV. CODE ANN. art. 273 (West 1998).

213. *See id.*; *see also* Ann Sjoerdsma, *Couple Should Exchange Vows with Each Other, Not the State*, VIRGINIAN PILOT & THE LEDGER-STAR, Feb. 9, 1998, at B11, available in 1998 WL 5535950. The Virginia covenant marriage law legislation was modeled after the Louisiana statute and requires many of the same features, including premarital counseling, a declaration of intent which states the couple will take "all reasonable efforts to preserve" their marriage, and mandatory counseling before any separation or divorce is granted. *Id.* Ohio also modeled its bill after Louisiana's law. *See* Mary Beth Lane, *Covenant Marriage Bill Testimony Marked by Tears*, PLAIN DEALER, Oct. 16, 1997, at 5B, available in 1997 WL 6618838.

214. *See generally supra* note 125 (discussing the Parliamentary divorce system).

period²¹⁵ before they can file for divorce.²¹⁶ Before a couple takes either step, the law mandates counseling.²¹⁷

A judgment of separation from bed and board is the first step in achieving a divorce in a covenant marriage.²¹⁸ The grounds for separation are similar to the fault grounds for divorce during Tudor and Stuart times. Adultery by one spouse, abandonment of the matrimonial dwelling for over one year with a refusal to return, and physical or sexual abuse of a spouse or child of one of the spouses or of the marriage are reasons to end the marriage.²¹⁹ The Louisiana covenant marriage law expanded the common law grounds for divorce by permitting the commission of a felony with a sentence of death or imprisonment to hard labor, the habitual intemperance of one spouse, cruel treatment or outrages so as to "render their [the couple's] living together insupportable,"²²⁰ and the living separate and apart without reconciliation for two years²²¹ to count as causes

215. See LA. CIV. CODE ANN. art. 307(A)(6) (West 1998). If there is a minor child of the marriage, the couple must wait one and a half years to obtain the divorce. If there are no minor children, then the separation period lasts only one year. See *id.*

216. See LA. CIV. CODE ANN. art. 273(A)(1) (West 1998). During the separation period, the couple should be trying to solve the problems in their marriage.

217. See *id.* But see LA. CODE CIV. PROC. ANN FORM NO. 361 (West 1998) (noting that within a covenant marriage, if one spouse deceived the other by saying he was not married and she later discovers he is, then their covenant marriage is legally void. Subsequently, none of the procedures need to be followed, as one party was never free to enter into the marriage due to the impediment.).

218. See *id.* at art. 307(B).

219. See *id.* at art. 307 (West 1998); see also 1998 Ariz. Legis. Serv. 25-903(4) (West). The Arizona law also names physical or sexual abuse of a relative of either spouse who permanently lives in the marital domicile as a cause for divorce, including a child of either spouse. See *id.*

220. LA. CIV. CODE ANN. art. 307(B)(6) (West 1998). Note that in order to obtain a separation from bed and board for mental cruelty the level of cruelty must reach the same standard of abuse which was set forth in the established Louisiana no-fault divorce statute. Under the covenant marriage law, mental cruelty was an addition made by the Louisiana Senate; the original bill only included physical cruelty. Also note that sixteenth and seventeenth century English courts really did not use mental cruelty as a grounds for divorce by itself; it needed to be joined by another fault ground. See *supra* notes 51-52 and accompanying text (discussing the rare use of mental cruelty as a cause for a divorce *a mensa et thoro*); see also *Georgia Preacher Is Seeking Voluntary 'Covenant Marriage'*, CHATTANOOGA FREE PRESS, Jan. 3, 1998, at C4, available in LEXIS, News Library, Chattanooga Free Press file. Under the proposed Georgia covenant marriage bill, fault grounds only include physical or sexual abuse, abandonment, and adultery. No extension beyond the common law fault grounds has occurred.

221. See LA. CIV. CODE ANN. art. 307 (West 1998); see also Sjoerdsma, *supra* note 213, at B11 (describing the Virginia proposed law in which the bill mandates a separation period of two years for those couples who have children and a separation period of only eighteen months for those who do not. The Virginia proposed law, as it now stands, would make it easier for Virginia couples, as compared to Louisiana couples, to end their covenant marriages.); *Marriage-Plus Really a Private Affair*, ATLANTA CONST., Feb. 23, 1998, at 8A, available in 1998 WL 3678551 [hereinafter *Marriage Plus*] (describing a Georgia covenant

for separation as well.²²² After the separation from bed and board is obtained, the marriage is not dissolved, and neither party may remarry.²²³ The effect of the separation is solely to end cohabitation. The parties maintain their separated status until they either reconcile or divorce. A temporary division of the couple's goods and effects also occurs.²²⁴ Temporary relief, in the form of spousal or child support, may also be granted to one party, but is not mandatory.²²⁵ Thus, some spouses, especially wives, may encounter financial hardships during the period of separation, subsequently coercing them into returning to their spouses because of their decreased financial resources during this period of "problem solving."²²⁶

An actual divorce transpires after the spouses have lived separate and apart without reconciliation, and pursuant to a valid separation decree, for the separation period.²²⁷ Once a divorce is obtained, couples bounce back to the previously enacted Louisiana divorce statute, which is based on the principles of no-fault and community property.²²⁸ In addition, while Louisiana is a no-fault state, judges consider fault in the determination of spousal support.²²⁹ Thus, the covenant marriage law only alters the means

marriage bill which would permit a divorce for a fault-based reason or after a separation period of only one year).

222. See 1998 Ariz. Legis. Serv. 25-903 (West). The Arizona covenant marriage law has even further extended the grounds for dissolving a covenant marriage. The law also includes the habitual abuse of drugs or alcohol by one spouse or the agreement of both spouses to dissolve the covenant marriage to be grounds for divorce. See *id.* at 25-903(7), 25-903(8).

223. See LA. CIV. CODE ANN. art. 309 (West 1998).

224. See *id.* at 309(B). The property is divided according to the community property guidelines of the state. It will be re-joined when reconciliation between the parties occurs.

225. See *id.* at art. 308; see also *id.* at art. 111; *Wheelahan v. Wheelahan*, 644 So. 2d 1125, 1127 (La. Ct. App. 1994). Note that under the Louisiana civil law, temporary alimony is not based on fault—any party who needs the financial support can receive it. But see *Ellman*, *supra* note 203, at B5 (stating that temporary alimony is not available in Arizona during the two year separation period).

226. It appears as if the Louisiana legislators almost hasten a divorce by taking steps which are performed during divorce proceedings, such as the division of property and the assignment of alimony. Legislators designed the separation period to have couples work out their problems, in an effort to continue their marriage, not prepare them prematurely for divorce and the final division of their property.

227. See LA. CIV. CODE ANN. art. 307 (West 1998).

228. See *id.* at art. 102.

229. See *id.* at art. 112. See, e.g., *Simon v. Simon*, 696 So. 2d 68 (La. Ct. App. 1997) (stating that the spouse seeking alimony cannot have legal fault in the break-up of the marriage, or spousal support would be precluded). See also *supra* note 157 and accompanying text (noting that while critics state that women occupy better financial positions after fault divorces, as compared to no-fault divorces, they still suffer economic hardships). It appears as though women will not improve their financial positions after the dissolution of a covenant marriage as compared to after the acquisition of a no-fault divorce.

of creating and dissolving a marriage, not the post-divorce circumstances of the parties.

Some legislators and lobbying groups have concerns about the effect of the covenant marriage law on women. While the law names physical abuse as a cause for divorce, the covenant divorce may perpetuate domestic violence and the abuse of women.²³⁰ Victims of domestic violence, usually women, must prove their physical abuse in two court proceedings in order to obtain a divorce:²³¹ the proceeding for separation from bed and board, as well as the actual divorce proceeding.²³² Making women prove their abuse places them in an inferior position in society and could discourage them from trying to leave abusive relationships.²³³

This requirement also makes it difficult for women to secure a separation, as evidentiary problems are bound to exist. If a woman encountered abuse when no witnesses were present and if she did not take pictures of the results of that abuse, no direct evidence can be presented in her favor.²³⁴ Additionally, with no evidence, no separation will be granted on the abuse grounds. Rather, the woman must continue to live in the marriage until the two year period tolls for living separate and apart, instead of the one year requirement for physical abuse.²³⁵ Moreover, if a battered spouse flees her home, due to the abuse, and returns later, she cannot file for a separation from bed and board, despite the abuse, because she abandoned her spouse and would be viewed as the guilty party.²³⁶ The abuser, however, would be justified in filing for a separation because of his wife's abandonment—an unfair situation for the abused spouse.

Besides the proof conundrum, other aspects of the covenant marriage law adversely affect victims of domestic violence. The law

230. See *Today*, *supra* note 196; *Senate Hearings*, *supra* note 201 (statement of Martha Kegel, representative for the ACLU).

231. See *Senate Hearings*, *supra* note 201 (statement of Martha Kegel, representative for the ACLU).

232. See LA. CIV. CODE ANN. art. 307(A), 307(B) (West 1998).

233. See *Senate Hearings*, *supra* note 201 (statement of Martha Kegel, representative for the ACLU).

234. See *id.* (statement of Martha Kegel, representative for the ACLU).

235. See LA. CIV. CODE ANN. art. 307 (West 1998); *Senate Hearings*, *supra* note 201 (statement of Martha Kegel, representative for the ACLU). Neither waiting period is ideal for a battered woman, as she could suffer more abuse during that period. *But see* 1998 Ariz. Legis. Serv. 25-903 (West). The Arizona law does not require a waiting period for physical, sexual, or emotional abuse of a spouse which will greatly help abused women who agree to a covenant marriage.

236. See *Senate Hearings*, *supra* note 201 (statement of Martha Kegel, representative for the ACLU).

emphasizes the need for couples to spend time together and to work through their problems.²³⁷ While an abused spouse is only required to remain separated from her husband for a year before obtaining a divorce,²³⁸ that period is still long enough to present further opportunities for abuse. The mandatory counseling also poses problems for battered women. It is principally unfair that an innocent, abused spouse must undergo counseling when she did nothing wrong.

Domestic violence is the one particular area where you should never have to put the woman in the same room with her abuser. . . . So where there's one person who manipulates the other, where there's someone who puts the other in fear, that's going to be the same relationship that's going to go into that counseling.²³⁹

The law almost appears to punish women who suffer abuse by making it difficult for them to receive any redress.

Besides concerns with domestic violence, the waiting periods have other consequences which adversely affect women. The separation period prolongs a painful and emotionally draining experience, while also forcing couples to stay in a marriage in which they are unhappy.²⁴⁰ Additionally, during the separation periods, the property is divided and women who are housewives and mothers lose the economic benefits of their husbands' incomes which they relied upon when married.²⁴¹ While temporary support²⁴² is helpful, it will not return women to the standard of living they had become accustomed to when married—a foreshadowing of their lives after the divorce.²⁴³

237. *See id.* (statement of Representative Tony Perkins, proponent of the Louisiana covenant marriage law).

238. *See Marriage Plus*, *supra* note 221, at 8A.

239. *Today*, *supra* note 196 (statement of Lynne Gold-Bikin, an opponent of the covenant marriage bill). *But see id.* (statement of Representative Tony Perkins, noting that the counseling requirement does not mandate that both spouses be present in the same room; counseling may be done in separate sessions. Counseling for abused spouses is mandated because a marriage is made of two people, and therefore, both should undergo some form of counseling when trying to salvage the marriage.).

240. *See id.* (statement of Lynne Gold-Bikin, an opponent of the covenant marriage bill).

241. *See id.*

242. *See* LA. CIV. CODE ANN. art. 308(D) (West 1998). Under the covenant marriage law, the temporary support available includes, "spousal support, claims for contributions to education, child custody, visitation rights, child support, injunctive relief and possession and use of a family residence or community movables or immovables." *Id.*

243. *See supra* Part IV (describing the effects of fault and no-fault divorces on women in America).

The covenant marriage law also reinforces some of the difficulties women encountered when exiting a marriage during the sixteenth and seventeenth centuries. It is generally easier for men, than women, to exit their marriages.²⁴⁴ In Louisiana, men tend to earn more money than women.²⁴⁵ In addition, men generally tend to be more financially secure during a separation and after a divorce than are women.²⁴⁶ Subsequently, they are more willing to file for a separation because of this financial security.²⁴⁷ Men are also socialized to be more competitive, making them better equipped psychologically to leave a marriage than women who are socialized to please others.²⁴⁸ Moreover, the continuation of no-fault divorce decrees based on community property ideals, as well as fault based grounds for alimony, will continue to subjugate women financially.²⁴⁹

The effect of the Louisiana covenant marriage law is not known. "Out of 11,169 marriage licenses sold in Louisiana from August 15, 1997, when the law took effect, until January 15, only 120 were covenant licenses, or 1 percent"²⁵⁰ of total licenses sold. However, on Valentine's Day, between three and four thousand previously married couples chose to opt into the covenant marriage, increasing its success rate.²⁵¹ It appears as though potential spouses doubt the efficacy of the covenant marriage law.

VI. COMPARISON BETWEEN THE LOUISIANA COVENANT MARRIAGE LAW AND THE ENGLISH COMMON LAW

When comparing the Louisiana covenant marriage law to the English common law, many similarities exist between both the structure of the laws, as well as their effects on women. One wonders if society has come full circle—are women being placed back into subordinate positions in society under the covenant

244. *But see infra* text accompanying note 284 (stating that the covenant marriage law does not directly discriminate against women).

245. *See* Terry A. O'Neill, *This Law Hurts Women*, U.S.A. TODAY, Aug. 14, 1997, at 14A.

246. *See Economic Consequences*, *supra* note 183, at 495.

247. *See id.* *But see Today*, *supra* note 196 (statement of Tony Perkins indicating that one benefit of the law revolves around the fact that it is not unilateral so women are not surprised with the divorce and have time to prepare financially for the divorce through job training).

248. *See* O'Neill, *supra* note 245, at 14A.

249. *See supra* notes 228-29 and accompanying text.

250. *Some Couples Seek Extra Commitment*, DES MOINES REGISTER, Feb. 15, 1998, at 1, available in 1998 WL 3193819.

251. *See* Michael J. McManus, *Covenant Marriage Legislation a Solid Idea*, FRESNO BEE, Feb. 28, 1998, at C7, available in 1998 WL 8733398.

marriage law, as they were 300 years ago? Despite the numerous parallels, a return to the archaic days of common law England, where women lived in subservient positions to men both during and after divorce proceedings, is not probable. The differences between the two periods are too great to fathom such a complete return. Women possess a stronger position in society than they did during the Tudor and Stuart periods. In the twentieth century, women own property, have standing to sue in court, and vote—legal rights they lacked in the past.²⁵² While women continue to maintain a subordinate financial position to men during and after divorces, the divorce laws are no longer written and interpreted in an implicitly unequal fashion, thus vastly improving the position of women.

Similarities exist between the dissolution of covenant marriages and English common law divorces. Both rely on comparable fault grounds which are needed in order to obtain a divorce: adultery, desertion, or abuse.²⁵³ Additionally, attempts to get the parties to reconcile are prevalent. In both legislatures, lawmakers looked down upon incompatibility as a cause for divorce.²⁵⁴ Strife was not desired in marriages, and legal authorities believed the parties should work through their marital difficulties—not divorce.²⁵⁵

With respect to post-dissolution support, both sets of courts provide wives with some financial assistance during and after the divorce proceeding. In actuality, aristocratic women were placed in better financial positions²⁵⁶ after a divorce in the sixteenth and seventeenth centuries, than twentieth century women, simply because the courts did not expect them to obtain work outside of the

252. See ROAD TO DIVORCE, *supra* note 5, at 4; see also *supra* notes 80-83 and accompanying text.

253. See *supra* note 43 and accompanying text. Louisiana legislators expanded the covenant marriage grounds for divorce beyond the traditional fault grounds granted in common law England, thereby suggesting that the common law courts strove even more to keep marriages together. Also note that while both periods offer fault causes for divorce, women during the sixteenth and seventeenth centuries encountered more difficulty having their fault grounds recognized in court. This scenario does not appear to be the case with the dissolution of covenant marriages. However, as no case law exists to date, I cannot be certain.

254. See LA. CIV. CODE ANN. art. 307(B)(6) (West 1998) (permitting incompatibility as grounds for divorce, but only after a two year separation period); see also INGRAM, *supra* note 6, at 180-82. Note that during the sixteenth and seventeenth centuries, incompatibility was completely forbidden as a cause for divorce. See *id.*

255. See Smith, *supra* note 21 at 107; *Senate Hearings*, *supra* note 201 (statement of Representative Tony Perkins, proponent of the Louisiana covenant marriage law).

256. Exceptions did exist, and in some separations from bed and board, women were given insufficient maintenance.

home to subsidize their maintenance.²⁵⁷ Subsequently, women received a larger percentage of their needed finances from their spouses.²⁵⁸ While women who enter into covenant marriages might receive a smaller overall amount of financial support from their husbands than their counterparts did during the sixteenth and seventeenth centuries, real sanctions exist if the husband does not pay alimony today.²⁵⁹ Nonetheless, husbands continue to avoid such sanctions and elude spousal and child support payments.²⁶⁰ The limited nature of the post-dissolution support, found in both laws, creates a decreased standard of living for women of both periods.²⁶¹

Another similarity between the laws during both periods concerns the well-being of children. Under the English common law, social ostracism for the wife, and possibly for her children, existed after a divorce.²⁶² The lack of financial support for children could encourage women to try to keep their marriages together, as they did not want their children to suffer.²⁶³ Comparatively, one of Tony Perkins' main reasons for the covenant marriage law in Louisiana included the protection of children—both psychologically and financially.²⁶⁴ He believed children who grew up in a household with two parents would fare better, as they had the economic and emotional support of both parents.²⁶⁵

257. See GIBSON, *supra* note 10, at 16.

258. See *supra* notes 87-92 and accompanying text. The previous assertion would only be true if the husbands paid the maintenance, as expected. Some women encountered problems with enforcement, as the ecclesiastical courts could only excommunicate wayward husbands. See *supra* notes 93-97 and accompanying text.

259. See WEITZMAN, *supra* note 2, at 289, 298-309 (discussing wage garnishments and federal legislation designed to enforce alimony payments).

260. See *id.* at 283 (noting that one in six men was in arrears for spousal support payments six months after their divorces); ARENDELL, *supra* note 175, at 76, 154 (describing a shocking pattern of failure by divorced fathers to pay court-ordered child support).

261. Note that the amount of spousal support to be received after the dissolution of a covenant marriage is not a change from the past fault and no-fault rules. The covenant marriage law maintains the status quo with respect to spousal support.

262. See *supra* notes 72-77 and accompanying text.

263. See Carbone, *supra* note 155, at 400; ROAD TO DIVORCE, *supra* note 5, at 5. However, many children lived with their fathers after a divorce, so often no child support was given to the wife.

264. See *Senate Hearings*, *supra* note 201 (statement of Representative Tony Perkins, proponent of the Louisiana covenant marriage law).

265. If the separation period succeeds and the marriage is maintained, then the covenant marriage did effect a change for the better with respect to the protection of children. However, if the couple obtains a divorce, despite the separation period, then the law failed to achieve its goal of protecting children. Despite the good intentions of the legislators, after the divorce, the children will live in single parent households and will probably suffer financial hardships due to the division of income. See, e.g., ARENDELL, *supra* note 175, at 76, 154 (describing the low sums paid in child support by divorced fathers and the problems

Finally, women find themselves in subordinate positions in society as a result of the termination of their marriages under both the common law and the Louisiana covenant marriage. During both periods, after a divorce,²⁶⁶ women suffer from social isolation and psychological difficulties.²⁶⁷ They lose their support and friendship networks, which they had relied upon in the past, due to their new status as divorced women.²⁶⁸ However, it appears that after either fault or no-fault divorces, women tend to distance themselves socially on their own, while during the sixteenth and seventeenth centuries, society isolated the women.²⁶⁹ Regardless, financial shortages have caused women in both periods to remove themselves from the social interactions they had previously pursued.²⁷⁰

Despite the aforementioned similarities, differences definitely exist between the two periods, forming my conclusion that women have not returned to such a subordinate position in society as was found during the Tudor and Stuart periods. The covenant marriage law is more expansive than the common law, as it permits divorces for incompatibility²⁷¹—a failure of the English common law. Additionally, counseling between the parties is emphasized in a covenant marriage—unhappiness in the marital union is not advocated.²⁷² Throughout the sixteenth and seventeenth centuries, however, the judges cared little about counseling—an unhappy marriage was a burden women simply had to bear.²⁷³

The most important difference between the covenant marriage law and the English common law is the treatment of women throughout all aspects of the divorce process. While the covenant marriage law contains provisions which may hurt women or which may diminish their position in society, due to the overall financially poor position women inhabit,²⁷⁴ legislators designed the law to grant

women face when trying to get the fathers to pay the support).

266. For this part of the analysis I am using data collected from women who underwent no-fault and fault divorces. At this time, no covenant divorces have been granted.

267. See WEITZMAN, *supra* note 2, at 335.

268. See *id.*

269. See *supra* notes 71-77 and accompanying text (describing the forced isolation of divorced women during the Stuart and Tudor times); *supra* notes 191-94 and accompanying text (discussing the self-induced isolation of women who just underwent a no-fault divorce).

270. See *supra* notes 71-72, 194.

271. See *supra* text accompanying notes 221, 254.

272. See LA. CIV. CODE ANN. art. 273 (West 1998).

273. See INGRAM, *supra* note 6, at 188. If counseling was conducted at all during this period, parish priests would be in charge. The ecclesiastical judges did not believe it was their concern.

274. See *supra* notes 244-49 and accompanying text (discussing the access problems women have with the modern-day court system, not because of facial discrimination, but because of their tenuous financial positions in society).

equal rights to both men and women, especially with respect to women's accessibility to the legal system. Both men and women contract the covenant marriage, both are held responsible for maintaining the marriage and both are permitted to seek an end to the union if a breach of the covenant occurs. In addition, both parties have equal access to the courts.²⁷⁵ Moreover, some feminists believe "Louisiana's new law helps women because it restores power to the innocent spouse, and it is typically the woman who has the legal power to file for a fault-based divorce."²⁷⁶ Furthermore, by requiring longer separation periods, the law places a check on men who "are too comfortable with abandoning a family."²⁷⁷ Such feminists believe that women are no longer helpless and currently have the power to file for divorces on their own.²⁷⁸ "[I]ndeed, women are the ones who file for the majority of divorces."²⁷⁹

This equal access to the courts did not exist during the Tudor and Stuart reigns.²⁸⁰ The threshold for women to obtain divorces was much greater than it was for men. Great abuse or complete abandonment were the sole causes for divorce which allowed women access to the ecclesiastical courts. Men, however, could sue for adultery,²⁸¹ as well as abandonment and abuse. Additionally, women lacked access to Parliament and subsequently had problems obtaining redress from that institution.²⁸² The patriarchal order of society failed to afford women equal treatment to men. "[S]he puts herself entirely into her Husband's Power, and if the Matrimonial Yoke be grievous, neither Law nor Custom afford her that Redress which a Man obtains."²⁸³

275. See LA. CIV. CODE ANN. art. 273(A)(1) (West 1998); *supra* notes 244-49 and accompanying text. While both men and women have the same opportunities to bring a divorce suit to court, men are more likely to do so because of their more stable financial position. Subsequently, even though no direct discrimination occurs, women suffer from indirect discrimination, limiting the number of divorce suits brought by them.

276. Melissa Lawton, Note, *The Constitutionality of Covenant Marriage Laws*, 66 *FORDHAM L. REV.* 2471, 2509 (1998).

277. *Id.* at 2510. Lawton did point out that women who lack independence and who are controlled by their spouses might encounter difficulties when trying to end their covenant marriages. This lack of autonomy could endanger their lives if they were in an abusive relationship. See *id.* In addition, the waiting period could severely decrease a woman's monetary stability. See *supra* notes 224-26 and accompanying text.

278. See *id.* at 2510-11.

279. *Id.* at 2510. But see *supra* notes 244-49 and accompanying text (discussing the access problems women have to the modern-day court system, not because of facial discrimination, but because of their tenuous financial positions in society).

280. See *supra* notes 49, 52, 62.

281. See *ASTELL*, *supra* note 14, at 37.

282. See *supra* text accompanying note 128 (showing the small number of women who sued in Parliament for a divorce).

283. *ASTELL*, *supra* note 14, at 34.

Differences also exist with respect to the types of recourse available to women. Under both laws, women suffer financial hardships. Nonetheless, once again, the Louisiana law is "on-its-face" neutral. If either spouse caused the divorce by their own fault actions, such as adultery, then that spouse, regardless of his or her gender, would be precluded from obtaining spousal support. Legislators did not create the law so that women would have a higher standard of conduct to meet, subsequently making it easier for them to be at fault.²⁸⁴ Rather, both parties to the marriage must live up to the same standards.

However, during the sixteenth and seventeenth centuries, a woman's maintenance was directly tied to her actions. The court decreased her maintenance or stopped it entirely if she had caused the divorce.²⁸⁵ If a woman's husband was at fault, it did not affect his financial situation at all—the court did not require him to pay his wife more money. Women suffered overt discrimination based upon their gender during common law England.²⁸⁶ While women maintain economically subservient positions to men in society in the twentieth century,²⁸⁷ blatant discrimination has basically been eradicated²⁸⁸—the results of the laws remain the problem. Women's economic inequality, with respect to their salaries in the job market and with respect to their willingness to assume more of the responsibilities of child care, helps to preserve the unequal results of divorce laws.²⁸⁹

The divorces' effects on women also vary greatly between the laws—another indication of women's improved position in society.

284. See LA. CIV. CODE ANN. art. 112 (West 1998). The covenant marriage law is objectively gender neutral. However, the factors considered by the court, when determining spousal support under the Louisiana fault laws, are subjective. For example, if a husband was guilty of adultery and the wife was an innocent spouse, the judge would have to award her alimony, if she was in need. However, he could decide that her need was not too great or that her husband did not have sufficient income to give her adequate spousal support to meet her needs. If judges did, in fact, decide alimony in such a fashion, they would be acting in a manner similar to their predecessors on the ecclesiastical courts. See *supra* text accompanying notes 86-89.

285. See *supra* notes 86-88.

286. See *supra* notes 86-92 and accompanying text.

287. See FINEMAN, *supra* note 179, at 36.

288. See *id.* at 38; see also WINNER, *supra* note 149, at 53-54 (noting that legislators designed certain changes in divorce laws in order to abolish the discriminatory treatment of women throughout the divorce process. However, while the changes "sounded good in theory; in practice the new system [was] terribly flawed . . . due to the manner in which these laws [were] administered. . . . In earlier days the inequities were built into the law themselves. Now the laws have changed, but not the attitudes of those who are supposed to apply the laws.").

289. See FINEMAN, *supra* note 179, at 36-37.

During the twentieth century, women maintain contact with their children after a divorce. In fact, most women become the custodial parent—caring for and raising their children.²⁹⁰ Even if a mother is not the custodial parent, in most cases, the court still grants her visitation.²⁹¹ Such contact with children did not exist during Tudor and Stuart England. Society viewed women as being unfit to be parents after a divorce and often deprived them of contact with their children.²⁹²

Under the covenant marriage law, women may be more resourceful and more self-sufficient than they were 300 years ago. After the dissolution of a covenant marriage, women are expected to enter the work-force and become self-supporting, as the spousal support, either from a fault or a no-fault decree, is usually neither permanent nor sufficient to support a women without other income.²⁹³ However, during the Tudor and Stuart periods, aristocratic women did not work, even after a divorce.²⁹⁴ Thus, women remained completely dependent on their spouses for money, subsequently placing them in an extremely subordinate position in society. Such a position does not exist in the modern era due to a woman's ability to supplement her husband's support payments with her own income.

One final difference between the English common law and the covenant marriage law revolves around society's attitudes towards both women and the institution of marriage. While the covenant marriage law attempts to reduce the divorce rate by establishing stringent requirements for those parties interested in obtaining a divorce,²⁹⁵ it does more readily recognize the need, in certain circumstances, for the dissolution of a marriage.²⁹⁶ However, throughout the Tudor and Stuart times, society denounced divorces

290. See ARENDELL, *supra* note 175, at 18. But see WINNER, *supra* note 149, at 44-50 (noting that many judges are taking custody away from mothers who previously had been the primary caretaker because, after the divorce, they must work outside the home. Similar decisions are not made for men.).

291. See WEITZMAN, *supra* note 2, at 260.

292. This idea was not imposed on the fathers as the law viewed them as the children's guardian. Even if the woman had not caused the divorce, her husband still retained the authority to keep her from the children. See *supra* text accompanying note 74.

293. See ARENDELL, *supra* note 175, at 155.

294. See *supra* text accompanying note 83.

295. See *supra* notes 210-17 and accompanying text.

296. See *supra* text accompanying notes 219-22 (discussing the permissible grounds for a divorce under the covenant marriage law). While divorces are possible in any situation, provided the couple fulfills the two year waiting period, the mandatory counseling and waiting period do slow down the divorce process. See *supra* text accompanying note 217.

for almost any reason.²⁹⁷ Furthermore, while the courts permitted divorces in certain limited situations, families, society, and the limited access to the judicial system continued to impede divorces in many cases,²⁹⁸ severely undercutting the logic behind such exceptions.

VII. CONCLUSION

Under the covenant marriage law, society has not come full circle. Women do not inhabit subordinate positions in the community during the divorce process, as they did throughout the sixteenth and seventeenth centuries. Parallels between covenant marriages and English common law marriages do exist. Both provide a limited means of recourse when ending unwanted marriages, and both have provisions which treat women unequally and unfairly—subordinate to men. However, women who contract the covenant marriages still maintain more autonomy, freedom, and equality than did women during the sixteenth and seventeenth centuries.

The Louisiana covenant marriage law is a strong attempt to decrease the number of divorces, through an alteration of the methods of entering and exiting a marriage. The waiting period and the mandatory counseling force couples to examine their marriages and to attempt to work out their differences, a procedure that is missing under the current Louisiana no-fault law. When incompatibility or irreconcilable differences are the causes for separation, the covenant marriage is a promising law. It not only provides the couple with time to work through their problems, but also gives the party who did not want the divorce time to prepare for it, both financially and psychologically. Such preparation could combat the feminization of poverty which appears to accompany so many divorces.²⁹⁹ However, the separation period mimics the

297. See *supra* text accompanying notes 14-17 (discussing the external pressures families placed on couples to keep their marriages intact).

298. See, e.g., *CRISIS OF THE ARISTOCRACY*, *supra* note 68, at 660-61 (mentioning the religious, social, and economic pressures which kept couples together).

299. See Bradford, *supra*, note 145, at 615 (noting that traditionally under the no-fault divorce system, women typically had no marketable skills, as they usually stayed home throughout their marriages. Thus, when they divorced their husbands, they had no job-related skills by which to earn a living and they were expected to be financially responsible for themselves). One could infer that with a waiting period, women would have the opportunity to refine marketable job skills while also receiving temporary alimony. Thus, upon the dissolution of the marriage, women would have job skills and would be capable of supporting themselves. But see WEITZMAN, *supra* note 2, at 351 (stating it is unlikely that the extended separation period of the covenant marriage law would decrease the

rehabilitative period after a traditional divorce during which women obtain job training and receive support from their husbands. If courts grant support during the separation period, judges might not extend the rehabilitative alimony if a divorce occurred, further hurting a woman's financial situation.

While the covenant marriage might ameliorate the position of women in cases that pertain to incompatibility, in situations where a fault cause, such as abuse, is the basis for divorce, the waiting period and the counseling are detrimental to women. Making an innocent spouse prove her husband committed a fault against her, in two separate court proceedings, is often degrading and difficult. Additionally, it is unfair for an innocent spouse to undergo counseling, as she did not cause the breakdown of the marriage. The waiting period simply prolongs this painful process and keeps women in households which are either unhappy or abusive.

Women occupy a stronger position in society under the covenant marriage law than under English common law. However, the Louisiana covenant marriage law made few improvements with respect to a woman's position in society since the institution of no-fault divorces. The covenant marriage law fails to alter the implications of divorce. It only changes the methods of entering and exiting a marriage. In order to improve the position of women in the post-divorce period, Louisiana legislators must take greater steps to redesign the marital laws so women achieve economic equality with their ex-husbands after a divorce. When legislators only change the entrance into and the exit from marriages, they do not eradicate the past problems that women have encountered under the fault and no-fault divorce regimes. The covenant marriage law achieves no real difference, as couples bounce back to the established marital laws in Louisiana. Subsequently, after women have obtained the dissolution of their covenant marriages, they become situated in economically inferior positions—the same economically inferior positions that their counterparts who underwent regular fault and no-fault divorces also occupied. Women do not gain an improvement in their financial, psychological, or social standings after a dissolution of a covenant marriage, as compared to a fault or no-fault divorces.

The Louisiana covenant marriage law has provisions that could adversely affect women. Until legislators initiate laws that alter the post-divorce circumstances of women, as well as the entrance

feminization of poverty because women would still lack their husband's income, support which they had relied upon in the past).

into and the exit from marriage, women will continue to occupy a weakened financial and social position in society. Despite the Law's shortcomings, the covenant marriage law is hardly a return to the patriarchal society that women endured during the Tudor and Stuart periods.

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