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MARRIAGE: WHY A SECOND TIER CALLED COVENANT MARRIAGE?

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Marriage, once considered an institution whose strength was essential to society's common good, has suffered from direct and indirect assault more than most Americans are willing to acknowledge. Marriage was at one time considered fundamental to a healthy democratic society because the *legal* and moral commitment of husband and wife assured a steady anchor for the family. The family is, of course, the institution responsible for acculturating children by instructing them concerning responsibility, respect for others, self-discipline and self-restraint, in other words, in the particulars of a common moral code.

Even if one accepts the indisputable assertion that changes in American culture affected our view of marriage, law too played no small part. Law with all of its symbolic value essentially "defined marriage down" from a sacred indissoluble union of man and woman to a companionate relationship that endures until either spouse loses affection for the other. Law accomplished this remarkable feat by unilateral no-fault divorce laws permitting one spouse to dissolve a family without good reason within a matter of a few months and by judicial opinions which, while recognizing a constitutional *right* to marry, chose to define marriage from one party's individualistic perspective only, which is predictable when one speaks of *rights* without correlative *obligations*. Thus,

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what was once legally recognized as a bedrock institution fundamental to our society's continued existence has legally evolved to a means of personal fulfillment or of self-actualization.

How do Americans rebuild a marriage culture from the ashes of a "divorce culture?" Ashes are not a firm foundation. Our hope lies in the possibility that *marriage*, like the proverbial phoenix, will rise from the ashes. I suggest that covenant marriage is the plumed phoenix. The legislation offers states an opportunity to change the dominant paradigm of marriage. To change the notion of marriage from a casual companionate relationship to a serious and sober lifetime commitment requires passionate dedication to the task. Proponents of lifelong marriage must convince Americans that marriage entails responsibility to one's spouse and unqualified responsibility to children born of the marriage. Rather than serving to denigrate "marriage," as detractors often argue, covenant marriage legislation offers the potential to reshape the American view of marriage.

I. ADVANTAGES OF COVENANT MARRIAGE DIVORCE LAW REFORM

A. Covenant Marriage Focuses On Strengthening Marriage, Not Simply Making Divorce More Difficult

What covenant marriage legislation offers that other divorce reform efforts lack is concentration on marriage itself by educating couples about the seriousness of marriage and equipping them for the inevitable "difficulties." Covenant marriage accomplishes these objectives through mandatory pre-marital counseling and the legal obligation to work hard at preserving the couple's marriage. Strengthening marriage requires more than teaching marriage and "relationship" skills in high school, or a reduction of the price of a marriage license to "encourage" important pre-marital counseling. Altering the course of the "divorce culture" requires more serious measures.

Three unique components of covenant marriage legislation make the reform effort weighty and serious: (1) the *legal* obligation to make reasonable efforts to preserve the marriage, including marriage counseling; (2) the "roll back" of liberal grounds for divorce, especially unilateral no-fault divorce; and (3) the reinstatement of *fault by a spouse* as sufficient reason to permit divorce. The reinforcement of the law strengthens the promise made *in advance* to take steps to preserve the marriage. In our culture moral notions of keeping one's promises has been so eroded that law is required to assure faithfulness. Society's *collective* interest in preserving marriages, if only "for the sake of the children," justifies the sanction of the law.

Unilateral repudiation of a spouse (and consequently, the family unit composed of one's children) for no good reason undermines social and religious condemnation of such irresponsible behavior. Eliminating no-fault divorce, which unfortunately Louisiana's covenant marriage legislation does not accomplish, and restoring a common moral code about appropriate conduct in marriage communicates society's willingness once again to judge *personal* behavior in the most intimate of relationships. Personal behavior within marriage affects the public. There can be no compartmentalization of a person's offensive behavior in his marriage and the effect that behavior has on the public. Ask his children. Ask the children of his partner in adultery.

Is covenant marriage legislation a precursor to the "privatization" of marriage? I surely hope not. Despite arguments for permitting private contractual arrangements of marriage, American society has a vital interest in strengthening marriage, marriage as traditionally understood. Evidence exists that legal recognition of other relationships as equivalent to marriage erodes and undermines the institution of marriage. Thus, where marriage is concerned, Americans may lack the moral education necessary for considered decisions, the best of which reflect some measure of sacrifice for future transcendental good. Freedom exercised responsibly requires virtuous citizens. Privatizing or customizing marriage by permitting two people to construct the content of their marriage is fraught with peril. Marriage that lasts a lifetime, "in sickness and in health," through life's many passages, requires heroic commitment and, to some degree, legal compulsion.

B. Politics Is The Art Of The Possible, And Covenant Marriage Combines Elements That Appeal To Conservatives And To Liberals

Covenant marriage legislation combines brilliantly conservative and liberal concepts—traditional marriage and choice, moral judgment about personal behavior and education. As a consequence, the legislation appeals to thoughtful conservative and liberal lawmakers alike, particularly those whose secular world view also acknowledges the undesirable consequences of the present divorce culture. For liberal lawmakers and their allies who do oppose covenant marriage legislation, the law exposes the hypocrisy of liberal dogma that insists on self-destructive choices in the name of freedom but shamelessly denies citizens a virtuous choice. The hypocrisy of such a position speaks for itself, and hypocrisy in America is among the most serious of remaining moral faults.

For traditional conservatives who understand that moral fault extends beyond hypocrisy, the best covenant marriage legislation reintroduces or expands objective fault as grounds for divorce. State law that once again willingly *judges* marital behavior conveys confidence in an

objective, common moral code. At the same time, covenant marriage legislation incorporates the liberal lawmaker's panacea – education – in the form of mandatory pre-marital counseling that stresses the seriousness of marriage and the expectation that the marriage will be life long. Another component of covenant marriage with appeal to liberals obligates the spouses to make “reasonable efforts” to preserve their marriage if difficulties arise, including marital counseling. Of course, the counseling *must be* directed to *preserving* the marriage, which often runs counter to the training received by therapeutic professionals. The psychiatrist, psychologist, or social worker focuses too often on the patient or client without concern for the larger community in which the person lives, such as the family.

C. In An Increasingly Secular Nation, Covenant Marriage Legislation Invites The Cooperation And Valuable Assistance Of The Church In The Work Of Preserving Marriage

Unlike professional therapists, a minister, priest or rabbi, who is faithful to his religious tenets, will counsel the value of permanent marriage. When difficulties arise and the covenant couple legally *must* take steps to preserve their marriage, proponents of covenant marriage hope that one or both spouses will seek the assistance of the church. The church is particularly well equipped to offer intensive one-on-one counseling for couples both before the marriage and during the marriage when difficulties arise. As important as his capacity to offer counseling services, the minister or priest speaks with moral authority and his concern extends beyond the individual to the person's family.

Although religious officials should be suspicious of governmental intrusion, covenant marriage legislation represents an attempt by committed people of faith to invite the assistance of the church. Rather than banishing religion from the public square, covenant marriage legislation invites religion back into public life to offer a service that religion is uniquely qualified to perform—preserving marriages. Increasingly, public policy wonks recognize that only the moral authority of religion can effectively solve the most stubborn social problems. So rather than further “sanitize” the already secular public square, policy makers are seeking “faith-based” organizations with which government may partner. Restoration of a public and religious partnership for the purpose of solving our country's most intractable social problems offers hope for our children's future.

D. Persuasion, Not Coercion, Of The Citizenry Is The Only Effective Means To Reverse More Than Thirty Years Of Erroneous Social Science And Celebration Of The Narcissistic Self

Conservatives owe President Bill Clinton a debt of gratitude for exposing the toll on the average American citizen of a thirty-year assault on traditional moral values. Conservatives, especially Christian conservatives, can no longer ignore the price of that continuous assault. The results have been devastating, but none more than the consequences of the much touted sexual revolution, particularly for women. Adultery, which at one time was a crime, is now described as a purely "private" matter even though it often results in the break-up of families. Unfortunately, the post-modern response consists of tolerating the behavior rather than condemning it.

Joe Loconte, in his May, 1998, article *I'll Stand Bayou in Policy Reviewi*, refers to the covenant marriage legislation as a cultural "sleeping giant."¹ The legislation invites those who believe in lifelong marriage to, in effect, "resell its value" to a cynical citizenry. Changing the culture requires missionary work, winning over one heart (or two hearts in the case of covenant marriage) at a time. Who better to perform the function of "selling" God's design for the relationship of man and woman than Christians? Covenant marriage legislation not only facilitates and encourages, but also *requires*, evangelizing marriage.

E. Covenant Marriage Offers Traditional "Communities" A Refuge From The Divorce Law Of A Post-Modern America.

Until this country's dominant culture changes, covenant marriage legislation permits us by agreement to create for ourselves and our families an alternative legal structure for family life. By electing the option of covenant marriage, we offer ourselves as models for a society desperately in need of moral example. A commitment to lifelong marriage requires self-sacrifice and recognition of duty to a transcendental good.

As early as 1945 the renowned French law professor Léon Mazeaud, who was a devout Catholic and extremely concerned about the future of the French family, proposed a marriage of one's choice that could be either indissoluble or dissoluble by divorce.

The family is made of stability. All [social] cohesion resides in its perpetuity The French family is, however, an ephemeral group. It is broken up at the whim of its members. Marriage, which founds it, is provisional. It endures as long as the happiness of the spouses endures. Divorce is there in order to rupture marriage *Born from*

¹ Joe Loconte, *I'll Stand Bayou*, 89 POLICY REV. 30, 32-33 (1998).

the fight led against the church, divorce is rooted in our laws. The debate ought to cease. It is possible to reach agreement, both in liberty and by liberty. Some want a marriage that divorce dissolves; others, an indissoluble marriage. Then let each choose! Our laws have, in succession, decreed first indissoluble marriage, then dissolvable marriage. Let them [now] decree marriage dissolvable or indissoluble according to the choice of the future spouses! . . . This is the solution to the problem of divorce—a facultatively indissoluble marriage. No one can protest, for each remains free to bind himself up to death or only up to divorce. No one will protest, save for the hypocrite who, at the same time, promises his life and keeps the disposition of it.²

Christopher Wolfe opines that the liberal ideal of autonomy is incompatible with the substantive moral ideal of marital fidelity “that is embraced by certain traditional communities that from one perspective are ‘within’ the American community and from another perspective are not . . .”³ He specifically mentions Catholics; I extend the identification of traditional “communities” to Christians. Gertrude Himmelfarb further expands “communities,” which she collectively labels the dissident culture, to include “those of little or no religious faith” who abide by traditional values and are unembarrassed by the language of morality.⁴

Covenant marriage legislation offers those of us in the dissident culture the opportunity to live as a traditional community under a stricter

² HENRI MAZEAUD ET AL., *Solution to the Problem of Divorce*, in *LECONS DE DROIT CIVIL: LA FAMILLE*, bk. 1., vol. 3, no. 1415, at 654 (Larent Levenuer ed., 7th ed. 1995). I am indebted to my colleague, Professor Randy Trahan, for his translation of this very important work.

³ Unfortunately, much liberal hostility to “paternalism,” in the form of legal regulation of morals (obscenity, homosexual acts, etc.), is not really opposition to paternalism per se, but to the substantive notions of morality involved. That explains, for example, why so many liberals are perfectly at ease with mandatory seatbelt laws . . . The desirability of avoiding death and serious physical injury seems so obvious that it is exempted from the usual liberal suspicion of regulating lifestyles when it comes to questions of morality.

Christopher Wolfe, *The Marriage of Your Choice*, *FIRST THINGS*, Feb. 1995, at 37, 41.

Wolfe’s article begins by reference to Hadley Arkes’ idea that legislation prohibiting abortions in the third trimester be introduced in Congress “in order to force pro-choice representatives to make arguments of some kind as to why such legislation should not pass.” *Id.* at 37. Arkes knew that even though such laws would not save many lives “it would be valuable because it would reveal more clearly and publicly the true foundations of the pro-choice position: radical autonomy, even to the point of destroying early, developing human life.” *Id.*

“The ideal of autonomy, an autonomy so broad as to preclude fixed, permanent, life-long commitments, is the foundation for our contemporary marriage laws. It is a substantive moral ideal.” *Id.* at 41. No-fault divorce springs from the same liberal well, as does liberal opposition to covenant marriage legislation.

⁴ Gertrude Himmelfarb, *The Panglosses of the Right Are Wrong*, *WALL ST. J.*, Feb. 4, 1999, at A22.

moral code reinforced by law, within the larger dominant culture that is subject only to minimal moral constraints. Covenant marriage legislation offers us the opportunity to demonstrate a "better way" to lay the foundation for the construction of strong and stable families.

II. CONCLUSION

As the Virginia legislature considers options to its current no-fault divorce law, the opportunities afforded by covenant marriage legislation should be emphasized. The combination of choice with traditional morality and of education with the restoration of moral judgment can appeal to both liberals and conservatives. Furthermore, unlike other divorce reform proposals, covenant marriage legislation requires that citizens be persuaded concerning the centrality of marriage and the importance of its permanence. The legislation invites the cooperation and support of religion in the persuasive effort. Only such a massive public relations effort can reverse decades of accelerating moral and cultural decline.