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Marriage and Divorce: Degrees of "I Do," and Analysis of the Every-Changing Paradigm of Divorce

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NOTE

MARRIAGE AND DIVORCE: DEGREES OF "I DO," AN ANALYSIS OF THE EVER-CHANGING PARADIGM OF DIVORCE

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I. INTRODUCTION

This year alone an estimated fifty percent of the marriages that are entered into will end in divorce.[1] As a result of the high percentage of marriages that end in divorce, marriage and divorce are two very important issues that have recently surfaced at the forefront of U.S. politics. As the second edition of *American Jurisprudence* states:

> In view of the importance of marriage as a social institution, and the benefits accruing therefrom, it is favored by public policy and the law. It has been said that marriage is an institution which is the

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1. Kaylah Campos Zelig, Comment, *Putting Responsibility Back into Marriage: Making a Case for Mandatory Prenuptials*, 64 U. COLO. L. REV. 1223, 1223 (1993). Zelig discusses mandatory contracting in marriage and divorce, as well as the advantages and the limitations of mandatory prenuptials. *Id.* at 1224.

> foundation of the family and of society, is basic to morality and civilization, and therefore is of vital interest to society and the state.[2]

In short, the law favors keeping marriages together and preventing divorce.[3] Divorce is no longer just an aberration or a step taken as a last resort. Today, divorce is as common an occurrence as marriage itself.[4] Hence, many states have imposed restrictions in an attempt to make a divorce more difficult to obtain and ultimately, to keep more marriages together. Unfortunately, as this note will discuss, the steps taken by many states may just serve as a "Band-Aid approach"[5] and may not actually get to the heart of the problem.

II. THE PARADIGM SHIFT FROM FAULT TO NO-FAULT

Historically, a strict, state-regulated fault system governed divorce and imposed specific requirements on the parties desiring the divorce. Prior to 1969, the laws regulating marriage reflected the common belief that the state had an interest in preserving marriage and therefore, should regulate the advent of marriage and its dissolution.[6] Under the fault system, a married couple could only obtain a divorce when it was alleged that one spouse had committed an act defined by the state as constituting fault or an offense against the marriage, while the other spouse was viewed as blameless.[7] Within the fault system, acts, such as adultery, abuse, abandonment, cruelty, and imprisonment, qualified as a "fault" or an offense against the marriage.[8]

By the early 1960s, attitudes about the family and the individual began to change and divorce became more prevalent.[9] The public began to view intrusion into the marital relationship by the state and state regulation of marriage and divorce, which was once the norm, as distasteful; hence, the

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2. 52 AM. JUR. 2D *Marriage* § 3 (1970) (providing further that "[i]t follows that a marriage will, if possible, be upheld as valid, and that its validity will be presumed unless disproved. A statute will not be construed to make a marriage void unless the legislative intent to such effect is clear and unequivocal.").

3. *See id.*

4. *See* Zelig, *supra* note 1, at 1223.

5. Julie Irwin, *Ohio Bill Would Raise Bar for Divorce*, CINCINNATI ENQUIRER, Aug. 20, 1997, at A01 (discussing generally the newly proposed Ohio bill that mimics the new Louisiana legislation and the general reaction to the proposed legislation).

6. *See generally* Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 609-10 (1997) (discussing generally both the evolution from fault to no-fault systems and the problems inherent to both systems, and criticizing some recent proposals to reform the no-fault system, including Michigan's Valentine's Day proposal).

7. *Id.* at 608-09.

8. *Id.* at 610.

9. *Id.* at 611.

decline of the fault system began.[10] Whereas previously marriage was viewed as a life-long contract between two individuals, the more secular nature of marriage led to a less restrictive view.[11] The emerging view was one of marriage as a partnership between two individuals which was terminable at the will of those involved when the marriage failed to meet the needs of either party.[12] However, the restrictive fault system that was in place in most states imposed formidable obstacles to divorce, to the dismay of the growing number of couples who desired divorces.[13]

In addition to the shifting paradigm of the family and the individual, the inherent problems of the fault system also led to its inevitable decline. Under the fault system, in order to obtain a divorce, one spouse had to allege, and attempt to prove, fault on the part of the other spouse.[14] One party was deemed to be "at fault" while the other party was consequentially viewed as blameless.[15] One of the main problems with this system was that it resulted in humiliating and costly litigation, which was a hardship to all parties involved, including taxpayers.[16] Other problems included the fact that if the couple decided not to stay married, but neither party had committed an act that could be construed as a fault or an offense against the marriage, the couple lacked a legal remedy to end the marriage. In short, in order to dissolve the marriage under the fault system, couples who mutually agreed to divorce were forced to either fabricate a situation in which one of the spouses was at fault,[17] or go to a jurisdiction with more lenient divorce laws.[18]

As a result, a movement toward a system of no-fault began. In 1969, California Governor Ronald Reagan signed the first no-fault divorce law.[19] This was the first of many forthcoming shifts from a fault to a no-fault

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10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*; *see also* Zelig, *supra* note 1, at 1224-25 (citing U.S. statistics: "In 1920, 170,505 divorces were granted in the United States, or 1.6 people per every 1,000 people in the total population were granted divorces. In most states that level had more than doubled to 845,000, or 4.0 per 1,000, by 1972."). Zelig goes on to comment, "It seems that divorce is replacing death as the most common terminative means of marriage." *Id.* at 1225.
14. Zelig, *supra* note 1, at 1225.
15. *Id.*
16. *Id.*
17. *Id.*
18. Bradford, *supra* note 6, at 611.
19. 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, 263 (1996). Heller discusses the return to fault-based divorce and its potential effect on the occurrence of domestic violence and the victims of domestic violence. *Id.* at 263-64. Heller concludes that the return to a fault-based system would have an overwhelming detrimental effect on women who are victims of domestic violence. *Id.* at 283.

system of divorce. The central tenets of the no-fault system were: (1) to alleviate the pain, expense, and humiliation inherent in the fault system; (2) to restore the parties' dignity;[20] (3) to change the grounds for divorce; and (4) to remove the requirement of showing and proving fault from the divorce procedure.[21] However, the no-fault system was not originally conceived as an encouragement to divorce or "revolving door marriages."[22]

Between 1969 and 1985, all fifty states incorporated some hybrid form of the no-fault divorce system into their divorce laws.[23] The Uniform Marriage and Divorce Act of 1970 served as a model for many states in the decision to eliminate fault as a factor in the allocation of property and spousal support.[24] Currently, twenty states have a pure no-fault system that excludes all consideration of marital misconduct.[25] Five states incorporate a full no-fault position with regard to property settlement and almost pure no-fault, or a very limited consideration of fault, for alimony purposes.[26] Three other states are almost pure no-fault, including the slight possibility of considering fault in both alimony and property settlements.[27] Seven states are no-fault with regard to marital property allocation, but allow courts discretion in considering fault in the determination of alimony.[28] Finally, fifteen states are true full-fault states that give their courts discretion to consider fault and misconduct in both alimony and property settlements.[29]

Once again, however, we find ourselves on the brink of a possible paradigm shift. As of February 1996, at least ten states had introduced bills designed to strengthen the marital institution by repealing or reforming the

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20. Zelig, *supra* note 1, at 1225.

21. Bradford, *supra* note 6, at 614.

22. *Id.* at 613.

23. *Id.* at 614.

24. *Id.*

25. Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 778, 781 (1996). Florida is among those states termed "pure no-fault." *Id.* at 778, 781. In Florida, marital misconduct is excluded completely from consideration for purposes of both property and alimony settlements. *Id.* Other states that follow the pure no-fault scheme include: Alaska, Arizona, California, Colorado, Delaware, Hawaii, Illinois, Indiana, Iowa, Maine, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Oregon, Washington, and Wisconsin. *Id.* at 781.

26. *Id.* at 778. The states that follow this scheme include: Idaho, Kentucky, New Jersey, Ohio, and Utah. *Id.* at 781.

27. *Id.* at 779. The states in this group are Arkansas, Kansas, and New York. *Id.* at 781.

28. *Id.* at 780-81. Louisiana is among this group of "no-fault property, full fault alimony" states. *Id.* These states have a pure no-fault position as to marital property allocations, but give their courts the discretion to consider fault in making alimony allocations. *Id.* The other states included in this group are: North Carolina, Pennsylvania, South Dakota, Tennessee, Virginia, and West Virginia. *Id.* at 781.

29. *Id.* at 780. The states in this group are: Alabama, Connecticut, Georgia, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, North Dakota, Rhode Island, South Carolina, Texas, Vermont, and Wyoming. *Id.* at 781.

no-fault system.[30] The proposals to reform no-fault divorce and return to a fault-based system of divorce received support on various different fronts,[31] including conservative Christians and pro-family activists.[32]

III. CRITIQUES OF THE NO-FAULT SYSTEM

With the advent of the no-fault system, the divorce rate jumped by thirty-four percent between 1970 and 1990.[33] In 1990, there were approximately 1.2 million divorces in the United States.[34] In 1970, about one-third of all marriages ended in divorce.[35] Today, nearly half of all marriages end in divorce.[36] However, despite the escalation in divorce rates, experts tend to disagree about how much of the increase in the divorce rate can actually be attributed to the change from a fault to a no-fault system.[37]

Certainly, the no-fault system has been the subject of scathing criticism. Critics of the no-fault system point to surging divorce rates and blame the ready availability of no-fault divorce for these high divorce rates.[38] They also argue that no-fault divorce has a devastating economic impact on women because it eliminates the leverage that women had under the fault system in negotiating property and alimony settlements.[39] They suggest that no-fault divorce undermines the wife's ability to gain alimony under the traditional justifications for support.[40] In contrast, under the fault system, the wife could allege fault on the part of the husband, and accordingly, the guilty husband was obliged to support her after divorce because the notion of marriage was one of a life-long commitment.[41] Under the no-fault system, however, no justification exists for obliging the husband to support the wife, or vice versa.[42] As a result, women suffer tremendous economic hardship after divorce. One study showed that after divorce, the former wife's discretionary income decreased by seventy-three percent, while the former

30. Bradford, *supra* note 6, at 607.
31. Heller, *supra* note 19, at 264.
32. Kevin Sack, *Louisiana Approves Measure to Tighten Marriage Bonds*, N.Y. TIMES, June 24, 1997, at A1 (discussing generally Louisiana's new legislation, the sources of support and motivation behind the movement in Louisiana, local criticism, and perceived problems with the legislation).
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. Heller, *supra* note 19, at 264.
39. *Id.*
40. Bradford, *supra* note 6, at 616.
41. *Id.*
42. *Id.*

husband's income increased by approximately forty-two percent.[43]

Critics of the no-fault system also contend that no-fault divorce has contributed to an increased propensity toward domestic violence within marriage.[44] The rationale behind this critique suggests that because the weight given to the misconduct of the spouse has diminished within the divorce proceeding, no-fault rules have weakened sanctions against domestic violence and also have less of a deterrent effect on domestic violence.[45] In addition, because fault is no longer relevant to the divorce proceeding, domestic violence is less likely to be discussed or introduced.[46] Therefore, it will remain "judicially invisible" throughout the no-fault divorce proceeding.[47]

Others argue that because the no-fault system made divorce easier, the devastating psychological and economic effects of divorce on children also have multiplied.[48] As a rule, children involved in divorce suffer stress and uncertainty.[49] In addition, because ninety percent of all children remain in the custody of their mothers after their parents have divorced, these children inevitably suffer from the financial hardships that are imposed on their mothers.[50]

Strong evidence also suggests that many Americans view the trend of easy divorce or divorce as a first resort with some discomfort.[51] In a 1995 survey, the Family Research Council found that thirty-one to fifty-five percent of those surveyed favored "'divorce reform to strengthen the rights of spouses who want to save the marriage.'"[52] Hence, the political response decrying the need to preserve the family and family values and the legislative push to strengthen the family by strengthening the states' ability to regulate commencement and dissolution of marriage began.

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43. Zelig, *supra* note 1, at 1227.
44. Heller, *supra* note 19, at 266.
45. *Id.* at 266-67.
46. *Id.*
47. *Id.* at 267.
48. *Id.* at 265; *see also* Bradford, *supra* note 6, at 617 (discussing the drastic decline in income for many mothers, who most often retain custody, and children following divorce, and the emotional effects of divorce on children).
49. Bradford, *supra* note 6, at 617.
50. *Id.*
51. *Id.*
52. *Id.* at 618 (quoting Gary L. Bauer, *End No-Fault Divorce*, USA TODAY, Dec. 29, 1996, at 10A, in which Bauer discussed a 1995 Family Research Council survey about divorce and the opinions of the U.S. public on divorce).

IV. LOUISIANA'S LEGISLATIVE RESPONSE: SHIFTING AWAY FROM NO-FAULT DIVORCE

Until recently, Louisiana, like many other states, relied solely on a hybrid no-fault system, which utilized no-fault as its basic premise.[53] Louisiana followed a pure no-fault position with regard to property settlement, but gave its courts discretion to consider fault in making alimony awards.[54] Most significantly, the system did not require a showing of fault or place other stringent requirements on the couple before allowing a divorce.[55]

Under article 101 of the Louisiana Civil Code, marriage terminates upon divorce, the death of either spouse, or a judicial declaration of its nullity.[56] Article 103 of the Civil Code provided for the judgment of divorce:

> A divorce shall be granted on the petition of a spouse upon proof that:
> (1) The spouses have been living separate and apart continuously for a period of six months or more on the date the petition is filed; or
> (2) The other spouse has committed adultery; or
> (3) The other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor.[57]

Under this law, a divorce could be granted after the couple had lived apart for six months, or immediately if one spouse could show that the other spouse had committed adultery or was convicted of a felony.[58] This was the essence of a typical no-fault divorce statute. No rigid proof of fault requirements were required except in the case of an immediate divorce, and only a modest waiting or "cooling off" period was mandated to allow for the possible reconciliation of the parties involved.

On June 24, 1997, everything changed. Louisiana became the first state in the nation to shift away from the exclusive use of no-fault divorce and to approve a law allowing a new, more binding form of the marriage contract

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53. Ellman, *supra* note 25, at 780-81.

54. *Id.*

55. LA. CODE CIV. PROC. ANN. art. 103 (West, WESTLAW through 1996 1st Ex. Sess. and Reg. Sess. Acts), *amended by* Covenant Marriage Act, No. 1380 (July 15, 1997), 1997 La. Sess. Law Serv. 1380 (West, WESTLAW through 1997 Reg. Sess.).

56. *Id.* art. 101. Article 101 provides that: "Marriage terminates upon: The death of either spouse. Divorce. A judicial declaration of its nullity, when the marriage is relatively null. The issuance of a court order authorizing the spouse of a person presumed dead to remarry, as provided by law." *Id.*

57. *Id.* art. 103.

58. Sack, *supra* note 32, at A1.

with stringent divorce requirements.[59] The new marriage contract, known as a covenant marriage, permits divorce only in narrow circumstances like proof of abuse, adultery, abandonment, imprisonment for a felony, or a lengthy marital separation.[60] On the final day of Louisiana's legislative session, the bill, which took effect on August 15, 1997, passed the House by a vote of 98 to 0 and the Senate by a vote of 37 to 1.[61] The Governor was fully expected to and ultimately did sign the bill.[62]

Louisiana effectively accomplished what many other states have attempted without success. The bill is the first legislative success in the nationwide movement led by conservative Christians and pro-family activists to reform no-fault divorce laws.[63] The "little-noticed Louisiana bill" avoids the controversial issue of trying to repeal no-fault divorce laws, a failed effort in eighteen states, by creating a two-tier system of marriage, which most likely will be copied by other states.[64] Under the new legislation, couples can choose a traditional marriage license without the stringent divorce requirements, which would be governed by the hybrid no-fault system in place, or a covenant license, which requires counseling and will only permit divorce in narrow circumstances.[65]

Under this system, couples who choose to enter into a covenant marriage must declare their intent to contract a covenant marriage and provide proof that they have completed the required premarital counseling.[66] The required

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59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. Richard Whitmire, *Louisiana Adopts 'Covenant Marriage' to Combat High Divorce Rates*, Gannett News Serv., June 17, 1997, *available in* 1997 WL 8830282; *see also* Julie Irwin, *Ohio Bill Would Raise Bar for Divorce*, CINCINNATI ENQUIRER, Aug. 20, 1997, at A01. In Ohio, a bill mimicking Louisiana's new covenant marriage legislation was set to be introduced in the state legislature. *Id.* Irwin also discusses the reaction to the proposal and points out some of the inherent problems with the legislation. *Id.*
65. Whitmire, *supra* note 64.
66. Covenant Marriage Act § 273 (A), 1997 La. Sess. Laws Serv. 1380 (amending LA. REV. STAT. ANN. tit. 9, § 273 (West 1950)). Section 273 of the Act provides, in part:

> A declaration of intent to contract a covenant marriage shall contain all of the following:
> (1) A recitation by the parties to the following effect:
> . . . .
> "We do solemnly declare that marriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live. We have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into this marriage. We have received premarital counseling on the nature, purposes, and responsibilities of marriage. We have read the Covenant Marriage Act, and we understand that a Covenant Marriage is for life. If we experience marital difficulties, we commit

premarital counseling includes a state-approved agenda discussing the seriousness of deciding to enter into a covenant marriage and the obligations and responsibilities of the subscribing parties.[67] Once a couple chooses to enter into a covenant marriage, the parties involved are legally committed to undergo counseling in order to solve any problems that may later develop.[68]

In a covenant marriage a judgment of divorce is available upon proof of: (1) adultery, (2) a felony conviction, (3) abandonment, (4) physical or sexual abuse of the spouse or a child, (5) separation without reconciliation for at least two years, or (6) a legal separation without reconciliation for one year from the date the separation from "bed and board" was signed, or one year and six months if there are minor children involved.[69] Even when proof is

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ourselves to take all reasonable efforts to preserve our marriage, including marital counseling."

. . . .

(2)(a) An affidavit by the parties that they have received premarital counseling . . . .

Id.

67. *Id.* § 273. The Act details both who may administer the premarital counseling and the agenda of such counseling. *Id.*

> [C]ounseling shall include a discussion of the seriousness of covenant marriage, communication of the fact that a covenant marriage is a commitment for life, a discussion of the obligation to seek marital counseling in times of marital difficulties, and a discussion of the exclusive grounds for legally terminating a covenant marriage by divorce or by divorce after a judgment of separation from bed and board.

Id.

68. *Id.* (detailing that premarital counseling shall include a discussion of the obligation of the parties to seek marital counseling in times of difficulty).

69. *Id.* § 307 (amending LA. REV. STAT. ANN. tit. 9, § 3). Section 307 provides, in part:

> Notwithstanding any other law to the contrary and subsequent to the parties obtaining counseling, a spouse to a covenant marriage may obtain a judgment of divorce only upon proof of any of the following:
> (1) The other spouse has committed adultery.
> (2) The other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor.
> (3) The other spouse has abandoned the matrimonial domicile for a period of one year and constantly refuses to return.
> (4) The other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses.
> (5) The spouses have been living separate and apart continuously without reconciliation for a period of two years.
> (6)(a) The spouses have been living separate and apart continuously without reconciliation for a period of one year from the date the judgment of separation from bed and board was signed.
> (6)(b) If there is a minor child or children of the marriage, the spouses have been living separate and apart continuously without reconciliation for a period of one year and six months from the date the judgment of separation from bed and board was signed . . . .

Id. § 307(A).

available to support the alleged fault, in most cases there will still have to be a legal separation for a year to eighteen months.[70] A couple can obtain a no-fault divorce only after living apart for at least two years without reconciliation.[71]

Additionally, Louisiana's legislation has provisions that would allow an already married couple to designate their marriage as a covenant marriage.[72] The new legislation also provides that a separation in a covenant marriage may only be granted by a court within the venue described by the statute.[73] The legislation prescribes that this venue may not be waived, and that a judgment of separation rendered by a court of improper venue is considered null.[74]

The primary motivation behind the new legislation was stated as an effort to "fight the crime and delinquency that social experts say arises from broken families."[75] Many supporters cite a study published recently by Judith Wallerstein, a researcher who has tracked the children of divorce for twenty-five years.[76] Wallerstein's results show that children of divorce suffer immensely, with problems such as alcoholism, substance abuse, and failed relationships of their own.[77] The Christian Coalition, an influential group behind much of the push for reform in this area, said that it supported the covenant marriage bill because it believes, "[T]he ease with which divorces can be acquired in this country now is one of the reasons that we have such problems with marital breakup and that is to us a family issue . . . because of all the consequences that flow from divorce, especially for children."[78]

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70. Janet McConnaughey, *Few Seeking Licenses Under New Covenant Marriage Law*, THE ADVOCATE (Baton Rouge, La.), Aug. 24, 1997, at 3B (discussing the immediate effects of Louisiana's new legislation and the response of the public to the new covenant marriage license).

71. *Id.*

72. Covenant Marriage Act, § 275, 1997 La. Sess. Law Serv. 1380 (amending LA. REV. STAT. ANN. tit. 9, § 275). Section 275(C) of the Act provides for the declaration of intent to designate an already existing marriage as a covenant marriage. *Id.* § 275(C). This section has the same requirements, including the recitation and the affidavit by the parties, as the section providing for new covenant marriages. *Id.* Section 275(C) provides, in part: " 'With full knowledge of what this commitment means, we do hereby declare that out marriage will be bound by Louisiana law on Covenant Marriage, and we renew our promise to love, honor, and care for one another as husband and wife for the rest of our lives.' " *Id.* § 275(C)(1)(a).

73. *Id.* § 308(B)(3) (amending LA. REV. STAT. ANN. tit. 9, § 308). Section 308(B)(3) provides: "The venue provided herein may not be waived, and a judgment of separation rendered by a court of improper venue is an absolute nullity." *Id.*

74. *Id.*

75. Whitmire, *supra* note 64.

76. Sack, *supra* note 32, at A1.

77. *Id.*

78. *Id.*

V. FLORIDA'S PROPOSAL: MARRIAGE PREPARATION AND PRESERVATION ACT OF 1997

In general, the characteristics of Florida's divorce system classified it among those states considered to be "pure no-fault."[79] These states exclude all consideration of marital misconduct and fault in making property and alimony allocations.[80] Under Florida Statute § 61.052, a judgment of dissolution of marriage shall be granted if it appears at the hearing, through evidence *pleaded generally*, that the marriage is irretrievably broken or one of the parties is mentally incapacitated.[81] No further proof or allegation of fault is required, except to show incapacity.[82]

Rather than follow Louisiana's lead and tighten the marriage bonds by creating a two-tier system of marriage, Florida has chosen a different tack in its effort to diminish the growing divorce rate. To accomplish this goal, a bill was proposed in Florida's House of Representatives to be entitled the "Marriage Preparation and Preservation Act of 1997."[83] The Act, which is similar in nature to a current Michigan proposal,[84] would require completion of "a marriage preparation course" as a condition requisite to obtaining a marriage license.[85] The required preparation course would be at least four hours in length and would include a review of the rights, obligations, and responsibilities of each party under Florida law with regard to each other and any children of the prospective parties.[86] The individuals applying for the

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79. Ellman, *supra* note 25, at 778, 781.

80. *Id.* at 778.

81. FLA. STAT. § 61.052(2)(b)(3) (1997) (emphasis added). Section 61.052(2)(b)(3) provides, in part: "If, at any time, the court finds that the marriage is irretrievably broken, the court shall enter a judgment of dissolution of the marriage. If the court finds that the marriage is not irretrievably broken, it shall deny the petition for dissolution of marriage." *Id.*

82. *See id.*

83. H.B. 1019, 105th Leg., 1st Reg. Sess. (Fla. 1997). The Act would impose additional requirements on couples who decide to marry or divorce and as such, would amend the existing divorce statute.

84. *Michigan Considers Requiring Pre-Marriage Classes*, WLN, Mar. 14, 1996, at 1351, *available in* 1996 WL 259070. Michigan House Bill 5635, if passed, would require all couples married in the state to either complete a marriage preparation program as a prerequisite to getting a marriage license or pay a higher license fee and wait 30 days before getting married. *Id.*

85. Fla. H.B. 1019.

86. *Id.* Section 2(2)-(3) of the text of the bill provides specifications as to who shall be allowed to conduct the marriage preparation course and what the course shall include as curriculum:

> (2) The marriage preparation course shall be conducted by one or more of the following:
> (a) A licensed professional counselor.
> (b) A licensed marriage and family therapist.

marriage license would be allowed to complete the course together or separately, and the proposal would require the parties to file a certificate of completion before a license would be granted.[87]

The new Act, if passed, also would require one or both of the parties to file and serve a notice of intent to seek divorce prior to filing for dissolution of the marriage in the court.[88] After the filing of the notice of intent, each party would be required to complete a court-approved "marriage preservation course" of at least twelve hours in six different weekly sessions.[89] The Act also provides specifications as to who qualifies as a provider of the course

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(c) A licensed or limited licensed psychologist.
(d) A certified social worker, certified family law mediator, or such other person approved by the chief judge of the circuit.
(e) An official representative of a religious institution or his or her designee.
(3) The marriage preparation course shall include, but not be limited to:
(a) The rights and responsibilities under Florida law of the marital partners to each other and to any children.
(b) Conflict management.
(c) Communication skills.
(d) Financial responsibilities.
(e) Children and parenting responsibilities.
(f) Typical problems during marriage with suggested solutions.

Id. In addition, § 2(4) states that the judicial circuits should establish a listing of course providers and sites with at least one site per county where the preparation course may be completed on a sliding fee scale. *Id.* § 2(4).

87. *Id.* § 2(1). Section 2(1) of the bill reads as follows:

> A man and woman who intend to apply for a marriage license as provided in section 741.04 shall, together or separately, complete a marriage preparation course of not less than 4 hours. Such course shall include a review of the rights, responsibilities, and requirements under Florida law of each prospective party to the marriage with regard to each other and to any children of the prospective parties to the marriage. The individuals applying for the marriage license shall verify completion of the course by filing with the application a certificate of completion from the course provider.

Id.

88. *Id.* § 5. Section 5 of the bill creates § 61.22 of the Florida Statutes to provide for the marriage preservation course and its specifications. *Id.* It provides, in part:

> (1) Prior to a filing for a dissolution of marriage with the court, one or both of the parties to the marriage shall file and serve a notice of intent to seek a divorce with the clerk of the circuit court . . . .
> (2) Each party, after notice of intent to seek a divorce has been filed with the clerk of the circuit court and served, and prior to a filing for a dissolution of marriage, shall have 90 days to complete a court-approved marriage preservation course, which shall be a course of a minimum of 12 hours in 6 different weekly segments.

Id.

89. *Id.* § 5(2).

and the minimum course curriculum.[90] After completion of the course or the expiration of ninety days, whichever is sooner, the parties would be able to file a petition for dissolution of marriage.[91]

However, the Act has not yet been approved. The bill was introduced, sent to the House Committee on Family Law and Children, and carried over to the 1998 regular session after adjournment of the 1997 regular session.[92] It remains in the House Committee.[93] But, considering the current political climate, the growing support for reform in this area, fear of the perceived decline in family and moral values being attributed to divorce, and

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90. *Id.* § 5(3)-(4). Basically the providers of the preservation course are the same as those designated as acceptable providers for the preparation course. *Compare id.* § 5(3), *with id.* § 2(2). The course material is listed in the bill as follows:

> The marriage preservation course shall include, but not be limited to:
> (a) Ways to build a successful relationship.
> (b) Using mediation and/or counseling to solve marital problems.
> (c) The negative effects of divorce on children.
> (d) The negative effects of divorce on men.
> (e) The negative effects of divorce on women.
> (f) The negative effects of divorce on society.
> (g) The most common causes of divorce and ways these causes may be overcome.
> (h) Keeping antagonism out of the divorce process.
> (i) Minimizing the effects of divorce on children.
> (j) The attorney relationship.

Id. § 5(4).

91. *Id.* § 5(7).

92. Information regarding the status of Fla. H.B. 1019 was found in *Florida Bill Tracking*, through a search of WESTLAW, State Materials, Florida, Statutes & Legislative Materials (visited 4/29/98); <http://www.leg.state.fl.us/session/1997/house/bills/billinfo/html/hb1019.html> (providing information regarding the status of H.B. 1019 (Fla. 1997)).

93. *Florida Statutes and Court Rules: Florida Bill Tracking, available in* WESTLAW, FL-BILLTRK; *Florida Bill Tracking* (visited Apr. 29, 1998) <http://www.leg.state.fl.us/session/1997/house/bills/billinfo/html/hb1019.html> (providing information regarding the status of H.B. 1019 (Fla. 1997)).

As of Thursday, April 30, 1998, the Act with numerous amendments had passed the House on a 91 to 21 vote and moved to the Senate. *House Passes Marriage — Prep Bill*, FLORIDA TODAY, May 1, 1998, at 06B. The Act has apparently undergone numerous revisions and amendments and bears little resemblence to the Act as it was first proposed. *Compare supra* notes 85-91 and accompanying text, *with* H.B. 1019, 106th Leg., 1st Reg. Sess. (Fla. 1998) (last amended April 30, 1998). The Act passed by the House on April 30, 1998, requires couples to wait three days prior to getting married unless they complete a four-hour marriage preparation course. *House Passes Marriage — Prep Bill*, *supra*, at 06B. The couples who completed the course could get married immediately and would get a $32 discount on the license fee. *Id.* However, the $32 discount would be added to the fee the couple would have to pay in order to obtain a divorce. *Id.* The Act passed by the House also requires couples with children to take a four-hour parenting course. *Id.* On May 1, 1998, the Senate concurred in the additional amendments to the Act, and it was sent to enrollment. *Florida Statutes and Court Rules: Florida Bill Tracking, available in* WESTLAW, FL-BILLTRK; *Florida Bill Tracking* (visited Apr. 29, 1998) <http://www.leg.state.fl.us/session/1997/house/bills/billinfo/html/hb1019e2.html>.

Louisiana's success in passing reform legislation, the likelihood that this bill, or some hybrid of it, will pass is considerable.

VI. ADVANTAGES OF LOUISIANA'S NEW AND FLORIDA'S PROPOSED LEGISLATION

Both Louisiana and Florida have legitimate interests and, some might say, admirable motives behind their efforts to strengthen marriage and cure the defects of the no-fault system. The imposition of waiting periods, proof of fault requirements, consent requirements, and mandatory course or counseling attendance will likely act as deterrents to those seeking divorce as a first resort.[94] Some couples may even reconcile as a result of the new requirements.

Two requirements that are central to the new fault proposals are the imposition of a waiting period before divorce and mandatory premarriage and predivorce education and counseling.[95] These requirements may actually force many couples to reconsider, and perhaps improve, the quality of the decisions made with regard to marriage and divorce.[96] In short, premarital counseling and waiting periods will force those entering marriage to carefully consider their actions before they act. Also, with the removal of instant gratification, which is currently available through the ability to immediately dissolve a problem marriage, the parties involved may be forced to reassess and reconsider their options.[97] In fact, studies show "that the likelihood of divorce depends not only on the attractiveness of the marriage, but also on the barriers to leaving it and the attractiveness of alternative arrangements."[98]

Additionally, the new fault proposals satisfy the popular expectation of justice. Under the pure no-fault system, fault is not taken into consideration when making property or alimony settlements so most settlements consist of giving each party equal shares of the family assets.[99] Accordingly, most people instinctively feel an injustice has been done when, under the no-fault system, a spouse who has committed adultery is entitled to a share of the family assets equal to that of the innocent spouse.[100] The new fault proposals seek to remedy this injustice by making fault a consideration in divorce proceedings again for both property and alimony settlements.[101]

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94. Bradford, *supra* note 6, at 620-21.
95. *See* Covenant Marriage Act, § 273, 1997 La. Sess. Law Serv. 1380; Fla. H.B. 1019.
96. Bradford, *supra* note 6, at 621.
97. *Id.*
98. *Id.*
99. *See id.*; Ellman, *supra* note 25, at 780.
100. Bradford, *supra* note 6, at 621.
101. *See id.*

In the fault system, the spouse who committed the violation against the marriage is not entitled to as much of the marital assets as the innocent spouse and may actually find their share diminished as a result of the violation they committed.[102]

VII. PROBLEMS WITH THE NEW PROPOSALS

Just as the no-fault system has problems, the new proposals advocating a return to a fault-based system or the placement of stringent requirements on divorce are also inherently problematic. As one presiding family court judge has said: "Given that it costs so much to try to prove fault, that it is almost never all one spouse's fault, and that neither spouse will gain any financial advantage from proving fault, it seems curious that the focus on fault remains so intense."[103] For example, one obvious problem with the new proposals is that couples will find ways to circumvent the fault provisions or avoid them altogether such as driving over state lines to jurisdictions without stringent requirements.[104] Also, the new proposals may force couples to once again stage elaborate schemes in order to meet the fault requirements needed to get out of an unwanted marriage.[105]

Another problem with the new proposals is that they do not provide a viable solution to deteriorating values. Fear of a perceived disintegration of family and moral values is touted as a reason for strengthening marriage bonds and condemning no-fault divorce, and although legislation tightening marriage bonds may show a community's respect for the institution of marriage, it does not follow that it will necessarily improve the state of family and moral values.[106] "[T]o suggest that teenagers will learn respect for marriage from the display of grown adults airing their personal grievances in public and concocting schemes to circumvent the law simply is not persuasive."[107]

New York, for example, has never authorized anything close to a pure no-fault system, yet it struggles as much as any other state with chronic domestic violence and a serious disintegration of family values.[108] Further-

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102. *See id.*

103. Hon. Anne Kass, *Proving Fault Does Not Simplify a Divorce*, 13 FAIR$HARE, Mar. 1993, at 25. The author is the presiding family judge with the Bernalillo County District Court in Albuquerque, N.M. *Id.* In her article, Judge Kass discusses the incongruity created by focusing on fault in divorce and the lack of "simple answers for complex problems." *Id.*

104. Bradford, *supra* note 6, at 632.

105. *Id.*

106. *See id.*

107. *Id.* Bradford disputes the contention of advocates that their legislation contains symbolic value and merit and sends a message to the community. *Id.*

108. Allan J. Berke, *What Does Love Have to Do with It?*, 69 N.Y. ST. B.J., Jan., 1997, at 4. Berke discusses New York's domestic relations laws and recent condemnations of no-

more, the divorced family structure, which is common in New York, does not necessarily translate into a negative impact on family values.[109] One suggestion is that perhaps the deterioration in values is not just a deterioration of family values but also a disintegration of other fundamental values like the value and respect for life in general.[110]

In addition, fault-based systems inevitably end up hurting one of the segments of the population they are purportedly designed and directed to protect: women. The negative financial impact of divorce on women, which is a problem often attributed to no-fault systems, can likewise be traced to fault-based systems. The return to systems that emphasize fault and require proof of fault, such as Louisiana's, would cause a loss of ground in the area of financial independence for women. This is because fault-based systems emphasize traditional gender roles.[111] Despite the fact that divorce generally resulted in a financial disadvantage for women, the change from fault to no-fault forced women to become better educated, more marketable, and consequently, more financially independent.[112] To revert to a traditional, fault-based divorce system would encourage women to resume traditional gender roles, which emphasize the financial dependence of women on their spouses.[113] Furthermore, it also stands to reason that any financial hardship or dependence incurred by a woman in marriage and divorce also would be felt by the children of the marriage.

The new proposals may go too far in the opposite direction and penalize those women who have chosen a career or lifestyle akin to financial independence because these roles do not mesh with traditional gender roles.[114] A fault-based system only works to the advantage of women if women are completely innocent parties.[115] As one writer explains it, the "feminist critique" of the fault system is that if a woman commits an act in violation of the marriage, the fault-based scheme will cause her to suffer dire economic consequences:

> Women already are disadvantaged economically by discrimination in

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fault divorce. *Id.* Berke is of the opinion that the whole system of marriage and divorce needs to be redefined and reworked. *Id.* at 8.

109. *Id.*

110. *Id.* Berke notes that because society today is extremely complex, it is crucial that we adopt a "valid and meaningful system of values." *Id.* He further reasons that this cannot be achieved in the present or future "unless [society] is governed by a cogent system of laws that is premised upon such values. A society regulated by laws bereft of value is a misguided society. A society regulated by laws bereft of family values is a recreant society." *Id.*

111. Heller, *supra* note 19, at 274.

112. *Id.* at 280.

113. *Id.*

114. Bradford, *supra* note 6, at 634.

115. *Id.*

> the workplace, and often by child-rearing responsibilities as well. Reducing economic support based on conduct could throw some women into poverty . . . . An economic penalty to him would only be an annoyance; but to her, it would be a loss of her primary means of support . . . . The advantages of a fault system for women also are undermined because courts generally are more willing to find fault with women than men for the same conduct.[116]

Louisiana's new legislation is particularly troubling because while strengthening marriage and the family are admirable motives, a two-tier system creates a quandary. Choosing between a covenant marriage and a regular marriage is a classic example of being stuck between a rock and a hard place. As in the case of a prenuptial agreement, what if only one person wants a covenant marriage?[117] How would a prospective bride explain to her intended life-long partner that just because she does not want to enter into a covenant marriage it does not mean that she does not love him and intend to stay with him, or anticipates divorcing him. So the initial hurdle, and perhaps problem, for a couple who wants to get married may come before they are even married. In short, the structure of the Louisiana statute literally forces the parties to explain their decisions rather than just offering the parties neutral options. Inevitably, it will infuse the couple's relationship with doubt and questions even before marriage.

Thus, there is little reason to believe that making divorce more difficult and more costly to obtain will, in the end, strengthen marriages and cause divorce rates to decline.[118] In the same vein, there is no reason to believe that making divorce more difficult will result in happier and more successful marriages.[119] A good marriage cannot be legislated, because "[a]lmost all couples who marry believe their love is forever and their commitment is for a lifetime. But things sometimes change and people sometimes change. And sometimes, no amount of work or commitment will make a marriage successful."[120]

Another problem with Louisiana's covenant marriage is that it does not recognize the stress that comes from living in an unhappy marriage.[121] The covenant marriage scheme presupposes that if the parties work harder, then

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116. *Id.*

117. Whitmire, *supra* note 64.

118. *Difficult Divorces May Add to Misery*, THE ADVOCATE (Baton Rouge, La.), June 13, 1997, at 10B. This article appeared in the news section under a heading titled "Our Views." It appears to be either an editorial or a collection of letters/views on the new legislation.

119. *Id.*

120. *Id.*

121. Irwin, *supra* note 5, at A01 (paraphrasing a quote within the article by Ellen Essig, a family law attorney and secretary of the Cincinnati Bar Association's domestic relations committee).

their marriage will be more successful.[122] The problem with this theory is that forcing a couple to try harder to make the marriage work only because they have a marriage license that requires it is generally not the best way to obtain successful results.[123] Forcing a couple to attend counseling or to discuss their marital problems, as the Louisiana legislation requires, generally does not cure the problem due to the resentment that is fostered when someone is forced to do something they may not want to do.

Another criticism of the Louisiana legislation is that it may actually harm the children it aims to protect.[124] A staff attorney with the Louisiana chapter of the American Civil Liberties Union called the legislation "'a Trojan horse' that would, in some cases, harm children by holding them hostage to bad marriages."[125] The goal of this type of legislation is to keep families together. However, making divorce difficult or even impossible to obtain may not be the best solution because in some instances divorce may be the best solution for the children of the marriage.[126] Admittedly, divorce has a negative effect on the children involved.[127] Yet, who is to say that it would be better for the children involved to force the parents, who hate each other and fight incessantly in both words and actions, to remain together while undergoing counseling before allowing them to divorce.

Louisiana's legislation raises some other difficult questions: What if the couple cannot afford counseling?[128] Where should the children live during the mandatory separation?[129] Should support be allocated for the separation period?[130] Louisiana's proposal is not the only new proposal with problems. Although overall Florida's proposal may be one of the more innovative and productive schemes proposed, the proposed requirement of predivorce counseling raises some concerns. Forcing someone to attend

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122. *Id.*

123. *Id.*

124. Sack, *supra* note 32, at A1.

125. *Id.* (quoting Martha Kegel, a staff attorney with the Louisiana chapter of the American Civil Liberties Union). Kegel said of the legislation:

> "It has the laudable goal of keeping families together, but it makes divorce difficult or even impossible in many unfortunate situations where divorce would be in the best interests of the children. . . . People support this bill because divorce is generally a very difficult thing for children. While that's true generally speaking, it's not always true in each specific case."

Id. (quoting Martha Kegel).

126. *Id.*

127. *See generally* Sack, *supra* note 32, at A1 (discussing the new Louisiana legislation and the problems inherent with the legislation, including a general discussion of the impact of divorce on children).

128. Irwin, *supra* note 5, at A01 (discussing the troubling questions presented by the proposed Ohio bill, which in form and substance, mimics the new Louisiana legislation).

129. *Id.*

130. *Id.*

counseling seems to be a contradiction in terms because generally counseling is only effective if the parties involved want or choose to attend. Requiring counseling will only foster resentment and further bad feelings between the parties. For example, in domestic violence cases once the battered spouse finally decides to file for divorce, to require him or her to give notice of his or her decision and to require both spouses to attend counseling, either together or separately, before granting a divorce will only serve to exacerbate an existing problem. It would in fact put the battered spouse at risk for future violence.

VIII. GETTING TO THE HEART OF THE PROBLEM

Florida's proposal seems to be one of the better, more effective ways of solving the divorce crisis. First, it makes it more difficult to get married. As one psychology professor aptly put it, " 'On the one hand . . . [i]t does seem like it's too easy to get a divorce . . . . But. . . [the covenant marriage proposal] seems like a Band-Aid approach. The problem is not that it's too easy to get divorced, but it's too easy to get married.' "[131]

There are good arguments for concentrating educational and counseling efforts within the precommitment stage. The period prior to marriage is probably the most effective because the couple will generally be more receptive than at the time of a divorce when the parties are generally resentful and defensive.[132] Counseling prior to marriage also may enlighten the couple to any differences in their attitudes and expectations that could be problematic in the future.[133] They would, therefore, have an opportunity to confront these differences prior to making the lifelong commitment of marriage.[134]

Others have suggested that a statutorily promulgated, clear and unambiguous marriage contract is what is needed.[135] The idea is that if the parties are perfectly clear as to what their rights and obligations are prior to marriage, fewer problems will arise after marriage.[136] The parties entering the marriage contract would then be able to evaluate the situation fully before entering into the contract and would be accountable for their decisions.[137]

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131. *Id.* (quoting Jack Arbuthnot, a psychology professor at Ohio University and co-director of the Center for Divorce Education).
132. Bradford, *supra* note 6, at 635.
133. *Id.*
134. *Id.*
135. Berke, *supra* note 108, at 8.
136. *Id.*
137. *Id.*

IX. DO WE HAVE A CLEAR WINNER?

In an area like divorce where there are numerous proposals and suggestions regarding the best way to remedy the problem, there is no clear winner. All of the proposals and possible remedies, including Louisiana's restrictive legislation, have positive aspects that could be used to formulate a better solution. Accordingly, a hybrid of Louisiana's new legislation and Florida's recent proposal, without their negative restrictions, could be the best remedy for the problem.

Generally, most states do not actively regulate marriage even though most do have significant bodies of law that govern the creation and termination of marriage.[138] State laws allow anyone of "minimal capacity to marry and . . . seemingly require[] less to obtain a marriage license than to obtain a drivers' license."[139] One problem with this loose system is that there is so little regulation by the state that it leaves the marriage contract open to ambiguity. Generally, when a couple enters into a marriage, they have so little guidance as to what the contract requires, if a contract even exists, that they do not clearly understand their obligations and responsibilities.[140]

One of the better ideas within Louisiana's new legislation is the idea of a clear and unambiguously delineated, statutorily created marriage contract.[141] Although some of the details of the contract seem unreasonably harsh, overall the clearly delineated marriage contract is a good idea. The advantage offered by Louisiana's covenant marriage contract is that the couple is provided with a clear recitation as to the expectations of each partner and of the state.[142] The couple should be afforded a marriage contract that provides them with a clear understanding of their life-long commitment to each other before they marry.[143] An unambiguous marriage contract would restore accountability to marriage and would give the parties involved the opportunity to evaluate their rights and obligations before they marry and enter into a life-long commitment.[144] In short, the marriage contract should spell out all of the responsibilities, obligations, expectations, and restrictions for the couple.

The best idea that emerges from Florida's proposed legislation is the

138. *Id.* at 4.
139. *Id.*
140. *Id.* at 8.
141. Covenant Marriage Act § 273, 1997 La. Sess. Law Serv. 1380.
142. *Id.* § 273A(2)(a).
143. Berke, *supra* note 108, at 8.
144. *Id.*

mandatory premarital counseling and education.[145] Premarital counseling and education imposes a mandatory waiting period for couples who want to get married. In essence, it would provide the couple with time. It would prevent a couple from marrying in haste because it requires counseling and education prior to the issuance of the marriage license.[146] The counseling and education requirement would give the couple an opportunity to reflect on their decision and to discuss their decision with a counselor, to make sure that they are making the best decision for themselves. Under the proposed Florida legislation, the premarital education and counseling could be taken by the couple together or separately and also would include information about the couple's responsibilities under the law with regard to each other and any children of the parties involved.[147] Premarital counseling, as opposed to predivorce counseling, is a good idea because the couple would be more receptive and more willing and therefore, in general, will get more out of counseling at this stage than they would prior to divorce.

Clearly none of the existing proposals are the clear winner or offer the best possible solution to the problem. However, a hybrid system combining Louisiana's clear and unambiguous marriage contract, without the stringent divorce requirements and predivorce counseling, and Florida's premarital counseling and education, without the predivorce counseling, would comprise a better system than what is currently available. A return to stringent divorce requirements and mandatory predivorce counseling, which only serve to build resentment and exacerbate existing problems, will not help remedy the problem. This hybrid approach would be better than many of the existing proposals that have stringent requirements because it concentrates on providing positive support for building a relationship at the advent of marriage rather than waiting until it is already too late.

X. CONCLUSION

"Family problems are the result of the way family members interact. Every member of the family contributes to the problem, and every member of the family needs to contribute to the solution."[148] Admittedly divorce is a family problem. Divorce also is often chosen as a first resort rather than a last resort as it was meant to be. However, placing stringent restrictions on marriage and returning to a fault system is not the way to encourage couples to work out their differences and try to make their marriages work. Although many of the new proposals are fueled by admirable motives and

145. Fla. H.B. 1019.
146. *Id.*
147. *Id.*
148. Kass, *supra* note 103, at 25.

strive for exemplary results, they do not provide the solution to the problem. "We need to focus more on teaching people positive problem-solving skills so they'll be less inclined to engage in fault-finding. One thing is certain, worrying about whose fault it is will never solve the problem."[149]

149. *Id.*