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REFORMING DIVORCE REFORM

Allen M. Parkman*

I. INTRODUCTION

For most of the history of the United States, it was difficult to dissolve a marriage because plaintiffs had to prove that their spouses had committed acts that constituted fault grounds for divorce. These grounds usually consisted of adultery, desertion, or cruelty. After World War II, frustrations with these fault grounds led to a reform movement that eventually changed the grounds for divorce in all the states. Between 1970 and 1985, all the states either replaced fault grounds with no-fault grounds of irretrievable breakdown or incompatibility, or added no-fault grounds to their existing statutes.

The optimism associated with the shift in divorce grounds has been moderated by the eventual recognition of their subtle, but perverse, repercussions. First, it was noted that many divorced women and their children were worse off due to the new legal environment.¹ More recently, concerns

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1. See Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169 (1974) (describing state policies imposing standardized rules on all marriages are outdated); see also Lenore J. Weitzman & Ruth B. Dixon, *The Alimony Myth: Does No-Fault Divorce Make A Difference?*, 14 FAM. L.Q. 141, 143-44 (1980) (finding that a small percentage of final California divorce decrees included alimony); Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 U.C.L.A. L. REV. 1181 (1981) [hereinafter Weitzman, *The Economics of Divorce*] (arguing that the introduction of no-fault divorce in California led to a deterioration in the awards to women at divorce); Ruth B. Dixon & Lenore J. Weitzman, *When Husbands File for Divorce*, 44 J. MARRIAGE & FAM. 103 (1982) (explaining that the percentage of divorces filed by husbands increased after California introduced no-fault divorce); LENORE J.

about the effect of no-fault divorce on other members of society, especially members of intact families, have arisen because no-fault divorce creates incentives for many adults to focus more on their own self-interest and less on that of their family.² No-fault divorce has had this effect because it usually permits either spouse to obtain a divorce unilaterally, seldom providing adequate compensation to the spouses for their costs resulting from the divorce and to the children for any deterioration in their quality of life. These costs can be financial as well as psychological. Financial costs occur when spouses' future income has decreased because they have made sacrifices for their family's benefit during marriage, such as assuming childcare responsibilities or making career concessions.³

Psychological costs follow from the realization that one's love is no longer being reciprocated. Faced with these higher

WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* [hereinafter WEITZMAN, *THE DIVORCE REVOLUTION*] (1985) (expanding Weitzman, *The Economics of Divorce*, *supra*).

2. See ALLEN M. PARKMAN, *GOOD INTENTIONS GONE AWRY: NO-FAULT DIVORCE AND THE AMERICAN FAMILY* (2000) [hereinafter PARKMAN, *GOOD INTENTIONS*]. It has been argued that no-fault divorce created incentives for both spouses to work full-time outside the home, even when those choices reduce the welfare of the family. See Allen M. Parkman, *Why Are Married Women Working So Hard?*, 18 INT'L REV. L. & ECON. 41 (1998) [hereinafter Parkman, *Married Women*] (describing how no-fault divorce is shown to cause married women to work longer hours); Allen M. Parkman, *Unilateral Divorce and the Labor-Force Participation Rate of Married Women, Revisited*, 82 AM. ECON. REV. 671 (1992) (showing how no-fault divorce causes married women to increase their work outside the home). Although not attributing the change to no-fault divorce, others have observed that married women have been working more hours at a job and in the home in the period since no-fault divorce was introduced. See VICTOR R. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 78 (1988). Other commentators have criticized the current state of marriage noting that liberation and self-fulfillment have imposed a substantial cost on others, especially children. These authors frequently see the problem as being a shift in values and, therefore, they do not see no-fault divorce as being at the core of the problem. See BARBARA DAFOE WHITEHEAD, *THE DIVORCE CULTURE* (1997) (showing how the nation's 30-year experiment with divorce has created a low-commitment culture full of broken families and shattered lives); MAGGIE GALLAGHER, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* (1996) (showing the devastating effects a broken marriage has on everyone it touches with the government contributing to its decline).

3. See Allen M. Parkman, *Bringing Consistency to the Financial Arrangements at Divorce*, 87 KY. L.J. 51 (1998-99) (describing how these sacrifices should be viewed as creating debts for which compensation is appropriate at divorce).

costs from divorce, it is no surprise that spouses have responded by reducing their commitment to marriage, frequently to the detriment of their families. Moreover, children are usually innocent bystanders to this process, but they are frequently worse off after divorce than they would have been if the marriage had continued.⁴

Responding to these concerns, there have been proposals for reforming the earlier divorce reforms that would make it more difficult for a couple to divorce.⁵ Any new reforms, however, will have only a limited effect on the perverse incentives created by no-fault divorce. This is because spouses frequently have little control over the grounds for divorce that will be applied to their marriage, and must therefore be concerned about a no-fault divorce even though they were either married, or are living, in a state in which divorce is more difficult. The law of the domicile of either spouse controls the grounds for divorce at the time of divorce rather than the law of the state in which the couple was married or the one in which they may have lived during most of the marriage.⁶ Consequently, a spouse who established domicile in a state with no-fault grounds for divorce could divorce a spouse who was married and living in a state in which divorce was difficult. A divorce can occur in a state in which a spouse has never lived because the courts treat

4. It is almost universally recognized that children are better off in a smoothly functioning two parent household, rather than with divorced parents. See, e.g., ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, *DIVIDING THE CHILD: SOCIAL & LEGAL DILEMMAS OF CUSTODY* 294 (1992). Whether children on average are better off with two parents than one is controversial and often depends on how traumatic divorce is for the children. Some find the adjustment to be fairly smooth. See *id.* Others conclude that divorce has left numerous children worse off and the adverse effects continue for many years. See JUDITH S. WALLERSTEIN & SANDRA BLAKELEE, *SECOND CHANCE: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* xv (1990).

5. See Elizabeth Schoenfeld, *Drumbeats for Divorce Reform*, 77 *POL'Y REV.* 8 (1996) (summarizing current proposals); David M. Wagner, *Divorce Reform: New Directions*, 400 *CURRENT* 7 (1998) (considering proposals including the complete privatization of marriage law); Jennifer Warren, *No-fault Divorce Under Fire in State, Nation*, *L.A. TIMES*, Apr. 12, 1998, at A1 (discussing three divorce options for California).

6. In most states, residency and domicile are treated similarly. While a few states have no durational requirement for filing for divorce but require only a bona fide residency or domicile, most states additionally impose a durational requirement ranging from six weeks to one year. Six months is the most common durational requirement for a divorce. See JOHN DEWITT GREGORY ET AL., *UNDERSTANDING FAMILY LAW* 193 (1993).

marriage as a status, giving the state in which either spouse is domiciled jurisdiction over a divorce.⁷ These decisions usually have to be honored in all other states, including the domicile of the other spouse, under the Full Faith and Credit Clause of the U.S. Constitution.⁸

This article makes a proposal for reforming earlier divorce reforms that resulted in no-fault divorce, arguing that a combination of no-fault, mutual consent, and fault grounds for divorce will improve the incentives that spouses face, and will provide substantial improvements for them and their children. Although marriage has become less attractive for some adults,⁹ a large majority of adults still want to marry.¹⁰ For these people, there are benefits from a long-term commitment that would be encouraged by the reforms proposed here, especially when the couple desires children. For these reforms to be effective, however, marriage can no longer be treated as a status, but instead must be recognized as a contract.¹¹ Subject to government regulations, especially

7. While the state in which either spouse is domiciled has jurisdiction to grant a divorce, the financial aspects of marriage require personal jurisdiction over both spouses. *See id.* at 201.

8. U.S. CONST. art. IV, § 1. (The full text of this section is: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state.").

9. Economists argue that in addition to romance, love, and sexual attraction, marriage also has a pragmatic foundation based on the gains that men and women have experienced from additional specialization within a relationship. The convergence in the opportunities available to men and women has reduced the opportunities for these gains from specialization and, therefore, the gains from marriage. *See, e.g.,* GARY S. BECKER, *A TREATISE ON THE FAMILY* (1991).

10. All the relevant data show that adults of all ages say that having a "happy marriage" is one of their most important life goals. For example, in 1992, when high school seniors were asked to rate life goals as part of the Monitoring the Future Project of the Institute for Social Research at the University of Michigan, "having a good family and family life" was the top ranked goal. *See* Norval D. Glenn, *Values, Attitudes, and the State of American Marriage*, in *PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA* 21 (David Popenoe et al. eds., 1996).

11. There is a long history of authors discussing marriage as a contract. *See, e.g.,* Richard W. Bartke, *Marital Sharing—Why Not Do It by Contract?*, 67 *GEO. L.J.* 1131, 1134 (1979) (proposing a model statutory framework that would permit couples to elect a community property arrangement for their marriage); Lloyd Cohen, *Marriage as Contract*, in *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 618 (Peter Newman ed., 1998); Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 *N.C. L. REV.* 879, 894 (1988) (proposing model ante-nuptial agreements that impose financial burdens for initiating divorce); Joan M. Krauskopf & Rhonda

to protect children, treating marriage as a contract that includes the grounds for dissolution would base divorce on the agreement entered into at marriage rather than the domicile at dissolution.¹² This agreement, like all contracts, would not change as either spouse moved from state to state or even abroad.

The next section discusses the impetus for, and the impact of, no-fault divorce. Section III presents the reform efforts to date, while Section IV cautions that these reforms will have only a limited effect. Section V then presents a reform program based on contract principles that would bring more predictability to marriage.

II. DIVORCE REFORM

By making marriage terminable at will, and often subject to limited compensation for the divorced spouse and any children, no-fault divorce has had a perverse impact on many people. This was not the intent or the anticipated effect of reforming divorce laws. In 1969, California adopted the first unequivocal no-fault divorce statute in the United States.¹³

C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974) (discussing partnership agreements between husbands and wives); Allen M. Parkman, *Reform of the Divorce Provisions of the Marriage Contract*, 8 BYU J. PUB. L. 91 (1993) (arguing for mutual consent to be the normal ground for divorce); Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453 (1998) (stating that the current state laws do not fit all marriages); Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 207 (1982) (arguing the utility of marriage contracts to govern human interactions); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990) (discussing the use of precommitment strategies, including ante nuptial contracts, to lower divorce rates); Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65 (1998) (describing how the courts only enforce the monetary aspects of marriage contracts); Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777 (1994) (stating how everything can be discussed in contract terms); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998) (discussing the need for men and women to bargain as equals).

12. See Rasmusen & Stake, *supra* note 11, at 500 (describing the importance of marriage being a contract to overcome the problems associated with it being a status).

13. See Family Law Act, ch. 1608, §§ 1-32, 1969 Cal. Stat. 3312. The first "pure" no-fault statute was enacted in California in 1969. See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1 (1987) (The California statute has been described as "pure"

Over the following fifteen years, all the other states and the District of Columbia enacted similar statutes establishing "irretrievable breakdown" or "incompatibility" as the only grounds for divorce or adding them to preexisting fault grounds.¹⁴ The new laws were viewed as a major, and desirable, reform of the statutes in effect throughout most of the history of the United States.¹⁵ Under these old statutes, a divorce, when permitted at all, usually could only be obtained on fault grounds such as adultery, cruelty, or desertion.¹⁶ Increasingly, spouses began perjuring themselves with fabricated testimony to establish these grounds when the marriage had failed for other reasons.¹⁷ Many no-fault

because it based divorce exclusively on the factual breakdown of the marriage). Prior to 1969, some states included no-fault grounds with their fault grounds for divorce. For example, incompatibility as a ground for divorce was introduced into the United States when it acquired the Virgin Islands from Denmark in 1917 with it subsequently being adopted by some states. See Graham Kirkpatrick, *Incompatibility as a Ground for Divorce*, 47 MARQ. L. REV. 453 (1964) (describing how incompatibility was used as a ground for divorce in New Mexico, Oklahoma, and Alaska). Other states had "no-fault" grounds for divorce, such as voluntary separation for a period of time, or incurable insanity; by the mid-1960s 18 states, Puerto Rico, and the District of Columbia permitted a divorce based on the parties living apart. See GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 162 (1991). By 1985, all the states had some form of no-fault divorce, either exclusively no-fault grounds or with no-fault grounds added to the fault grounds. See Linda D. Elrod et al., *A Review of the Year in Family Law: Children's Issues Dominate*, 32 FAM. L.Q. 661 (Winter 1999) (providing data on the current status of divorce laws).

14. The states rapidly enacted no-fault divorce statutes. Iowa passed its no-fault divorce statute in 1971. By August 1977, only three states retained essentially fault grounds for divorce. See Doris J. Freed & Henry H. Foster, Jr., *Divorce in the Fifty States: An Overview*, 11 FAM. L.Q. 297 (1977). More than no-fault, the important characteristic of the new laws was that they permitted one spouse to obtain a divorce even when the other spouse opposed it. Today only four states (Mississippi, New York, Ohio, and Tennessee) require mutual consent for a no-fault divorce. See Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1277 n.24 (1996) (discussing whether a tort action for spousal emotional abuse should be allowed).

15. See Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 297 (1987) (showing how the fault divorce laws were in conflict with the reality that divorce was commonly permitted based on mutual consent); see also WEITZMAN, *THE DIVORCE REVOLUTION* *supra* note 1, at 51 (explaining how the divorce reforms were embraced with a pioneering zeal).

16. Although much of American law came almost directly from England, our history of divorce differs substantially from that in England. There were no judicial divorces in England until 1857, while many colonies and state courts could grant divorces from an early time. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 179, 434 (1973).

17. See Kay, *supra* note 15, at 299 (stating that a major goal and an

divorce statutes removed the consideration of marital fault from the grounds for divorce, the award of spousal support, and the division of property.¹⁸

A. *Impetus for Change*

An initial question is why there was pressure for such a dramatic change in divorce laws. The shift from fault to no-fault divorce was initially motivated by the change in circumstances facing some American adults that reduced the attraction and stability of marriage for them. While marriage has always had a romantic foundation in the United States,¹⁹ it also has pragmatic considerations because couples could improve their quality of life by living together compared to staying single. This occurred because gains that resulted from increased specialization increased their welfare and that of their family.²⁰ An example of this specialization is child rearing, which can have little market value. Marriage became a long-term commitment to encourage such activities. In the colonial era, this specialization generally occurred on farms. With the industrial revolution, the increase in employment opportunities for men resulted in their specializing in income earning, while wives specialized in domestic activities.

Changing conditions reduced the gains from specialization as the opportunities available to men and women converged. Employment opportunities for women increased, reducing their dependence on men for income.²¹ Meanwhile, labor-saving devices became more readily available for the home, reducing men's dependence on

enduring achievement of the reforms was the elimination of hypocrisy and perjury from divorce proceedings). The most usually fabricated ground was cruelty. *See id.*

18. *See* Doris Jonas Freed & Henry H. Foster, *Family Law in the Fifty States: An Overview*, 17 FAM. L.Q. 365, 382 (1984) (The trend is to minimize the importance of marital misconduct as a factor in settlements). *See also* Elrod et al., *supra* note 13 (describing the recent status of the law).

19. *See* EDWARD SHORTER, *THE MAKING OF THE MODERN FAMILY* (1975) (illustrating a history of courtship and marriage in the United States).

20. Gary Becker has done the seminal work on the economics of family. *See, e.g.*, BECKER, *supra* note 9.

21. The female labor force participation rate has been increasing for a long time in the United States, increasing from 15% of women aged 25-44 in 1890 to 60% by 1980. *See* VICTOR R. FUCHS, *HOW WE LIVE: AN ECONOMIC PERSPECTIVE ON AMERICANS FROM BIRTH TO DEATH* 127 (1983).

women.²² Particularly important in this process was a decline in the attraction of having children.²³ Children are an important source of the gains from specialization as they usually force at least one parent to increase their specialization in childcare.²⁴ For much of history, children were valuable to parents, as they provided intangible pleasure as well as labor and support in old age. In the Twentieth Century, the value of their labor and support in old age declined, while increased employment opportunities for the parent who usually provided childcare (the mother) increased the potential cost of children. Childcare responsibilities required some combination of payments to providers or reduced earnings for a parent. Overall, the benefit that adults anticipated from children fell while the cost of children increased. The result was that people elected to have fewer children and, in some cases, they decided to have none.²⁵

With fewer opportunities for specialization during marriage, the gains from marriage were reduced, and the likelihood increased that a marriage that was entered into optimistically would turn out to be unsuccessful. In the process of dissolving their marriage, many people concluded that there were obvious problems with the existing fault grounds for divorce because they were perceived to be hypocritical and unfair. If the divorce was amiable, the couple had to fabricate testimony to establish the fault grounds of adultery, desertion, or cruelty. Essentially, they had to commit perjury to obtain their divorce. If the divorce was not amiable, the divorcing spouse had a bigger problem since the "innocent" party had to initiate the divorce. The result could often be a much more generous compensation and custodial package than the divorcing spouse preferred.

22. *See id.* at 130.

23. Between 1800 and 1910 the fertility rate, which is the number of births per thousand women aged 15-44, fell by more than half, and it fell by half again during the ensuing 70 years. *See id.* at 17.

24. *See id.* at 144 (After peaking in 1957, the fertility rate has declined dramatically.). The births per thousand population declined from 24.1 in 1950 to 14.8 in 1996. *See* BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1998, at 76 tbl.92 (118th ed. 1998).

25. For example, the percentage of households consisting of married couples with children under 18 declined from 31% in 1980 to 25% in 1997. *See id.* at 62 tbl.71.

Some people looked for easier methods for dissolving unsuccessful marriages, thus the unilateral, no-fault divorce resulted. Unfortunately, we moved from a "one law fits everyone" environment based on fault to one based almost exclusively on no-fault grounds. Many adults still wanted to make a long-term commitment to their spouse, especially if they wanted children, and this was frequently frustrated by the new divorce laws. No matter the sincerity of promises made to a spouse, there was no way to escape the fact that the states had preempted the basis for divorce, and in most cases they permitted unilateral divorce. It was reasonable for many adults to respond to the statutes rather than the promises. The need for divorce laws that could accommodate a variety of preferences was not appreciated. In an unfortunate leap of logic, the conclusion was that if fault divorce was bad then no-fault divorce had to be good.

B. *The Impact of No-Fault Divorce*

Gradually, the initial optimism toward no-fault divorce was tempered by the recognition of its negative repercussions.²⁶ The key impact of no-fault divorce has been a reduction in the compensation to a divorced spouse for their commitment to their marriage and any sacrifices that they made for its benefit, resulting in adults making a weaker commitment to their marriage.

1. *Divorced Spouses*

Initially, these concerns were addressed to divorced women and their children. More recently other concerns about the effect of no-fault divorce on other members of society, especially those in intact families, have developed. Perhaps the most striking consequence of the introduction of no-fault divorce has been the deterioration in the financial condition of divorced women and the children of divorced parents.²⁷ The dissolution of a marriage can result in financial arrangements to cover a property settlement, spousal support, and child support. After the introduction of no-fault divorce, the financial settlements received by

26. See PARKMAN, GOOD INTENTIONS, *supra* note 2, at 91 (discussing the impact of no-fault divorce).

27. See WEITZMAN, THE DIVORCE REVOLUTION, *supra* note 1.

divorced women appear to have declined substantially.²⁸ This is especially the case for women in marriages of long duration.²⁹ The smaller settlements are due to no-fault divorce reducing the negotiating power of spouses who did not want to dissolve their marriage. Under the fault system, the initially unwilling plaintiffs usually were unlikely to agree to file the suit if they did not already know the financial outcome. The negotiations and the settlements were essential to induce their cooperation. The fault grounds for divorce were important for providing leverage for the initially nonconsenting spouses, not for determining the details of financial arrangements. The courts' role was generally only to certify the parties' agreements.

No-fault divorce reversed the roles of the parties and the courts. With fault divorce, there were incentives for the couple to negotiate their own arrangements ignoring the applicable statutes and courts.³⁰ Alternatively, with no-fault divorce the parties who did not want their marriage to be dissolved had significantly less negotiating power, and in many states a divorce could be obtained unilaterally. In divorce litigation, the courts based settlements on the existing laws that dictated the division of property and alimony and child support awards.³¹ There was no critical analysis of these laws during the fault divorce era because the courts seldom applied them in controversial cases. The

28. *See id.* at 323.

29. More than half of the women married more than 15 years are not awarded support. *See id.* at 187. Moreover, divorces are becoming more common among long duration marriages. *See* Marilyn Chase, *No-fault Divorce Has a Fault of Its Own, Many Women Learn*, WALL ST. J., Jan. 21, 1985, at 18 (In 1960, only 4% of divorces involved couples married more than 15 years with that percentage rising to 20% in 1985.). While divorces can occur for numerous reasons, the asymmetry of the contributions of husbands and wives to marriage can leave wives vulnerable at middle age. This occurs because the childcare responsibilities of wives tend to occur before the prime income earning years of the husband creating incentives for husbands to seek a divorce especially if the costs of divorce are low. *See* Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267 (1987).

30. *See* MAX RHEINSTEIN, MARRIAGE, STABILITY, DIVORCE AND THE LAW 8 (1972) (explaining how divorcing couples privately agreed to an uncontested divorce); *see also* 1966 CAL. REPORT OF THE GOVERNOR'S COMM'N ON THE FAMILY 30-1 (estimating that 94% of divorce hearings in California were uncontested).

31. Replacing the fault grounds for divorce with no-fault grounds led some authors to conclude that family law was being privatized. *See, e.g.,* Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1445 (1992).

divorced spouse could then expect to receive half of the limited marital property, short-term rehabilitative spousal support, and child support if there were minor children.³² The spousal and child support was often difficult to collect.³³ The laws governing property settlements had serious problems as they considered only a narrow set of assets as property.³⁴ Most important, they ignored the spouses' income earning capacities, which financial analysts would recognize as just as much an asset as a car, a house, or a share of stock.³⁵ This omission was particularly egregious when a spouse had reduced her future income earning capacity by limiting her career during marriage. Recognizing the fairly predictable outcome of litigation probably resulted in negotiated settlements that were not substantially different from those expected at trial. While a couple might trade off the different components of the settlement, a spouse was not likely to receive greater value overall than that provided by law.

While there is general agreement that women in long duration marriages have been adversely affected by the introduction of no-fault divorce, there has been some debate about the magnitude of the effect. Lenore Weitzman provided the initial evidence. In 1978, she interviewed divorced men and women in Los Angeles County, California and concluded that divorced men experienced an average forty-two percent increase in their standard of living in the first year after divorce and divorced women and their children experienced a seventy-three percent decline.³⁶ Other scholars have questioned the magnitude of the impact that she observed. Using a different data set, Saul Hoffman and Greg Duncan found the economic status of divorced women fell an average of approximately thirty percent in the first year after di-

32. See WEITZMAN, *THE DIVORCE REVOLUTION*, *supra* note 1, at 110 (property), 143 (spousal support), 262 (child support).

33. For example, in 1991 only 54% of custodial parents—mostly mothers—even had child support awards. While some of these parents had never married, most were either still married, divorced, or separated. Of those with awards, three quarters received any payments at all and of those receiving payments approximately two thirds received full payments. See LYDIA SCOON-ROGERS & GORDON H. LESTER, *CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS: 1991* (BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, Series P60-187, 1995).

34. See Parkman, *supra* note 3, at 55.

35. See *id.* at 66.

36. See WEITZMAN, *THE DIVORCE REVOLUTION*, *supra* note 1, at 323.

orce.³⁷ Richard Peterson replicated Weitzman's analysis and demonstrated that the estimates reported in her book are inaccurate.³⁸ Peterson's analysis, which used the same sample and measures of economic well-being as Weitzman's book, produced estimates of a twenty-seven percent decline in women's standard of living and a ten percent increase in men's standard of living after divorce.³⁹ More recently, Sanford Braver addressed some issues that the other authors had ignored such as the effects of taxes and additional transfers between parents to conclude that men were only two percent better off and women one percent worse off after a divorce.⁴⁰ Certainty, we now have to conclude that Weitzman's often-quoted numbers are probably inaccurate and the more accurate effects may be substantial, but smaller.⁴¹

Although less documented, no-fault divorce also has been a disaster for numerous divorced men. Because of the possibility of unilateral divorce, they can easily have the marriage to which they have committed themselves dissolved against their will. These men frequently are the primary

37. See Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Divorce*, 22 DEMOGRAPHY 485 (1985); Saul D. Hoffman and Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641 (1988).

38. See Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528 (1996).

39. See *id.* at 533. In Weitzman's response to his article, she acknowledges that a subsequent review of her data revealed problems. See Lenore J. Weitzman, *The Economic Consequences of Divorce Are Still Unequal: Comment on Peterson*, 61 AM. SOC. REV. 537 (1996) The policy impact of her earlier research was not caused by its specific statistics. For example, she over-sampled people in longer marriages, who were more adversely affected by divorce. Moreover, she notes that she had questioned the 73% decline in women's post divorce standard of living, but had been reassured by her computer assistant that the number was accurate. See *id.*

40. See SANFORD L. BRAVER, *DIVORCED DADS* 55 (1998).

41. See also H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437 (1986) (portraying an empirical study of the impact of legal and informational constraints on the marriage relationship); MACCOBY & MNOOKIN, *supra* note 4, at 260 (showing that both fathers' and mothers' incomes, adjusted for any court awards, fell after divorce with the income of the mothers falling substantially more than that of the fathers).

Some scholars have questioned even the basic idea that women are actually worse off after divorce. See HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 159 (1988). However, Jacobs does not address questions that are capable of refuting Weitzman. See PARKMAN, *GOOD INTENTIONS*, *supra* note 2, at 105.

source of income for two households instead of one. Financial support may be going to an ex-wife who left him for another man with whom she is now living. In addition, child support can be going to an ex-wife with the man essentially having no control over how it is spent. For legal as well as practical reasons, fathers often are given only limited access to their children after divorce.⁴²

2. *Intact Families*

A more subtle effect of no-fault divorce may be on the quality of life for members of intact families. As noted above, the key impact of no-fault divorce has been a reduction in the compensation to a divorced spouse for his or her commitment to the marriage and any sacrifices made for its benefit. The people who traditionally made these sacrifices rationally responded to this new environment by making a weaker commitment and fewer sacrifices.

Marriage is expected to be an arrangement that increases the welfare of all participants. Altruism is very important within families.⁴³ People tend to make decisions in markets based on narrowly defined self-interest, but the same people tend to base their decisions within the family on altruism. That is not to say that they are rational in one setting, but not in the other. Relationships in markets are often temporary. If a decision in a market confers uncompensated benefits on a stranger, the actor is not likely to receive anything in return.

Meanwhile, relationships within families can continue for longer terms. Actions within families that benefit the other members often result in the other members acting similarly at another time. Consideration of the effects on other family members is more likely when the persons bestowing benefits anticipate that the other family members will reciprocate. This is more likely to occur when marriage is a long-term arrangement, or at least if the persons making the decisions

42. When there is a conflict in the custodial preferences of fathers and mothers, the courts tend to respond to the mothers' preferences. See MACCOBY & MNOOKIN, *supra* note 4, at 149.

43. See BECKER, *supra* note 9, at 277. An argument for more state control over marriage than over other contracts is based on contracts being based on self-interest, while marriage should be based on altruism. See Schultz, *supra* note 11, at 241-42. Unappreciated are the disincentives that no-fault divorce creates for considering the welfare of others.

know that they will eventually be compensated for any costs that they incur. Under those circumstances, the parties recognize that there is a quid pro quo: they act with the knowledge that their actions will benefit others, and they in turn will benefit from the acts of the other members of the family. The incentives for these activities are often the benefits received from the other parties' activities.

If a marriage can be dissolved unilaterally without adequate compensation, the incentive structure changes. This is especially true if the benefits generated by the parties' actions are not concurrent. For example, the childcare services frequently provided by one spouse tend to occur before the other spouse's peak earnings period. Both child rearing and income earning confer benefits on the other family members, but the caregiver may question whether the marriage will continue long enough for them to receive the external benefits produced by the other spouse's future income and their children's love. If they do not have faith that their marriage will continue into that period, they do not have as strong an incentive to increase their specialization in child rearing.

If the marriage is not viewed as a long-term arrangement, conflicts arise between preferences of the family and of individuals who worry about their fate if the marriage is dissolved. Some individuals who limit their employment opportunities may fear that they will not be compensated for any reduction in their future earnings (human capital) that occurs if they work only part-time, since full-time jobs provide opportunities for on-the-job training that are not available in part-time positions.⁴⁴ Spouses have incentives to evaluate the trade-off between working at home and at a job by considering their own welfare rather than that of their family. Increasing work outside the home from twenty to forty hours per week might impose more costs than benefits on the family, so that the net benefits for the family are negative. Conceptually, the benefits include the psychic income from the jobs,⁴⁵ but from the spouses' perspective, the

44. Firms expect to get a higher return on investments in on-the-job training for full-time workers than for part-time workers, so they make larger investments in full-time workers. See GARY S. BECKER, *HUMAN CAPITAL* 30 (3d ed. 1993).

45. Often the psychic income of employment is overestimated. As

extra hours of employment provide them with skills that would be beneficial if their marriage ends in divorce. Therefore, the benefits of the jobs exceed the costs, and they decide to work full time.⁴⁶

The effects of no-fault divorce are particularly apparent with married women. On the one hand, they have been forced to increase their emphasis on maintaining their marketable skills during marriage, while on the other they have felt compelled to sustain an important role in the home. Judging by the increase in the number of hours that they work, no-fault divorce has reduced their welfare. Victor Fuchs found that married women are working more hours per year after no-fault divorce than they had worked under fault divorce, and when they work outside the home, their responsibilities at home are not absorbed by other members of their families.⁴⁷ My research provides some additional support that this shift in behavior by married women was a result of the introduction of no-fault divorce.⁴⁸ Living in a no-fault divorce state was shown to increase the total hours worked by married women by four and a half hours per week. This occurred because married women in no-fault divorce states worked on average six and a half hours more per week outside the home while only reducing their work in the home

retirement benefits increase, many workers elect to take early retirement that indicates that they prefer leisure to their jobs. Better-educated workers are more likely to find interesting jobs and, therefore, work longer. See FUCHS, *supra* note 21, at 160 (explaining that at ages 55-64, over 80% of men with a college degree are still in the work force, compared with only 60% of men with an elementary school education).

46. Although the substantial increase in the labor force participation rate of married women is frequently attributed to financial necessity, the largest increase in the labor force participation rate of married women has been among those with middle to high income husbands. See Chinhui Juhn & Kevin M. Murphy, *Wage Inequality and Family Labor Supply*, 15 J. LAB. & ECON. 72 (1997) (stating that these findings cast doubt on the notion that the primary cause of the increased employment of married women has been financial necessity).

47. See FUCHS, *supra* note 2, at 78. Between 1960 and 1986, women increased the annual hours that they worked in the house and at a job by seven percent, even as the hours spent by men in those two activities fell by the same percent. See *id.* Married women increased their paid employment by 74%, while they decreased their housework by 14% and their childcare by 26%. See *id.* Over the same period, men increased their housework slightly, but they provided even less childcare than before. Much of this shift was due to women continuing to assume most of the responsibility for childcare. See *id.*

48. See Parkman, *Married Women*, *supra* note 2.

by two hours.

3. *Children*

Although the discussion here has centered on adults, no-fault divorce has also probably adversely affected the quality of life for many children. Certainly, children can benefit from the additional income and stimulation that come from their parents' employment.⁴⁹ This is most likely to occur when parents place a primary importance on the welfare of their family when making decisions. However, no-fault divorce creates incentives for parents to interpret their self-interest more narrowly based on their own welfare and less on the welfare of their family. With marriage being a much more fragile institution, there are potentially fewer rewards associated with concern about other family members.⁵⁰

Most parents are deeply concerned about the welfare of their children, but like all choices, parenting is influenced by its costs and benefits. When employment opportunities outside the home were limited, and sacrificed careers were protected to some extent by fault divorce, the cost of a parent placing an emphasis on childcare was low. As the cost rose because employment opportunities increased and no-fault divorce reduced the protection for sacrificed careers, parents became less willing to make this sacrifice. Moreover, the high rate of marriage dissolutions increased the likelihood that parents, and especially fathers, might eventually have a more limited interaction with their children, thereby reducing the benefit of parenthood.⁵¹ With higher costs and lower benefits of parenthood, many parents have reduced their commitment to their children. As parents spend more time at jobs, they usually have less time to devote to their children.⁵²

49. See SUSAN CHIRA, *A MOTHER'S PLACE* (1998) (reviewing scientific evidence that supports gains for children from mothers' employment). *But see* JOAN K. PETERS, *WHEN MOTHERS WORK* (1997) (stating that mothers' sacrificing themselves is not good for children).

50. See, e.g., FUCHS, *supra* note 2, at 78 (stating that after the introduction of no-fault divorce, married couples increased their paid work while decreasing their housework, but more importantly, by reducing their childcare).

51. See Margaret F. Brinig & Frank H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393 (1998) (stating that with joint custody laws, fathers feel more involved with their children and are more likely to meet their child support obligations).

52. Although parental involvement with their children is important, increasingly parents are turning responsibility for childcare over to others. In

The importance of parenting extends beyond just the preschool years. The assistance and encouragement provided by parents later on can be frustrated when both parents have major obligations outside the home or when the marriage has been dissolved. The period of increased parental employment and marital instability has been associated with the deterioration in the performance of children in school.⁵³

While no-fault divorce has reduced the attention that children get in two-parent households, they get even less attention if their parents are divorced. No-fault divorce has not only made family life less stable during marriage, it has also probably contributed to the increase in the divorce rate.⁵⁴

1990, more than half of American infants were in the care of someone other than their parents. See Shannon Brownlee et al., *Culture & Ideas: Lies Parents Tell Themselves About Why They Work*, U.S. NEWS & WORLD REP., May 12, 1997, at 58. In 1994, in families in which the mother was either employed full-time or had more than a college education, or the family income was more than \$50,000 a year, approximately 35% of preschool children were either in childcare or a nursery school and another 15% were being cared for by someone other than a relative in the provider's home. See Lynne M. Casper, *Who's Minding Our Preschoolers? Fall 1994 (Update)*, U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, P70-62, (1997).

53. Between 1967 and 1997, the average score on the verbal component of the Scholastic Assessment Test (SAT) fell from 543 to 505, while the math score fell from 516 to 511. During intervening years, these scores were even lower. See BUREAU OF THE CENSUS, *supra* note 24, at 183 tbl.290. While the increase in single parent households has undoubtedly contributed to this trend, no-fault divorce has probably reduced parental academic support for their children.

54. It has been difficult to test for the effect of no-fault divorce on the divorce rate. First, no-fault divorce has taken a variety of forms from "irretrievable breakdown" to "living separate and apart" for a specific period creating ambiguity about how it should be specified in empirical studies. Second, those studying the effects expect them to be lagged; and the structure of the lagged effects is unknown. Last, since all states have had some form of no-fault divorce for more than a decade there are no states with different laws against which the no-fault divorce states can be compared. Any comparison with an earlier period is forced to deal with a broad variety of others changes that have occurred.

These problems have not deterred scholars. Gary Becker found that the change in the grounds for divorce in California in 1970 led only to a short-term increase in the divorce rate in that state with the rate quickly returning to its old trend. See BECKER, *supra* note 9, at 334 (describing that the actual rates for California were higher than the "trend" in 1970-1972, but they returned to the long-term trend by 1973). In the first systematic study of the impact of no-fault divorce on the divorce rate, Elizabeth Peters found that residence in a no-fault divorce state in 1979 did not increase the probability that a woman would divorce. See Peters, *supra* note 41, at 446. Doug Allen has challenged Peters's results by questioning her designation of no-fault divorce states. See Douglas W. Allen, *Marriage and Divorce: Comment*, 82 AM. ECON. REV. 679 (1992) (stating that by removing the influence of the regional variables used by Peters,

Although the divorce rate rose under fault divorce, people did not casually dissolve a marriage. There had to be a strong sense that the marriage was failing, and at least one spouse frequently had to make major concessions to induce the other spouse to cooperate in a divorce. Knowing that it was going to be difficult to dissolve their marriage, spouses had an incentive to strive to make their marriage work. The durability of marriage frequently worked to the benefit of children.

No-fault divorce permits either parent to dissolve a marriage unilaterally, potentially based on very flimsy motives. The potential for no-fault divorce often compounds the problems by making marriages more fragile by reducing the spouses' commitment to their marriage in the first place. Therefore, a marriage could be dissolved when there was still the potential for a successful and rewarding relationship for the entire family. Paul Amato and Alan Booth found that between 1980 and 1992 only a minority of divorces reviewed involved high conflict marriages.⁵⁵ Not having made a substantial commitment to their marriage, some spouses

no-fault divorce has a positive effect on the divorce rate). Using different data than Peters and Allen, Martin Zelder concluded that no-fault divorce caused an increase in the divorce rate. See Martin Zelder, *Inefficient Dissolution as a Consequence of Public Goods: The Case of No-fault Divorce*, 22 J. LEGAL STUD. 503 (1993). Using still another data set, Jeffrey Gray concluded that unilateral divorce had little effect on the probability that a couple would divorce. See Jeffrey S. Gray, *Divorce-Law Changes, Household Bargaining, and Married Women's Labor Supply*, 88 AM. ECON. REV. 628 (1998). However, Leora Friedberg determined that divorce rates would have been about six percent lower if states had not adopted no-fault divorce. See Leora Friedberg, *Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data*, 88 AM. ECON. REV. 608 (1998). Since some states that have no-fault grounds for divorce still consider fault in determining financial settlements, a true no-fault divorce state would be one in which the laws governing both dissolution and the financial settlement are no-fault. Using that definition for no-fault divorce, Peg Brinig and Frank Buckley found that no-fault divorce was associated with higher divorce levels. See Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At-Fault People*, 18 INT'L. REV. L. & ECON. 325 (1998). See also Robert Rowthorn, *Marriage and Trust: Some Lessons from Economics*, 23 CAMBRIDGE L.J. ECON. 661 (1999) (discussing evidence on the issue). In conclusion, the more recent evidence lends some support to the argument that no-fault divorce has increased the divorce rate.

55. See PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK 220 (1997) (stating that only 28% of parents who divorced during the study reported any sort of spousal physical abuse prior to divorce, 30% reported more than two serious quarrels in the last month, and 23% reported that they disagreed "often" or "very often" with their spouses).

divorced after a minor provocation. Weighing the costs and benefits of divorce might not adequately take into consideration the impact of the divorce on any children.

While disruptive families frequently hurt children, they are usually better off in fairly smooth functioning two parent households than in single parent households or stepfamilies.⁵⁶ In single parent households, the relations between the custodial parent, usually the mother, and her young children are often strained after divorce.⁵⁷ Being a single parent is a demanding and frustrating experience. Divorced mothers, compared with married mothers, are less affectionate with their children, punish them more harshly, and monitor their behavior less carefully.⁵⁸ In addition, after divorce there is a reduction in the critical link between children and their father.⁵⁹ When a father is not present at home, his son is twice as likely to end up in jail.⁶⁰ Much of what fathers contribute to child development is simply the result of having a second adult in the home. Their presence is also important because men and women have many fundamental differences that benefit children.⁶¹ Differences have universally been found in aggression and general activity level, cognitive skills, sensory sensitivity, and sexual and reproductive behavior. Conditions for children do not necessarily improve if the

56. See SARA McLANAHAN & GARY SANDERFUR, *GROWING UP WITH A SINGLE PARENT* 3 (1994) (stating that an intact family can provide the child with important social capital).

57. See E. Mavis Hetherington, *Coping with Marital Transitions: A Family Systems Perspective*, in *COPING WITH MARITAL TRANSITIONS: A FAMILY SYSTEMS PERSPECTIVE* 7 (E. Mavis Heatherington & W. Glenn Clingempeel eds., 1992).

58. See *id.* at 6.

59. See DAVID POPENOE, *LIFE WITHOUT FATHER* 10 (1996) (explaining that studies show that virtually all children clearly distinguish a mother role from a father role); see also Paul R. Amato, *Father-Child Relations, Mother-Child Relations, and Offspring Psychological Well-being in Early Adulthood*, 56 *J. MARRIAGE & FAM.* 1031 (1994) (discussing the important role of fathers in the lives of young adults).

60. In a report presented at the 1998 American Sociological Meetings, Cynthia Harper and Sara McLanahan found that boys whose fathers were absent from the household had double the odds of being incarcerated, even when other factors, such as race, income, parents' education, and urban residence, were held constant. Boys who grew up with a stepfather had an even higher rate of incarceration. See *Boys with Absentee Dads Twice as Likely to Be Jailed*, *WASH. POST*, Aug. 21, 1998, at A3.

61. See POPENOE, *supra* note 59, at 139 (stating that men and women think and act differently).

custodial parent remarries. Children in stepfamilies are no better off, on average, than children in divorced, single parent families.⁶²

In summary, no-fault divorce has created incentives for adults to be more concerned about themselves and less about their family. The repercussions of no-fault divorce go beyond the deteriorating conditions of divorced women and their children. By making a long-term commitment to a marriage less attractive, no-fault divorce has also had an adverse effect on married couples and their children.

III. LEGISLATIVE REFORMS OF NO-FAULT GROUNDS FOR DIVORCE

While there has been substantial criticism of the effects of the current divorce laws, the reform of no-fault divorce statutes has been very limited.⁶³ Surveys show that roughly half of all Americans favor changes that would make it more difficult to get a divorce,⁶⁴ which is a significant increase from a decade ago. Still, it was almost thirty years after the passage of no-fault divorce in California before states seriously considered alternatives. In 1996, at least twenty states considered divorce reform, including proposals in twelve states to modify or eliminate no-fault divorce statutes.⁶⁵ The reform movement got its start in the Midwest, where legislators in Michigan and Iowa sought to create a divorce system that would prohibit no-fault dissolution in cases in which one spouse contests the divorce or minor children were involved. On Valentine's Day 1996, Michigan State Representative Jessie Dalman launched the divorce counter-revolution. In an announcement made on the steps of the Michigan Capital Building, Representative Dalman

62. See MCLANAHAN & SANDERFUR, *supra* note 56, at 71 (stating that remarriage of the custodial parent does not affect a child's chances of graduating from high school or avoiding a teenage birth).

63. See Laura Bradford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607 (1997) (considering three proposals to return to consideration of fault in the divorce process).

64. See Ann Scott Tyson, *States Put Minor Speed Bumps in Divorce Path*, CHRISTIAN SCIENCE MONITOR, Sept. 10, 1996, at 1 (describing how some reform proposals include longer waiting periods and mandatory counseling).

65. See Maggie Gallagher, *Time to 'fess Up to Messing Up*, USA TODAY, Jan. 23, 1997, at 15A (describing how no changes had occurred in the 12 states considering reform).

unveiled a series of bills designed to strengthen the institution of marriage by ending unilateral divorce.⁶⁶ If one spouse opposes the divorce, these bills would require proof of fault consisting of desertion, infidelity, abuse, a prison sentence of more than three years, alcoholism, or drug addiction.⁶⁷ If both the husband and wife wanted to dissolve the marriage, the no-fault grounds would remain. However, if children still live at home, the couple would be required to get counseling and propose a parenting plan first. The bill also encouraged premarital counseling by having a lower marriage license fee and shorter waiting period for those people who had gone through sessions with a minister, psychologist, or family therapist.

Representative Dalman's bills were not passed and similar bills have fared no better in other states. The first bill to be voted on was in Washington State, which would have permitted couples to sign a prenuptial contract excluding no-fault divorce.⁶⁸ Common among the opponents of any change in the no-fault divorce laws has been concern for the people who make a mistake when they marry. For example, the minority leader of the Washington legislature, a family lawyer, argued that the bill might induce many couples to sign prenuptial contracts they would later regret. Ignored is the subtle fact that many people want, and are willing to make, a long-term commitment to their spouse. This is not permitted in most states under current legislation. The Washington bill did not pass. Iowa's efforts did meet with some success, as it passed legislation in 1996 that required parents to take classes on how to protect their children from the pain of divorce.⁶⁹

In 1997, Louisiana became the first state to enact a major revision of its no-fault divorce statute when it passed the Covenant Marriage Act.⁷⁰ This Act gives those planning to

66. See H.B. 4432, 88th Leg., 1995 Reg. Sess. (Mich. 1995).

67. See Kenneth Cole, *Bills Work Make Divorce Harder*, DETROIT NEWS, Feb. 13, 1996, at 1 (Rep. Jessie Dalman introduced an 11 bill package).

68. See *id.*

69. See Warren, *supra* note 5, at A1 (describing how reformers wanted to create three divorce options in California).

70. LA. REV. STAT. ANN. § 9-272 (West 2000); see also Nicole D. Lindsey, *Marriage and Divorce: Degrees of "I Do," an Analysis of the Ever-Changing Paradigm of Divorce*, 9 U. FLA. J.L. & PUB. POL'Y 265 (1998) (discussing a proposed Florida statute similar to the one enacted in Louisiana); Katherine Shaw Spaht, *Propter Honoris Prestum: For the Sake of the Children:*

marry in Louisiana a choice between two options: a standard marriage with the potential for a no-fault divorce or a covenant marriage.⁷¹ The covenant marriage differs from the standard marriage in several ways. Most fundamentally, those choosing a covenant marriage must receive counseling prior to the wedding,⁷² must agree to pursue additional counseling if the marriage encounters difficulty,⁷³ and cannot obtain a no-fault divorce without a lengthy separation.⁷⁴ Under these covenant marriages the grounds for divorce are limited. A spouse to a covenant marriage may obtain a judgment of divorce only upon proof of one of the following: (1) the other spouse has committed adultery,⁷⁵ (2) the other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor,⁷⁶ (3) the other spouse has abandoned the matrimonial domicile for a period of one year and constantly refuses to return,⁷⁷ (4) the other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses,⁷⁸ or (5) the spouses have been living separate and apart continuously without reconciliation for a period of two years, if there is no separation agreement.⁷⁹

If a separation agreement has been obtained, the parties can obtain a divorce after one year of separation if there are no minor children,⁸⁰ and after one year and six months of separation if there are minor children.⁸¹ Separation judgments can be obtained for the same fault-based reasons as the divorce, as well as for the "habitual intemperance of the other spouse, or excesses, cruel treatment, or outrages" if such behavior is "of such a nature as to render their living together insupportable."⁸² So far, couples in Louisiana have

Recapturing the Meaning of Marriage, 73 NOTRE DAME L. REV. 1547 (1998). Spahnt also drafted the Louisiana Covenant Marriage law.

71. See LA. REV. STAT. ANN. § 9-272 to 9-273.

72. See *id.* § 9-273(A)(2)(a).

73. See *id.*

74. See *id.* § 9-307.

75. See *id.* § 9-307(A)(1).

76. See LA. REV. STAT. ANN. § 9-307(A)(2).

77. See *id.* § 9-307(A)(3).

78. See *id.* § 9-307(A)(4).

79. See *id.* § 9-307(A)(5).

80. See *id.* § 9-307(A)(6)(a).

81. See *id.* § 9-307(A)(6)(b).

82. LA. REV. STAT. ANN. § 9-307(A)(6).

not warmly received the covenant marriage. After one year, only one percent of Louisiana newlyweds have chosen it.⁸³ In 1998, Arizona passed similar covenant marriage legislation.⁸⁴ Meanwhile, Pennsylvania, Illinois, Virginia, Georgia, and a handful of other states are also considering similar legislation.

In summary, public concern about no-fault divorce has not led to any significant reforms to date. While the Louisiana Covenant Divorce Legislation has received substantial publicity, it is not likely to affect many people's behavior. Therefore, the next concern is why there has been such a limited response.

IV. IMPEDIMENTS TO REFORM

Although we have observed substantial reform activity, there has not been much progress. A major problem with any reform of no-fault divorce is that the conditions that led to the shift from fault to no-fault divorce no longer exist. The problems with fault divorce were obvious. The laws were hypocritical, forcing people to fabricate testimony to obtain a divorce that ended a marriage that had failed for other reasons. People were lying to get a divorce and, to add to the discomfort, they were lying under oath, committing perjury. In addition, there were some very vocal advocacy groups. Because the problems with fault divorce were obvious, no-fault reforms had strong support among academics.⁸⁵ In addition, the matrimonial bar was very uncomfortable suggesting perjury to its clients, giving it a strong impetus to change the grounds for divorce.⁸⁶ Finally, there were divorced

83. See Christine B. Whelan, *No Honeymoon for Covenant Marriage*, WALL ST. J., Aug. 17, 1998, at A14 (stating that 17 states considered similar legislation during 1998, however, only Arizona passed it into law). During the last six months of 1998, data collected by Steve Nock, a sociologist at the University of Virginia, indicated that the percentage of couples selecting a covenant marriage had increased to approximately three percent. He also determined that people in Louisiana were only gradually becoming aware of the covenant marriage alternative. Conversation with Steve Nock, Sociologist, University of Virginia (Feb. 22, 1999).

84. See ARIZ. REV. STAT. § 25-901 (2000).

85. See Herma Hill Kay, *A Family Court: The California Proposal*, 56 CAL. L. REV. 1205, 1220 (1968) (describing how the matrimonial offense approach to divorce should be modified); see also Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966) (rejecting the idea that marriage fails because of certain specific acts).

86. See Grace Blumberg, *New Models of Marriage and Divorce*, in

people, men being the most vocal, who were often unhappy with the negotiations necessary to obtain a divorce.⁸⁷

A. *Subtle Repercussions*

The problem with no-fault divorce is that its repercussions are subtle, while not being hypocritical. It is subtle because the primary reaction has been a reduction in the commitment by adults to their family. Few people recognize that both parents frequently are making a major commitment to employment, not because of dire financial circumstances or because jobs are wonderful and fulfilling, but because they are both concerned about their circumstances if the marriage is dissolved. Although there is broad concern about the state of the American family, seldom is no-fault divorce recognized as a significant contributing factor.⁸⁸ Since no-fault divorce is effectively unilateral divorce in most states, there is no opportunity for hypocrisy. If someone wants out of a marriage, they do not have to rationalize why, they just file for divorce. Without recognition of the problem and a committed advocacy group, the reform of no-fault divorce has not progressed very far.

Regrettably, the debate so far represents the triumph of the obvious over the subtle. No-fault divorce is defended because it protects people who have made a miscalculation by marrying someone with whom they no longer want to live—the obvious.⁸⁹ There is concern for the unfortunate women

CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION 349, 352 (Kingsley Davis ed., 1985) (arguing that the primary beneficiaries of the no-fault divorce reform were lawyers and judges who had been forced to compromise professional ideals in the routine management of divorce cases).

87. The concern of divorced men can be illustrated with James A. Hayes, who was the Chairman of the California Assembly Judiciary Committee that drafted the California no-fault divorce act. He had negotiated a divorce settlement prior to the passage of the Act, which he eventually had modified based on the Act and the Assembly's Report that he wrote. See PARKMAN, *GOOD INTENTIONS*, *supra* note 2, at 80.

88. For a discussion of concerns about the family, see Elizabeth Gleick, *Should This Marriage Be Saved*, TIME, Feb. 27, 1995, at 48 (discussing the problems facing the family without referring to no-fault divorce).

89. See, e.g., STEPHANIE COONTZ, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES* 82 (1997) (explaining that making divorce more difficult only exacerbates bitterness and conflict). Others argue that no-fault divorce protects children from the mistakes of their parents, without recognizing the benefits to children from parents having incentives to make better decisions. See Robert M. Gordon, *The Limits of Limits on Divorce*,

who would be locked into loveless marriages if the grounds for divorce were either mutual consent or fault. However, what is ignored because it is a great deal subtler, are the gains from encouraging and rewarding those who have made or are attempting to make better decisions. They want to search diligently for the best spouse and then after marriage they want to make the decisions that increase their own and their family's gains from marriage. No-fault divorce does not encourage or reward success in this process. A number of disciplines use the term "moral hazard" to describe the tendency of a person who buys insurance to relax his efforts to prevent the occurrence of the risk that he has insured against.⁹⁰ In a similar manner, no-fault divorce is a form of insurance against bad decisions, and as a result it encourages bad decisions.⁹¹ Since no-fault divorce, in comparison to fault or mutual consent divorce, reduces the cost of poor judgment when choosing a spouse, less diligent searches for spouses would be expected and, as a consequence, poorer matches and more divorces would result.⁹² Rather than reducing the cost of poor decisions, this article argues that the preferred solution would be to encourage wiser decisions.

The debate about divorce reform also represents an unfortunate use of the English language. The problem with current divorce laws is not that they are necessarily no-fault, but rather that they permit unilateral divorce. In fact, it is interesting to consider whether the divorce reforms that we have observed over recent decades would have been as warmly received if the proposed legislation had been called unilateral divorce rather than no-fault divorce. If the true problem with the current laws is that they are recognized as permitting unilateral divorce, then the appropriate alternative to consider is mutual consent rather than fault divorce. Mutual consent divorce for established marriages has a great deal more to support it than does fault divorce.

107 YALE L.J. 1435 (1998).

90. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 108 (4th ed. 1992).

91. With no-fault divorce making it easy to limit the costs of poor judgment as to a choice of a spouse, it should be no surprise that adults are less likely to search diligently for a spouse often resulting in poor matches. See Bruno S. Frey & Reiner Eichenberger, *Marriage Paradoxes*, 9 RATIONALITY & SOC'Y 187 (1996).

92. See discussion *supra* Part II.B.2.

B. *The Constitutional Constraint on Divorce Reform*

Even if the grounds for divorce were changed in a few states in a manner that encouraged adults to make a long-term commitment to their marriage, the impact would be minor at best. Lurking ominously behind even public awareness of the problems created by no-fault divorce is federal law that holds that a marriage is a status⁹³ that gives the state in which either spouse is domiciled jurisdiction to grant a divorce, which usually will be honored in the other states due to the Full Faith and Credit Clause of the U.S. Constitution.⁹⁴ As a practical matter, so long as marriage is treated as a status, the federal system in the United States discourages states from having grounds for divorce that are substantially stricter than those in other states.⁹⁵ Although state statutes govern divorces, reform will be hard to accomplish on a state-by-state basis. Regulating the family is part of the police power and has historically been confined to the states under the Tenth Amendment of the U.S. Constitution.⁹⁶ The federal government has only made limited intrusions into family law.⁹⁷ For example, although

93. See *Williams v. North Carolina*, 317 U.S. 287 (1942). The references here to the problems associated with marriage being treated by the courts as a status really consist of three interrelated conflict of laws doctrines: the status exception, the domicile rule, and the choice-of-law corollary. The status exception compels respondents in divorce cases either to defend in states with which they have no meaningful connection or to forfeit their right to stay married. The domicile rule gives a state court jurisdiction only over people domiciled within the state. Last, the choice-of-law corollary authorizes states to apply their divorce laws to marriages with which they have no real connection. See Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813 (1995) (stating that the status exception should not be used to sanction divorce or child custody proceedings in states that lack personal jurisdiction over all interested parties); Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 WM. & MARY L. REV. 1 (1997) [hereinafter Wasserman, *Divorce*] (stating that neither the domicile rule nor its choice-of-law corollary further the policies for which they have been defended).

94. U.S. CONST. art. IV, § 1. For discussions of the jurisdictional issues in divorce, see HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 413 (2d ed. 1974); GREGORY ET AL., *supra* note 6, at 189.

95. See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 190 (1989) (describing how it is common for a state to grant a divorce when it does not have jurisdiction over the couple's property or children).

96. See, e.g., *Simms v. Simms*, 175 U.S. 162, 167 (1899) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State, and not the laws of the United States.").

97. See Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 U.C.L.A. L. REV. 1297 (1998) (challenging both the existence of an exclusively

divorce law is a state matter, the U.S. Supreme Court has delineated some special rules for divorce jurisdiction, primarily to specify which divorce decrees must be afforded full faith and credit.

When most states had similar fault grounds for divorce, seldom was it advantageous for a spouse to move to another state to obtain a divorce. Moreover, the U.S. Supreme Court was unwilling to give full faith and credit to a divorce obtained by a spouse in a proceeding in which the other spouse, who was domiciled in another state, did not participate. In 1905, the Supreme Court first addressed the issue of migratory divorce in *Haddock v. Haddock*.⁹⁸ In that case, a couple was married in New York in 1868 and never lived together.⁹⁹ Eventually, the husband moved to Connecticut.¹⁰⁰ In 1881, he obtained a divorce in that state based on constructive, but not actual, service of process on his wife, who continued to live in New York and who never appeared in the Connecticut action.¹⁰¹ In 1899, the wife sued for divorce in New York and obtained personal service on her husband in that state.¹⁰² In his defense, the husband pleaded the Connecticut judgment.¹⁰³ The U.S. Supreme Court held that one party to a marriage domiciled within a state did not give the court of that state jurisdiction to render a decree of divorce enforceable in all the other states by virtue of the Full Faith and Credit Clause of the Federal Constitution against a nonresident who did not appear and was only constructively serviced with notice of the pendency of the action.¹⁰⁴ The Court emphasized that the divorce suit was not a proceeding *in rem* justifying the state court to enter a decree as to the *res*, or the marriage relationship, entitled to be enforced outside the territorial jurisdiction of the state court.¹⁰⁵ The Court acknowledged that the states had an important role in regulating marriage and the decisions in one state can

local tradition in family law and the uncritical use of historical claims in federalism discourse).

98. 201 U.S. 562 (1905).

99. *See id.* at 564.

100. *See id.* at 565.

101. *See id.*

102. *See id.* at 564.

103. *See id.* at 565.

104. *See Haddock*, 201 U.S. at 580, 606.

105. *See id.* at 576.

conflict with those in other states.¹⁰⁶ The Court concluded,

For if it be that one government in virtue of its authority over marriage may dissolve that tie as to citizens of another government, other governments would have a similar power, and hence the right of every government as to its own citizens might be rendered nugatory by the exercise of the power which every other government possessed.¹⁰⁷

The trend toward migratory divorces continued, especially as some states discovered that easy divorces and short-term residency requirements could attract new businesses. This trend was particularly apparent in Nevada. In 1942, the U.S. Supreme Court reconsidered the credit to be given migratory divorces, and it overruled *Haddock* in *Williams v. North Carolina*¹⁰⁸ ("*Williams I*"). The Court held that the domicile of one or both spouses is sufficient to confer divorce jurisdiction to a state court, stating, "each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there."¹⁰⁹ In this case, Mr. Williams and Mrs. Hendrix were initially married in North Carolina and lived with their spouses there for more than twenty years.¹¹⁰ In May 1940, they went to Las Vegas, Nevada, lived there for the statutory minimum period of six weeks to establish a domicile in the state, and then filed for a divorce from their spouses.¹¹¹ Their spouses, who continued to live in North Carolina, did not enter an appearance nor were they served with process in Nevada. Publication of the summons in a Las Vegas newspaper and mailing a copy of the summons and complaint to the last post office address of Mrs. Hendrix's husband served process upon him.¹¹² A North Carolina sheriff served Mr. Williams's wife, obviously in North Carolina, by delivering a copy of the summons and complaint to her.¹¹³ She

106. *See id.* at 573.

107. *Id.*

108. 317 U.S. 287 (1942).

109. *Id.* at 299.

110. *See id.* at 298.

111. *See id.*

112. *See id.*

113. *See id.* at 290.

also did not appear at the proceeding in Nevada.¹¹⁴ Mr. Williams was granted a divorce on August 26, 1940, on the ground of extreme cruelty, and Mrs. Hendrix received hers on October 4, 1940, on the same ground plus willful neglect.¹¹⁵ The couple married on the same day that Mrs. Hendrix received her divorce.¹¹⁶ As husband and wife they returned to North Carolina where they were eventually prosecuted and convicted of bigamous cohabitation.¹¹⁷

In reversing this conviction, the U.S. Supreme Court created a somewhat unique role for divorce proceedings. While acknowledging that they are not *in rem*, it also concluded that it is not a mere *in personam* action either because of the states' interest in the marriage relationship.¹¹⁸ It held "that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent."¹¹⁹ It recognized the concern expressed in *Haddock* that due to the Full Faith and Credit Clause, divorces obtained without personal service would substantially dilute the sovereignty of other states.¹²⁰ The Court noted that it did not address the issue of the power of North Carolina to refuse full faith and credit to the Nevada divorce if, contrary to the findings of the Nevada court, North Carolina found that no bona fide domicile was acquired in Nevada.¹²¹

This last issue was addressed by the U.S. Supreme Court in *Williams v. North Carolina*¹²² ("*Williams II*"), which followed when the Williams were convicted again of bigamy in North Carolina when a North Carolina court rejected Nevada's determination that the Williams established valid domicile in Nevada and, therefore, their divorces were not valid in North Carolina.¹²³ The Court emphasized the

114. See *Williams*, 317 U.S. at 290.

115. See *id.*

116. See *id.*

117. See *id.* at 291.

118. See *id.* at 297.

119. *Id.* at 298.

120. See *Williams*, 317 U.S. at 302.

121. See *id.*

122. 325 U.S. 226 (1945).

123. See *id.* at 227.

important role of the states in the regulation of marriage by stating:

Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.¹²⁴

Based on this concern, the standard for what constitutes an individual's domicile assumes a central role. The North Carolina jury was instructed that a domicile was the place where a person "has voluntarily fixed his abode . . . not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time."¹²⁵ North Carolina was not required to yield its policy toward the conditions necessary to establish a valid domicile just because Nevada found that petitioners were domiciled there.¹²⁶ North Carolina was entitled to find that Mr. Williams and Mrs. Hendrix did not acquire domiciles there, and that the court there was without power to liberate the petitioners from the laws of North Carolina.¹²⁷ Not having established a domicile in Nevada, the Court held that Mr. Williams and Mrs. Hendrix were still domiciled in North Carolina, where they continued to be married to others, thus making their cohabitation bigamous.¹²⁸

Although there is concern with honoring divorce decrees in jurisdictions other than the one in which they are granted, the courts have continued to require an actual domicile in a state as a condition necessary for a valid decree based on due process. For example, in 1953 Mr. and Mrs. Alton lived in Connecticut, which had the traditional fault grounds for divorce. Mrs. Alton went to the Virgin Islands, where incompatibility was a ground for divorce, and six weeks residency was prima facie evidence of domicile.¹²⁹ Her husband entered an appearance and waived service of

124. *Id.* at 230.

125. *Id.* at 236.

126. *See id.* at 239.

127. *See id.*

128. *See Williams*, 325 U.S. at 239.

129. *See* Bill No. 55, 17th Leg. Assembly of the Virgin Islands, passed May 19, 1953, approved May 29, 1953, amending Sec. 9 of the Divorce Law of 1944.

summons.¹³⁰ The trial court judge asked for further proof of domicile, which was not provided, so he denied the couple their divorce.¹³¹ On appeal, in *Alton v. Alton*,¹³² the United States Court of Appeals for the Third Circuit held invalid under the Due Process Clause of the U.S. Constitution¹³³ a statute determining domicile based on a period of residency without additional requirements that address the intent of the parties.¹³⁴ Because marriage is a status, domicile continued to be the key issue.¹³⁵ The court concluded that “[a]n attempt by another jurisdiction to affect the relation of a foreign domiciliary is unconstitutional even though both parties are in court and neither one raises the question.”¹³⁶ Moreover, “we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere.”¹³⁷

While the decisions in *Williams II* and *Alton* might lead one to conclude that migratory divorces would become much less attractive, that did not occur. As illustrated in *Cooper v. Cooper*,¹³⁸ state courts tended to apply a very generous standard toward the acts and duration necessary for establishing domicile, thereby allowing migratory divorces to flourish. The Coopers were married in 1935 in Iowa and continued to live in that state.¹³⁹ In 1958, Hazel Cooper obtained an Iowa decree of separate maintenance.¹⁴⁰ Eventually, in October 1969, her husband, Dr. Raymond Cooper, moved to Reno, Nevada, and filed for divorce there in December 1969.¹⁴¹ Hazel was personally served in Iowa.¹⁴² At the end of December, she was adjudged to be in default for not having made an appearance, and the divorce was granted

130. See *Alton v. Alton*, 207 F.2d 667, 668 (3d Cir. 1953), *vacated as moot*, 347 U.S. 610 (1954) (per curiam).

131. See *id.*

132. See *id.*

133. U.S. CONST. art. V.

134. See Wasserman, *Divorce*, *supra* note 93 (limit the effect of *Williams II* by holding that due process requires domicile only in ex parte cases).

135. See *Alton*, 207 F.2d at 673.

136. *Id.* at 677.

137. *Id.*

138. 217 N.W.2d 584 (Iowa 1974).

139. See *id.* at 585.

140. See *id.*

141. See *id.*

142. See *id.*

to her husband.¹⁴³ In January 1970, Dr. Cooper returned to Iowa and married Mary in February.¹⁴⁴ In 1971, Dr. Cooper died, and the following year Hazel commenced an action to set aside the Nevada divorce.¹⁴⁵

To the casual observer the facts do not appear to be substantially different from those of Mr. Williams, except that Dr. Cooper returned to Iowa for his subsequent marriage. Dr. Cooper made an effort to appear to be establishing a domicile in Nevada. He attempted to secure a license to practice anesthesiology, but was only granted one as a general practitioner and he found employment in that field.¹⁴⁶ Moreover, he established a checking account and obtained a Nevada driver's license.¹⁴⁷ However, balanced against these actions, he never purchased property, he lived in an apartment during his stay and he never obtained Nevada automobile license plates.¹⁴⁸ He maintained his office in Iowa primarily to collect bills, but his future wife did administer shots to some patients when directed to by other doctors.¹⁴⁹ When coupled with the short duration of his stay in Nevada, there was no compelling case that Dr. Cooper had an intention of making Nevada his home either permanently or for an indefinite or unlimited length of time, which *Williams II* appears to require for the establishment of a domicile.¹⁵⁰ The Iowa court noted that a party seeking to collaterally invalidate a foreign divorce decree for lack of domiciliary jurisdiction assumed a heavy burden.¹⁵¹ It then placed a burden on Hazel Cooper to prove by clear, satisfactory, and convincing evidence that Dr. Cooper did not have the requisite intent to establish a domicile in Nevada at the time that he moved there.¹⁵² With some concern for the position in which Mary Cooper would find herself if the divorce was invalid in Iowa,¹⁵³ the Iowa court held that Hazel Cooper failed to negate the presumption of jurisdiction that

143. *See id.*

144. *See Cooper*, 217 N.W.2d at 585.

145. *See id.*

146. *See id.*

147. *See id.*

148. *See id.* at 586.

149. *See id.*

150. *See Cooper*, 217 N.W.2d at 587.

151. *See id.*

152. *See id.*

153. *See id.* at 586.

attends the contested divorce decree.¹⁵⁴

With the introduction of no-fault divorce making the divorce laws in most states similar, the need for migratory divorces has been reduced, along with any litigation as to whether divorces granted to a spouse in one state should be honored in other states. Still, the decisions in *Williams I* and *II* and how they have been interpreted in cases like *Cooper* present major problems for divorce reform. Migratory divorce was perceived to be a problem when most states had strict divorce laws, but a few had lenient laws. One can imagine the problems proponents of stricter divorce laws have if most states have lenient laws. So long as marriage is treated as a status, this problem is almost insurmountable.

C. Full Faith and Credit

Whether marriage is a contract or a status is crucial,¹⁵⁵ because of the Full Faith and Credit Clause of Article IV of

154. See *id.* at 589.

155. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter RESTATEMENT] (illustrating the critical distinction between these concepts by treating status and contract very differently). Divorce is covered under "Jurisdiction Over Status" with the RESTATEMENT stating: "State of Domicile of One Spouse[:] A state has power to exercise judicial jurisdiction to dissolve the marriage of spouses one of whom is domiciled in the state." *Id.* § 71. The situation is very different if the marriage is treated as a contract and the couple, either by choice or statute, has chosen to be governed by the laws of a particular state. RESTATEMENT § 187 says the following regarding contracts:

Law of the State Chosen by the Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

Id. § 187.

the U.S. Constitution, which states that "the Congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof,"¹⁵⁶ thereby requiring states to recognize the public acts, records, and judicial proceedings of other states. In 1790, Congress passed the Full Faith and Credit Act, which provided methods to authenticate acts, records, and judicial proceedings.¹⁵⁷ That was followed in 1804 with an amendment to the Act to assure authentication of non-judicial proceedings.¹⁵⁸ More recently, Congress has acted under this Clause to emphasize specific types of state acts that should be honored in other states. For example, in 1980, Congress passed the Parental Kidnapping Prevention Act,¹⁵⁹ which provides that child custody rulings that comply with the Act in one state shall be honored by all other states. This was followed in 1994 by similar legislation, the Full Faith and Credit for Child Support Orders Act,¹⁶⁰ which assures that child support orders entered in one state will be honored by sister states, and the Safe Homes for Women Act,¹⁶¹ which provides that any protection order issued by a state will be accorded full faith and credit in sister states.

Recently, for the first time, Congress has passed legislation instructing states that they do not have to honor the legal actions of other states. This occurred with the Defense of Marriage Act ("DOMA")¹⁶² which has two provisions. The first provision defines "marriage" and "spouse" under federal law to include only partners of the opposite sex.¹⁶³ The exclusion of same-sex marriages from federal law prevents those partners from obtaining numerous federal benefits. The second provision of DOMA provides that a state "shall not be required to recognize same-sex marriages

156. U.S. CONST. art. IV, § 1. The first sentence of this section provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."

157. See Act of May 26, 1790, ch. 11, 1 Stat. 122 (codified as amended at 28 U.S.C. § 1738 (1994)).

158. See Act of Mar. 27, 1804, ch. 56, 2 Stat. 298 (codified as amended at 28 U.S.C. § 1739 (1994)).

159. 28 U.S.C. § 1738A (1994).

160. 28 U.S.C. § 1738B (1994).

161. 18 U.S.C. § 2265 (1994).

162. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. § 7 (1997), 28 U.S.C. § 1738C (1997)).

163. See 1 U.S.C. § 7 (1997).

performed in other states.”¹⁶⁴ The conclusion of most legal scholars is that the DOMA will probably be declared unconstitutional under the Full Faith and Credit Clause if it is challenged in the courts.¹⁶⁵ Others have argued that it is unconstitutional under the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution.¹⁶⁶

While the first sentence of the Full Faith and Credit Clause requires states to give full faith and credit to each others’ judgments, the second sentence allows Congress to prescribe the effect states must give other states’ judgments or acts. The Supreme Court has not decided the issue of whether Congress has the power to create exceptions to the Full Faith and Credit Clause by using the effects clause.¹⁶⁷ The effects clause has been interpreted as only endowing Congress with the power to enact supplementary and enforcing legislation.¹⁶⁸

In sum, the Full Faith and Credit Clause prohibits Congress from passing legislation that limits the effects of a state’s divorce decrees in other states. Therefore, so long as marriage is treated as a status people cannot possibly know the grounds for divorce that will be applied to their marriage if their spouse ever wants to dissolve it, and a decree granted in another state will probably have to be honored in all other states.

V. OVERCOMING CONSTITUTIONAL CONSTRAINTS ON DIVORCE REFORM

So long as marriage is treated as a status and many states have no-fault divorce laws, it makes it virtually impossible for the other states to make marriage more

164. See 28 U.S.C. § 1738C (1997).

165. See Heather Hamilton, Comment, *The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943 (1998) (explaining that traditionally Congress’s power under Article IV has only been exercised in an affirmative manner); James M. Patten, Comment, *The Defense of Marriage Act: How Congress Said “No” to Full Faith and Credit and the Constitution*, 38 SANTA CLARA L. REV. 939 (1998) (arguing that the DOMA violates the Framers’ intent).

166. See Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263 (1997) (having been written in the wake of *Romer v. Evans*, 517 U.S. 620 (1996)).

167. See Patten, *supra* note 165, at 949.

168. See Edward Corwin, *The Full Faith and Credit Clause*, 81 U. PA. L. REV. 371, 373 (1933).

durable by making divorce more difficult. Not knowing where a couple will eventually reside will force many spouses to protect themselves against a no-fault divorce even though they either were married, or are living, in a state in which divorce is more difficult. Frequently spouses establish residency in a state other than the one in which they were married. A divorce obtained in a no-fault divorce state has to be given full faith and credit in all other states, including the one in which the other spouse lives or the one in which they were married. Domicile is not difficult to establish, either due to a legitimate move or for the purpose of pursuing a divorce. Most states impose a durational requirement ranging from six weeks to one year to meet the domicile requirement to file for divorce.¹⁶⁹ The most common durational requirement for divorce is six months.¹⁷⁰

Although long delayed, there has been some movement toward reform as noted above. Louisiana and Arizona passed covenant marriage laws and Iowa requires parents to take classes on how to protect their children from the pain of divorce.¹⁷¹ The primary problem with covenant marriage is the agreement entered into in one state is not binding on the spouses if either spouse establishes a domicile in another state.¹⁷² The incentive for couples to make a long-term commitment to their marriage is still severely restricted because people do not know where they will live in the future.

A. *A Framework for Divorce Reform*

The first important step toward an effective reform of divorce laws is to recognize that a marriage agreement is a contract. This can be accomplished either judicially or legislatively. The U.S. Supreme Court could overrule or modify its decision in *Williams I* to recognize that marriage is

169. See GREGORY ET AL., *supra* note 6, at 193.

170. The Alaskan legislature, for example, removed the residency requirement for divorce in 1975, so their divorce statute contains no residency requirement for a divorce uncomplicated by alimony, property division, or child custody. See *Perito v. Perito*, 756 P.2d 895 (Alaska 1988).

171. See *supra* notes 70-85.

172. Some authors have questioned the constitutionality of covenant marriage laws based on the right to marry. See Melissa Lawton, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471 (1998) (concluding that it is constitutional, but ineffective).

a contract rather than a status.¹⁷³ Alternatively, Congress could enact legislation establishing that as fact. The enforcement of contracts, especially if they include a choice of law provision, is usually based on the law chosen by the parties and otherwise is determined by an interest analysis.¹⁷⁴ Then full faith and credit would have to be given to a judgment based on the contract agreed to at marriage rather than to a divorce decree obtained unilaterally in a state in which the other spouse may never have lived. More than just accurately reflecting the couple's situation, treating a marriage as based on a contract would correct the problems that have been created by treating marriage as a status. Uncertainty about the conditions associated with dissolution of the marriage will be reduced. This is because the agreement entered into at the time of the marriage subject to any mutually agreed upon modifications, will continue throughout the duration of the marriage.¹⁷⁵

1. *Marriage as a Contract*

While the term "contract" is sometimes associated with marriage, activities before and during marriage are traditionally not covered by contract law. Marriage is created by an agreement similar to a contract, but once solemnized it becomes a status controlled more by law than the preferences of the parties.¹⁷⁶ Marriage also has been described as a civil contract to subordinate the role of religious denominations in its formation.¹⁷⁷ Nevertheless, the agreement by two people to marry includes all the elements of a contract: offer, acceptance, and consideration. The offer and acceptance are obvious. Both the law and marriage vows include obligations for both parties that meet the standards for consideration.

Marriage also involves problems similar to those

173. The U.S. Supreme Court could reconcile interstate judgements law in divorce cases to conform to the law in other contexts, which would permit states to reject the status exception, the domicile rule, and its choice-of-law corollary. See Wasserman, *Divorce*, *supra* note 93, at 56. Alternatively, uniform legislation could be enacted, or Congress could enact a federal statute requiring states to recognize the divorce decrees of other states. See *id.* at 57.

174. See RESTATEMENT, *supra* note 155, at §§ 186-188.

175. While their agreement could call for damages as remedy for a breach, it is argued later that the more appropriate remedy for breach of a marital contract should be specific performance.

176. See *Maynard v. Hill*, 125 U.S. 190 (1888).

177. See CLARK, *supra* note 94, at 31.

addressed by contract law. Contract law traditionally has served an important role in limiting two dangers when exchanges occur over time: opportunism and unforeseen contingencies.¹⁷⁸ Fundamental functions of contract law are to deter people from behaving opportunistically to encourage long-term investments, and to reduce the need for people to take costly steps to protect themselves. The common law, and more recently statutes such as the Uniform Commercial Code, deal with unforeseen contingencies by prescribing the elements of a commercial contract unless modified by the parties. These types of problems also occur during marriage. Opportunism can occur when a husband attempts to divorce a wife after she has given him the "best years of her life." The laws specifying the spouses' obligations at divorce deal with unforeseen contingencies.

The creation of the marriage agreement is similar to the requirements of a commercial contract, since the agreement must be voluntary, and it can be annulled if the agreement of one party was obtained by fraud or force. The parties must be competent based on age and mental capacity to make a socially acceptable choice. Marriage is often viewed as a status rather than a contract because of the government's role in establishing the terms of the marriage agreement.¹⁷⁹ However, governments play a major role in the contracting parties' relationships and many other subjects of contracts. Child labor laws, for example, limit the parties who can enter labor contracts, and drug laws limit the subject of contracts. In addition, there are numerous governmental environmental, health, and safety regulations around which parties cannot contract.

178. See POSNER, *supra* note 90, at 89.

179. This was clearly stated in the following passage from *Maynard*:

Marriage is something more than a mere contract, though founded upon the agreement of the parties. When once formed, a relation is created between the parties that they cannot change; and the rights and obligations of which depend not upon their agreement, but upon the law, statutory or common. It is an institution of society, regulated and controlled by public authority. Legislation, therefore, affecting this institution and annulling the relation between the parties is not within the prohibition of the Constitution of the United States against the impairment of contracts by state legislation.

Maynard, 125 U.S. at 198; see also GREGORY ET AL., *supra* note 6, at 25.

2. *Breach of a Contract*

Having argued that a marriage agreement is clearly similar to other contracts, the next issue is the preferred outcome if one party wants to terminate a contract. Most contracts are terminable at will subject to an award of damages, but in a minority of cases the parties have a right to specific performance of their agreement.¹⁸⁰ Similarly, two outcomes are possible when a spouse wanted to dissolve a marriage: liquidated damages and specific performance. With no-fault divorce, the divorcing spouse was confronted with liquidated damages consisting of the financial and custodial arrangements required by law or specified by the parties in pre- or post-marital contracts. Meanwhile, with fault divorce, innocent spouses had a right to specific performance of the agreement to remain married during the joint lives of the parties. The desirability of damages or specific performance if a party wants to terminate a contract varies with the nature of the contract.

a. *Damages*

Damages are the usual remedy if a contract is breached and are based on compensating the nonbreaching party for any loss.¹⁸¹ It is not the policy of the law to compel the performance of contracts, but only to require each party to choose between performing and compensating the other party for any injury resulting from non-performance.¹⁸² A party to a contract who is injured by its breach is entitled to compensation for the injury sustained and is entitled to be placed, to the extent possible by money, in the same financial position he would have been in if the contract had been performed.¹⁸³ The usual standards for damages are the expected gain or the loss incurred due to reliance.

180. Richard Posner identifies seven remedies for the breach of a contract: the promisee's reliance loss, the expectation loss, liquidated damages, consequential damages, restitution, specific performance, and a money penalty specified in the contract or other punitive damages. See POSNER, *supra* note 90, at 117.

181. See CHARLES L. KNAPP, *COMMERCIAL DAMAGES* (Charles L. Knapp ed., 1998), for a more detailed discussion of damages.

182. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897).

183. See MARTIN WEINSTEIN, *SUMMARY OF AMERICAN LAW* 190 (1988).

b. *Specific Performance*

Specific performance is only ordered when damages are not an adequate remedy.¹⁸⁴ This occurs when damages are difficult or impossible to measure because of the lack of good substitutes for the performance promised by the breaching party. It requires the party who breaches the contract to perform or face contempt of court. Still, it is a right rather than a requirement, because the party who has a right to specific performance can waive that right. The usual incentive for waiving the right is compensation. The most common use of specific performance occurs when the subject of the contract is unique. A large percent of the cases involving specific performance affect real estate transactions. However, it also can be used in suits for personal property when the property is unique. While personal services are often unique, the courts are less willing to apply specific performance to contracts for personal services. When applied to personal service contracts, specific performance is usually in the form of injunction to stop the person from providing the service elsewhere rather than requiring the performance of the contracted service.

c. *Welfare Enhancing Remedies*

Contract remedies tend to create incentives for parties to make decisions that increase social welfare.¹⁸⁵ When two parties contract, it is reasonable to assume that both expect to be better off due to the contracted transaction. Contracts that involve future activities can be subject to unforeseen changes. The potential for damages confronts the parties with the option of either performing under the contract or paying damages. If the seller's costs rise so that the buyer can acquire the contracted goods from another source at a lower price than the seller's costs, society is better off if the buyer buys from the alternate source. The law requires the seller to compensate the buyer for the difference between the contract price and the price actually paid. Meanwhile, the supplier has avoided incurring the higher costs of production.

The use of specific performance as the remedy for the

184. *See id.* at 205.

185. *See* POSNER, *supra* note 90, at 118 (stating that social welfare is increased by inducing parties to consider the costs and benefits of their actions).

breach of a contract for unique goods is also explained as being based on a desire for welfare enhancing outcomes.¹⁸⁶ When a breach is worth more to the breaching party than performance to the victim, specific performance creates incentives for the parties to reach a settlement that leaves them better off. Specific performance forces the parties to identify their costs and benefits of non-performance. The cost associated with nonperformance when the good is unique is the value of the good to the buyer and the expense of finding an alternative. This cost usually cannot be estimated by anyone other than the parties, and they have incentives to make that calculation to determine if there is a basis for a negotiated settlement. Specific performance does have the disadvantage that it can increase the cost of settlement negotiations. These negotiations are a deadweight loss since the cost incurred by one party does not confer a benefit on the other.

The choice of a contract remedy often turns on a trade-off between the potential cost of "excessive breaches" when damages are awarded and of "excessive performance" when specific performance is awarded.¹⁸⁷ Because of the legal requirement that damages must be proven and not speculative, the damages due to a breach can be underestimated. With damages, the result can be breaches when the benefits of the breach do not exceed the costs, i.e., excessive breaches. Alternatively, with specific performance one party can demand the performance of the contract either due to spite or an incorrect estimate of the outcome of negotiations when the net benefits are negative, i.e., excessive performance. With either remedy, the parties can avoid the legal outcomes by negotiating their settlements.

In summary, the preferred rules will be the ones that are more likely to produce welfare enhancing outcomes, with damages preferred for normal transactions and specific performance when the subject of a contract is unique. Since the costs of dissolving a marriage tends to be unique for each

186. See Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351 (1978) (stating that specific performance is based on unique and non-unique goods); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L.J. 271 (1979) (arguing for a broader application of specific performance); William Bishop, *The Choice of Remedy for Breach of Contract*, 14 J. LEGAL STUD. 299 (1985) (arguing that default rules should be based on transaction costs).

187. See Bishop, *supra* note 186, at 300.

marriage, specific performance of each spouse's right to the continuation of the marriage has strong appeal, especially for established marriages. Because specific performance is a right rather than an outcome, the parties have incentives to negotiate a different outcome if the benefits of dissolution exceed the costs.

B. *Specific Performance and the Marriage Contract*

Specific performance as the remedy for breach of a marriage contract is particularly attractive because the costs of divorce can be large and indeterminate, especially by anyone other than the spouses. First, consider the effect of marriage on the spouses' income earning capacities, their human capital.¹⁸⁸ At marriage, individuals have already acquired some separate property. For many people, their most valuable asset is their human capital. The value of this human capital is the discounted value of earnings that reasonably can be expected in the future net of any future investments. During marriage, human capital can increase or decrease. If it increases, marital property is created. Alternatively, if a spouse's human capital decreases during marriage due to decisions by the spouses, that loss is similar to a contribution of separate property to the marriage. Often a couple decides that the family will benefit from one spouse limiting her career to assume a primary role as a housewife and mother. At divorce, this person's human capital is worth less than if she had not limited her career.¹⁸⁹ However, it is difficult to determine by how much, because identifying the career that someone would have had, if they did not have it is mere speculation. The couple is probably in a better position to accurately gauge the magnitude of this sacrifice than any judge or jury would be.

The incorporation of human capital into the property considered at divorce would still not recognize other subjective costs due to divorce. While the knowledge that the divorcing spouse no longer wants to live with the other spouse might reduce that person's attraction to the divorcing spouse,

188. See Parkman, *supra* note 3, at 63.

189. The decision for the wife to sacrifice her human capital for the benefit of the family can be viewed as resulting in an implied contract of indemnification for which compensation is appropriate if the marriage is dissolved. The divorce laws do not provide for this remedy in any systematic way.

there is still a potential loss to that person due to the desire for a continuing relationship with that person. Another important source of costs for the non-divorcing spouse are those associated with search.¹⁹⁰ Both parties incurred search costs to identify each other initially. One spouse then decides that he or she has already found a person that he or she prefers to the current spouse or is willing to incur additional costs searching for a better spouse or situation. The other spouse involuntarily must incur the cost of searching for another mate or living situation. Often, this cost can be very high. Finally, a major cost can occur because a divorce may be harmful to the couple's children.¹⁹¹ When two parents live separately, instead of together as an intact family, the quality of life can deteriorate for the children of those parents. If divorce were more difficult to obtain, some parents probably could make their marriage work and thereby provide benefits to their children. The parent, usually the mother, who expects custody of the children after divorce is more likely to recognize the costs that the children will incur because they will be less happy when they only live with her.

The costs resulting from loss of companionship, time spent searching for a better spouse or situation, and the harm to children are difficult to calculate and, therefore, are not included in awards at divorce. As a result, the divorce awards tend to underestimate the costs of divorce. When the costs of divorce are underestimated, the probability increases that a divorce will occur when the net benefits are negative. These divorces reduce social welfare.

C. *The Marriage Contract*

The marriage contract proposed in this article begins with the idea that for established marriages, the spouses should have a right to specific performance of their agreement that the marriage will continue for the duration of their lives. Early in the marriage, no-fault divorce would still be permitted, while extreme behavior would be the basis for a

190. See BECKER, *supra* note 9, at 328 (arguing that marriage is the result of a search process during which the parties weigh the benefits and the costs of additional search).

191. See Gary S. Becker & Kevin M. Murphy, *The Family and the State*, 31 J.L. & ECON. 1 (1988) (stating that little is known about the effect of divorce on children). Generally, children prefer an unhappy marriage to a divorce. See WALLERSTEIN & BLAKELEE, *supra* note 4, at 11.

divorce based on fault.

A very simple statute is proposed here. It prescribes only the default grounds and financial arrangements at divorce, while leaving couples with the opportunity to modify their contract either before or during marriage. The statute would also state that the couple is entering into a contract and if a divorce action is ever initiated, the couple has chosen the laws of the state of marriage to govern the aspects of divorce covered by the contract. States have traditionally been reluctant to become involved in the normal interactions within a family, and that is a position that is supported here.¹⁹² At the same time, the states' interest in marriage itself has been held to be so large that the states have had the right to control the marital status of spouses domiciled within the state.¹⁹³ This state preemption has become increasingly questionable. The imposition by essentially all states of a no-fault divorce agreement on all spouses has been a disaster in many cases, and social welfare would be improved by giving adults more freedom to create their own marriage contracts, while maintaining state control where it is important. The state's role in protecting children is obvious, so it is appropriate for states to have statutes that establish rules for protecting children during and after a marriage. It is important to recognize that the conditions accompanying the dissolution of marriage have far greater affect on the quality of the marriage than has been commonly accepted. These conditions strongly influence the commitment that the

192. Traditionally, the American family has been viewed as the cornerstone of our society with the result that the state legislatures and courts have been reluctant to intervene in family affairs. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 205 (1888). Still, if a legislature wanted to intervene, its powers were viewed as broad until 1965. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court held that the Connecticut statute forbidding the use of contraceptives was unconstitutional as applied to married couples. Some authors have described marriage as a long-term relational contract in which the parties contemplate a long-term commitment to pursue shared goals without providing specific standards for how those goals are to be reached. The terms for dissolving the relationship are important in establishing the incentives for cooperation. See Elizabeth S. Scott & Robert E. Scott, *Marriage As Relational Contract*, 84 VA. L. REV. 1225 (1998).

193. See *Williams v. North Carolina (Williams D)*, 317 U.S. 287, 289 (1942). Of course, the state's adoption of no-fault divorce laws can be interpreted as the state's reversing their paternalistic position on marriage, thereby acknowledging the right of couples to have a greater control over their own affairs. See Haas, *supra* note 11, at 910.

spouses make to their marriage.¹⁹⁴

A basic marriage contract consisting of a combination of no-fault, mutual consent and fault grounds for divorce will provide a major improvement in the incentives facing adults. At the same time, it is important to recognize the alternatives facing adults. Incentives are central to the decisions people make. The most desirable incentives result from people being confronted with all the costs and benefits of their alternatives, since many social scientists assume that people choose alternatives that they perceive as having the largest net benefits.¹⁹⁵ A full consideration of the relevant costs and benefits would contemplate not only those of the person making the decision, but also those of the other affected people. The preferred improvement in social welfare occurs when people choose alternatives with the largest net benefits. Because the current, unilateral divorce laws permit people to ignore many of the costs of divorce, people have incentives to make less desirable decisions during, and potentially, at the end of marriage. The combination of divorce grounds recommended in this article forces people to consider a fuller range of costs and benefits associated with marriage and divorce, thereby, creating incentives for them to make decisions that are more likely to increase their welfare and that of those around them.

The contract proposed here is not appropriate for all adults. The alternatives facing adults are much more varied than those in the past, and as a consequence, a wider variety of relationships are appropriate. A marriage contract continues to be the appropriate choice for people who anticipate making sacrifices based on the expectation that a

194. Since the state controls the grounds for divorce, people who do not like the legally prescribed ease of, and arrangements at, divorce have been forced to turn to premarital agreements. These agreements traditionally were difficult to enforce, but that situation has improved in the states that have passed the UNIFORM PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1987) [hereinafter UPAA]. See Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998). Still, premarital agreements are not attractive for most couples because they do not have a clear idea of the range of potential future events and the conditions that they want to attach to these events. See Gregory S. Alexander, *The New Marriage Contract and the Limits of Private Ordering*, 73 IND. L.J. 503, 507 (1998) (concluding that premarital agreements can lead to more egalitarian marriages).

195. See FUCHS, *supra* note 21.

relationship is going to be long term. For others it may be attractive as a form of commitment; while for some people it may not be attractive at all. We should recognize that this is not a contract that is appropriate for all relationships. It is meant for the large number of people who want a long-term relationship and who feel their relationship would be improved by having incentives to make sacrifices that benefit their family or evidence of a commitment.

The default financial arrangements at divorce, which traditionally consisted of a property settlement, alimony, and child support, should be based on "debts" incurred during marriage.¹⁹⁶ Choices during marriage result in obligations that are best treated as debts. Child support can be viewed as a debt to the child that the parents incur when they elect to become parents. This component of the financial arrangements should be subjected to close scrutiny by the state, for example, by establishing minimum levels. Because the reasons for and level of alimony are very ambiguous,¹⁹⁷ the primary emphasis in the financial arrangements between the spouses at divorce should be on the property settlement. The property settlement should be based on partnership principles with the items being considered expanded to include the spouse's income earning capacities (their human capital). Couples can acquire marital property, such as mutual fund shares, by saving. Saving is the sacrifice of current consumption that should be treated as a debt of the couple to the spouses as individuals if the marriage is dissolved. Other acts such as limiting a career or providing uncompensated educational support create a debt between the spouses that should be recognized at divorce. When the couple's assets, such as their human capital, cannot easily be sold, the property distribution should be based on periodic payments.

1. *Mutual Consent Divorce*

Mutual consent would be the primary ground for divorce.

196. This topic is discussed in more detail in Parkman, *supra* note 3, at 56.

197. See Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989); CLARK, *supra* note 94, at 620; HARRY D. KRAUSE, FAMILY LAW 404 (3d ed. 1995); AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 5 (Proposed Final Draft Part I, Feb. 14, 1997).

Since mutual consent gives either spouse the right to the continuation of the marriage, it is similar to specific performance of other types of contracts. Traditionally, the understanding has been that when a couple marries they were entering into an agreement that is expected to last for the lifetime of at least one of the spouses.¹⁹⁸ The agreement proposed here is for those who continue to have that expectation. Mutual agreement of the spouses as the basis for the dissolution of established marriages is attractive because many of the costs of dissolution are difficult for persons other than the spouses to estimate, and even the spouses may find the process challenging. The opponents of fault divorce, and more recently those who support no-fault divorce, do not appear to have given serious consideration to mutual consent divorce.¹⁹⁹ However, mutual consent is more likely to produce welfare enhancing outcomes than either fault or no-fault grounds.

Among those willing to consider a change, the normal alternative to no-fault divorce is fault divorce rather than mutual consent divorce.²⁰⁰ If we recognize that the true problem with the current laws is that they permit unilateral divorce, then the appropriate alternative to consider is mutual consent divorce rather than fault divorce. Knowing that the ground for divorce for established marriages is mutual consent, spouses would be encouraged to make sacrifices that benefit their marriage. However, since not all established marriages are successful, and if a couple is questioning the durability of their marriage, mutual consent

198. For example, the wedding vows in West Virginia include the statement for both the bride and the groom, "to have and to hold, from this day forward, for better, for worse, for richer, for poorer, in sickness and in health, to love and to cherish, as long as life shall last, and thereto I pledge thee my faith." W. VA. CODE § 48-1-12b (1998).

199. It was commonly recognized that prior to the shift from fault to no-fault grounds for divorce, there was a conflict between the divorce law on the books, which declared marriage indissoluble except for marital fault, and the law in practice, which tolerated divorce by mutual consent. See Kay, *supra* note 15, at 297.

200. See Bradford, *supra* note 63 (addressing three proposals to return to consideration of fault). But see Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996) (concluding that fault functions are better served by the tort and criminal laws than family law), cf. Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719 (finding no evidence that fault divorce could confer benefits at all).

would increase the incentives for them to recognize and place a value on the collective benefits and costs of marriage and, potentially, divorce. Both benefits and costs are broad concepts that include both financial as well as psychological factors. Some of the costs of divorce include the effects on the spouses' human capital as well as those associated with lost companionship, the search for a new spouse or companions, and the disruption in the lives of the children. These costs can be substantial. Under mutual consent divorce, the party who does not want the divorce would have an incentive to ask for compensation for these costs as a basis for agreeing to the divorce.

This point can be illustrated with two examples. A husband, who is being asked for a divorce by his wife, may feel that he has made only limited sacrifices for the benefit of the family, is no longer strongly attracted to her, and can find someone just as attractive with a limited amount of effort. He might also conclude that any children would not be adversely affected by a divorce. Under these circumstances, he might be willing to reach a divorce agreement at a small cost to his wife. Since the benefits of the divorce exceed the costs, social welfare would be improved by permitting the divorce. Alternatively, he may have made major sacrifices for his family's benefit, might still be strongly attracted to his spouse, and may feel that only a long and costly search would find another comparable spouse or living situation. He also might be concerned that their children would suffer from a divorce compared with the quality of life that is possible if the parents stay together. He might under these circumstances ask for a level of compensation that the other spouse is unwilling to provide. In other words, the party who wants the divorce does not value the divorce as much as the other spouse (and children) values the continuation of the marriage. In this case, social welfare is improved by continuing the marriage.

One of the attractive aspects of mutual consent divorce is the increased likelihood that both parents will address the costs incurred by their children due to divorce. These costs go far beyond just maintenance, which is covered by child support. If the divorcing spouses are forced to recognize the full costs of their divorce, some parents might be able to make their marriage work and thereby provide benefits to their

children.²⁰¹ The parents, usually the mothers, who expect custody of the children after divorce are most likely to recognize the costs that the children will incur. If the children are less happy after divorce, their attitudes will impact the welfare of the custodial parent. These changes in the welfare of the children and the custodial parent are a cost. The custodial parent has incentives to take these costs into consideration when considering whether to agree to divorce.

Another attraction of mutual consent divorce is the incentives it creates for couples to consider the rules that are appropriate for their marriage. If people considering marriage knew that mutual consent was the primary ground for dissolving an established marriage, that knowledge might increase the incentive for them to negotiate premarital agreements. Neither fault divorce or no-fault divorce provides marrying individuals with the opportunity to construct their own grounds for the dissolution of their marriage. With mutual consent divorce, the dissolution of marriage would be based on the parties' criteria rather than that of the state. Under those circumstances, the parties might be more inclined to specify their own grounds at the time of marriage. Some might feel that a career conflict should be a ground for dissolution, while others might not.

Because the divorce would be based on the mutual agreement of the spouses, the spouses could ignore the default financial arrangements suggested above. If a spouse expected a divorce to be extremely costly, that person could ask for substantially more than would be provided by the default financial arrangements. Any agreement of the spouses should be subject to regulations that attempt to protect the interests of any children.²⁰²

Mutual consent is not a perfect solution. It can result in the continuation of a marriage if one party wants to ignore the costs imposed on the parties by the marriage.²⁰³ This can

201. Under no-fault divorce, many divorces occur when there has only been a minor discord between the spouses. See AMATO & BOOTH, *supra* note 55, at 220.

202. See Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1551, 1558 (1984) (finding that the principal defect of no-fault divorce laws, that promote a clean break for the spouses, is an adequate concern for minor children of those marriages).

203. See Bishop, *supra* note 186, at 300 (stating that specific performance can

occur when a spouse who makes a decision based on spite is opposed to a divorce under any circumstances. However, people can be surprisingly rational even when dealing with emotional issues such as marriage and divorce. In most divorces, at least one spouse initially wanted the marriage to continue,²⁰⁴ but when the collective benefits of divorce exceed the costs, social welfare is increased by divorce. Under those circumstances, the parties have incentives to construct an agreement that leaves them both better off. The large number of divorces based on mutual consent under the fault grounds illustrates the willingness of spouses to negotiate even under trying conditions.

Although mutual consent as a basis for divorce is unappealing to some people because it appears to lock people into unsuccessful and potentially abusive marriages, the provisions for no-fault and fault grounds for divorce discussed earlier should address many of these concerns. No-fault divorce is appropriate early in a marriage as the couple is still evaluating each other, and fault divorce is appropriate when extremely abusive behavior occurs. However, we need to recognize the limited ability of mutual consent to keep an antagonistic couple together. Either spouse can always leave the relationship with the only restrictions being the response of others, any financial obligations imposed by law on the spouses to each other and their children, and of course, the ability to marry anyone else.

2. *No-fault Divorce*

No-fault divorce is still attractive during the early period of a marriage. Mutual consent divorce gives substantial power to spouses who do not want a divorce. To limit abuse of this power, it would appear to be attractive to permit no-fault divorce when the potential costs of divorce are likely to be low, as they tend to be early in a marriage and when there are no children. Early in marriage, a couple is still involved in an evaluation process. The gains from marriage are much smaller today for many couples.²⁰⁵ Each spouse questions

result in excessive performance).

204. See WALLERSTEIN & BLAKELEE, *supra* note 4, at 17 (finding that one-third of the women bitterly opposed the divorce).

205. When the opportunities available to men and women were very different, then there were substantial gains from specialization that made most

whether he or she wants to make a long-term commitment to the other party. During this period of evaluation, no-fault divorce should continue to be the grounds for divorce.

Eventually, at least one spouse may make sacrifices based on a long-term commitment to the marriage and then the grounds for divorce should shift to mutual consent. These sacrifices will usually occur because a spouse is limiting a career or the couple is having a child. In our highly mobile society, it is common for a couple to relocate. Frequently, in this process a spouse is forced to relinquish a desirable job so that the other spouse can take advantage of an employment opportunity that appears to be in the couple's long-term best interest.²⁰⁶ In addition, children usually require one parent to adjust his or her career to assist in childcare. With these changes in the couple's circumstances, the ground for divorce would shift to mutual consent. Since accommodations for the long-term benefit of the marriage may be subtle, setting a predetermined period, such as five years, as the basis for the shift from no-fault to mutual consent divorce would be reasonable. The grounds for divorce are going to change under certain circumstances, such as a relocation, a child, or a specified time period. Recognizing this will force a couple to reevaluate their commitment to each other. If they are uncomfortable with the restrictions that will accompany mutual consent divorce, they can mutually agree to maintain no-fault grounds for divorce.

Because no-fault divorce limits the incentives for couples to negotiate, default financial arrangements would apply to these divorces if the couple has not agreed to alternative arrangements. Because no-fault divorce would only be permitted early in a marriage, the property issues should not be complicated. The major sacrifices, such as limiting a career due to relocation or the assumption of childcare

adults better off married. As employment opportunities have improved for women and labor saving devices become more common in the home, some men and women have found that they have less to gain from marriage. The reduced gains from marriage are particularly apparent for a couple that does not want children. For a discussion of the gains from marriage, see PARKMAN, *GOOD INTENTIONS*, *supra* note 2, at 42.

206. Some critics of reform have suggested that the elevation of the criterion for divorce based on children degrades couples that have either not had or are not capable of having children. See David M. Wagner, *Divorce Reform: New Directions*, *CURRENT* 7 (Feb. 1998) (stating that some covenant marriage proposals would only make divorce difficult if the couple had a child).

responsibilities, would already have shifted the grounds for divorce to mutual consent.

Under this proposal, no-fault divorce would be limited to the early phase of a marriage. The most persuasive defense of no-fault grounds for divorce throughout a marriage is based on protecting people who eventually realize that they made a mistake in their choice of a spouse.²⁰⁷ Seldom is recognition given to the benefits of mutual consent that would flow to people willing to make a long-term commitment. Therefore, this combination of no-fault divorce early in a marriage followed by mutual consent appears to address both of those concerns. We need to recognize that using no-fault divorce to protect people from their own poor judgment is not the proverbial "free lunch," since it imposes substantial costs on people wanting to make a long-term commitment.

3. *Fault Divorce*

Fault divorce should still have a role in dissolving marriages as well. Mutual consent can create problems when someone is "driven out" of a marriage rather than "wanting out." It is often difficult for anyone, including the spouses and judges, to clearly identify fault. Being driven out of a marriage raises concerns similar to those addressed with the fault divorce statutes. Under fault divorce, the "guilty" spouse did something that gave the "innocent" spouse a right to dissolve the marriage, and the innocent spouse was driven out of the marriage. Mutual consent would not provide a solution for the situation in which one spouse inflicts cruelty on the other spouse or commits adultery, and then refuses to consent to a divorce. During the fault divorce era, courts showed little skill, however, at making determinations in these cases. Often the grounds given for fault divorce were hypocritical, and the marriage had failed for other reasons.²⁰⁸ In addition, even when fault grounds could be proven, the reasons why a marriage failed were probably a great deal more complicated than just the acts that established fault grounds. Still fault divorce would appear to be appropriate when there is clear evidence of fault such as abuse of a spouse

207. See American Bar Association, Press Release, Oct. 18, 1996 (stating that 84% of family lawyers, in an A.B.A. survey, opposed rescinding no-fault divorce).

208. See RHEINSTEIN, *supra* note 30, at 247.

or any children. Because abuse is socially unacceptable behavior and should be discouraged, it should also be the basis for an adjustment in the default financial and custodial arrangements at divorce.

In sum, mutual consent as the ground for the dissolution of most marriages is not a perfect solution to problems facing the family, but it is superior to the alternatives, especially no-fault divorce for all marriages. No-fault divorce early in marriages provides spouses with an opportunity to evaluate their commitment to each other at a fairly low cost. Fault divorce can still be appropriate when a spouse is forced out of a marriage under extreme circumstances. The reforms advocated here have a logical foundation and would be a substantial improvement over current divorce laws. However, for these reforms to be effective, marriage has to be recognized as a contract entered into at marriage upon which dissolution has to be based. This would overcome the current Constitutional limits on divorce reform.

4. *The Enforceability of Marriage Contracts*

Our last concern is with the enforceability of a contract, such as the one suggested here, in states other than the one in which it was created. Until recently contracts between spouses were seldom enforced even in the state in which they were created.²⁰⁹ A couple of recent trends suggest that the likelihood is increasing that states other than the marriage state will honor these contracts.

The Restatement (Second) of Conflict of Laws gives support to the principal that the law of the state chosen by contracting parties should be enforced.²¹⁰ These laws will be applied unless two conditions exist. The first is when the chosen state has no substantial relationship to the parties, and there is no reasonable basis for the parties' choice.²¹¹

209. Since marriage itself was not treated as a contract, the only contracts were pre- and post-marital agreements between the spouses that were severely restricted. The states had preempted the grounds for divorce so divorce grounds were not a legitimate subject for these contracts. Other issues have gradually been recognized as appropriate for premarital contract under certain conditions. Initially, these contracts addressed property at death and later property at divorce. More recently, they have been expanded to consider alimony. See CLARK, *supra* note 94, at 1-20.

210. See RESTATEMENT, *supra* note 155, § 187.

211. See *id.* § 187(2)(a).

While an argument can be made that this requirement has been met by the marriage state even if residency there was brief, couples probably would be advised to more carefully choose their marriage state even if it is a source of inconvenience for others. That is currently not an issue because the laws of the marriage state are not relevant if a spouse seeks a divorce in another state.

The second is that a state can reject the law chosen by a couple if the:

application of law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.²¹²

This section would have created a major problem if only some states had the contract proposed here and most states had only fault divorce. If the couple attempted to enforce the contract in a fault divorce state, the courts in that state probably would have concluded that its concern for its domiciliaries was a "materially greater interest" thereby permitting it to apply its laws rather than those chosen by the couple. The states' central role in marriage, which often was interpreted as having precedence over the spouses' interests, has declined dramatically over the last few decades, as evidenced by the passage of no-fault divorce statutes. If a state has acknowledged that its "fundamental policy" is to let spouses dissolve their marriage unilaterally even in the face of the opposition of their spouse, it would be hard pressed to impose its laws on spouses who had elected to make it more difficult to divorce. No-fault divorce is a reflection of the state's willingness to permit couples to decide for themselves when their marriages have failed.²¹³

Further evidence of the decline in the paternalistic role of states is provided by the growing willingness to give spouses greater freedom to draft pre- and post-marital contracts.²¹⁴

212. *Id.* § 187(2)(b).

213. *See* Haas, *supra* note 11, at 910.

214. *See* Bix, *supra* note 194; Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887 (1997) (suggesting that rather than restricting these contracts steps should be taken to ensure full knowledge and the opportunity to negotiate); Singer, *supra* note 31.

Many see *Posner v. Posner*²¹⁵ as the turning point toward permitting couples more flexibility in drawing up their own marriage contracts.²¹⁶ In that case, the court upheld an award of alimony that was prescribed in an ante-nuptial agreement. The court acknowledged that some states were retreating from the position that the states' interests in marriage take precedence over the private interests of spouses.²¹⁷ In particular, it noted the passage of no-fault divorce statutes as a reflection of this trend.²¹⁸ Subject to fair disclosure, the court held that the ante-nuptial agreement that addressed alimony after divorce was valid and binding.²¹⁹

The enforceability of premarital agreements became much more predictable with the approval of the Uniform Premarital Agreement Act ("UPAA"),²²⁰ which has been adopted by half of the states.²²¹ Under the uniform act, an agreement is unenforceable under only two sets of circumstances: (1) if there was a lack of voluntariness²²² or (2) the agreement was substantially unreasonable at the time of execution and the aggrieved party did not have adequate knowledge of the other party's financial position.²²³

The willingness of states to enforce contractual parties' choice of law even as applied to marriage is reflected in a recent Connecticut case, *Elgar v. Elgar*.²²⁴ In that case, the couple was married in New York, and had signed an ante-nuptial agreement containing a choice of law provision specifying that the agreement was being made pursuant to New York law and would be interpreted accordingly.²²⁵ During the marriage, the wife remained a New York resident, while the husband continued to reside in Connecticut, with the two sharing time in both places.²²⁶ When the husband died, the wife challenged the validity and enforceability of the

215. 233 So. 2d 381 (Fla. 1970).

216. See Haas, *supra* note 11, at 907; Bix, *supra* note 194, at 152 n.20.

217. See *Posner*, 233 So. 2d at 384.

218. See *id.* at 387.

219. See *id.* at 394.

220. See UPAA, *supra* note 194.

221. As of May 1998, 26 jurisdictions had adopted the UPAA. See *id.* at 78 (Supp. 1998) (listing jurisdictions).

222. See *id.* § 6(a)(1).

223. See *id.* § 6(c).

224. 679 A.2d 937 (Conn. 1996).

225. See *id.* at 939.

226. See *id.* at 940.

agreement.²²⁷ A referee concluded that under sections 187 and 201 of the Restatement (Second) of Conflict of Laws,²²⁸ the parties' expressed choice of New York law was valid and under New York law the agreement was enforceable.²²⁹ The trial court found that the evidence supported the referee's findings of fact, and the conclusions of law were legally and logically correct.²³⁰

That decision was upheld on appeal.²³¹ Particularly important here is the court's consideration of the choice of law provision based on section 187 of the Restatement. The court took special notice of the importance of protecting the justified expectations of the parties.²³² It then went on to conclude that the law selected had a substantial relationship to the parties, and that there was a reasonable basis for their choice. In addition, Connecticut did not have a greater material interest in the determination of the issue than New York, the laws of which had been chosen by the couple.

In summary, the last thirty years has not only observed a shift from fault to no-fault grounds for divorce, but also a reduction in the states' role in matrimonial decisions. Couples are being permitted to include a broader range of provisions in ante-nuptial agreements and, either through statutes such as the UPAA or court cases, it is much more likely that their preferences will be enforced by the courts. It is a logical step for states to extend this trend to permit couples to contract as to the grounds for divorce, either

227. *See id.* at 939.

228. *See* RESTATEMENT, *supra* note 155, §§ 187, 201 ("Misrepresentation, Duress, Undue Influence and Mistake: The effect of misrepresentation, duress, undue influence and mistake upon a contract is determined by the law selected by application of the rules of §§ 187-188.").

229. *See Elgar*, 679 A.2d at 941.

230. *See id.*

231. *See id.* at 945.

232. Comment (e) to § 187 of the RESTATEMENT provides:

Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations.

through statutes or case law.

VI. CONCLUSION

This article discusses the need for a reform of earlier divorce reform that resulted in no-fault divorce. Reform efforts to date have not been impressive. A program is proposed that would make mutual consent the ground for divorce in established marriages in which at least one spouse has made a significant sacrifice based on the expectation that the marriage is going to last for a substantial period. Prior to those sacrifices, no-fault divorce would be the basis for divorce. Fault divorce would be available in extreme cases. The impact of any reform is limited because the Full Faith and Credit Clause of the U.S. Constitution currently requires states to honor divorces acquired in other states. This impediment can be resolved by recognizing that a marriage creates a contract rather than a status.
