

Notes

The Limits of Limits on Divorce

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[L]egal control of marriage has no call to deal with hypothetical fungible legal spouses seen in the flattering mirror of the ought-to-be. Its business is with people as they are. Its first premise should be that the weak, the overbearing, the nasty, the selfish—those who have failed of decent effort to make a marriage go—are least likely prospects to rear well because of mere compulsion to stay in unsatisfactory marriage.

—Karl N. Llewellyn¹

On July 15, 1997, Louisiana became the first state to roll back its no-fault divorce law.² Although a Louisiana couple can still enter a “contract marriage” terminable after a six-month separation, a couple may also choose to establish a “covenant marriage” that can be dissolved only by a two-year separation or proof of fault.³ For all the media attention it has garnered, this new law is significantly less restrictive than its sponsors and no-fault’s critics had hoped. They have pressed for laws that would eliminate the option of divorce without fault, require the consent of both parties to divorce, or extend the waiting period for divorce without consent to as long as seven years.⁴

Advocates of change argue that divorce has hurt children and that restrictive laws can help them.⁵ If this claim is right, then there are powerful arguments from many perspectives for rewriting the divorce laws. Protecting

1. K.N. Llewellyn, *Behind the Law of Divorce* (pt. 2), 33 *COLUM. L. REV.* 249, 284 (1933).

2. See Covenant Marriage Act, 1997 La. Acts 1380 (codified at LA. REV. STAT. ANN. § 9:224 to 309 (West 1997)); see also Jon Jeter, “Covenant Marriages” Tie the Knot Tightly, *WASH. POST*, Aug. 15, 1997, at A1.

3. See LA. REV. STAT. ANN. § 9:307.

4. See *infra* notes 47-53 and accompanying text.

5. See Jeter, *supra* note 2 (describing concern for children as the “real catalyst” behind recent legislative efforts).

children is a widely shared American value.⁶ The law governing family dissolution already reflects a “children first” approach.⁷ The best-known academic approach to family law also holds that “the law should make the child’s needs paramount.”⁸ More broadly, liberal political theory embraces limitations on adult autonomy to protect children from palpable harms.⁹ Helping children thus provides a widely accepted rationale for restricting divorce.

The child-oriented critics of no-fault divorce press two attacks on the current regime. Most argue that no-fault divorce has increased the divorce rate, that divorce hurts children, and hence that no-fault laws hurt children.¹⁰ Others claim that no-fault laws hurt children by leaving divorced mothers, usually the custodial parents, with inadequate financial resources.¹¹ From either perspective, divorce law raises a simple question: “Are we willing to put the well-being of children first . . . ?”¹²

These criticisms of no-fault divorce rest on a distinct vision of human nature and legal power. It is an optimistic vision, influenced by economic analysis, in which people respond rationally, predictably, and morally to changes in legal regimes. Many authors have questioned such assumptions, and one sensibility within modern political thought provides a particularly vivid contrast. Judith Shklar, Isaiah Berlin, and Michael Oakeshott ground their liberal commitments to freedom in skepticism about legal power. They suggest that because of social diversity, many legal reforms will produce losses that optimists overlook. They recognize that cultural norms and economic realities may influence people far more than law. And they argue that intractable vices often mock, and sometimes pervert, legal efforts to shape conduct. This “skeptical liberal” sensibility commends to law a modest mission—not so much stopping destructive conduct as minimizing its effects.

Taking up the invitation of a skeptical liberalism to view family life with sensitivity to its intricacy and law with skepticism about its power, this Note

6. See Robert Pear, *Greasy Kid Stuff; Washington Kidnaps Dick and Jane*, N.Y. TIMES, June 15, 1997, § 4 (Week in Review), at 1 (discussing the political potency of appeals to child welfare).

7. See Jon Elster, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1, 5 (1987) (noting wide agreement on the principle “that disputed custody decisions ought to be settled exclusively or nearly exclusively according to what is in the child’s best interest”).

8. JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 7 (1996).

9. See, e.g., Elizabeth S. Scott, *Rehabilitating Liberalism in Modern Divorce Law*, 1994 UTAH L. REV. 687, 731-33.

10. See, e.g., Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 29-37 (1990); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 101-02, 113-15; Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 88-90 (1981); William A. Galston, *Divorce American Style*, PUB. INTEREST, Summer 1996, at 12, 14-18.

11. See, e.g., ALLEN M. PARKMAN, *NO-FAULT DIVORCE: WHAT WENT WRONG?* 79-88 (1992); LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 378 (1985); Gary S. Becker, *Finding Fault with No-Fault Divorce*, BUS. WK., Dec. 7, 1992, at 22.

12. Galston, *supra* note 10, at 26.

argues that highly restrictive divorce laws would have little effect on divorce rates, but would impose large costs on children. Contrary to the overbroad claims by some of no-fault's critics, recent research shows that while some children suffer serious harm from divorce, other children benefit from divorce, and many others suffer mostly from harms connected with divorce but distinct from it. If restrictive legislation stops helpful divorces or exacerbates independent harms to children, then it will have costs that the narrow focus on divorce obscures.

These findings suggest that in order to help children, law must be a precise instrument as well as a powerful one. New evidence suggests that law is neither: Compared to cultural and economic influences, the law has a small influence on rates of marital breakdown. This finding is a puzzle for those who insist that people rationally respond to legal incentives. Clinical observation attests to the intuition supplied by skeptical liberalism: Many people who are divorcing are conflicted, confused, short-sighted, or self-involved in ways that resist legal improvement. As a result, proposals to condition divorce on fault or mutual consent would likely encourage destructive conduct that hurts children more and leaves their parents less financially secure than current law. Legal changes more symbolic and less restrictive than those favored by many of no-fault's critics might still discourage harmful divorces and, more important, would not inflict new pain on children.¹³

Part I of this Note summarizes the argument that no-fault divorce hurts children. Part II elaborates the assumptions of this argument and offers the alternative of a skeptical liberalism. Part III shows how the facts about divorce, children, and the law confirm a skeptical liberal's intuitions that sharply restricting divorce will not help children. Part IV suggests small reforms that would not hurt children, and might help them.¹⁴

13. Some critics of the current regime are acutely aware that tough laws can backfire. See, e.g., Galston, *supra* note 10, at 26 ("At some point, highly demanding laws become less effective than those that are less restrictive."). Much of this Note argues simply that the point of diminishing returns from restriction arrives much sooner than critics believe.

14. Because its focus is the relationship between child welfare and laws governing marital dissolution, this Note has two important limitations. It discusses laws regulating post-divorce finances only to the extent that these laws alter the operation of grounds for divorce and their effect on children, *see infra* notes 161, 181, not as variables independently affecting children. Similarly, the effects of divorce on adult well-being are analyzed only to the extent they touch children. The Note does not discuss claims that adults as well as children gravely suffer from current law or have a fundamental "right to divorce." In focusing on children, the Note defends no-fault divorce at what even some of its supporters concede is its weakest point. See, e.g., Margaret Talbot, *Love, American Style*, NEW REPUBLIC, Apr 14, 1997, at 30, 32 (describing the anti-divorce movement as "incontrovertibly correct" about the "dire consequences" of divorce for children). It is possible, however, that consideration of divorce law in wider perspective would yield additional arguments for (or against) strict regulation.

I. THE CHILD-CENTERED CASE AGAINST NO-FAULT DIVORCE

Critics of no-fault divorce attack legal reforms of the last three decades.¹⁵ Until the late 1960s, virtually every state formally permitted divorce only if one spouse proved that the other was insane or had committed statutory fault.¹⁶ Spouses who agreed to divorce could in practice collude to “prove” fault, although this often required perjury.¹⁷ In 1966, New York liberalized its very strict law to permit divorce based on consent after a two-year separation or on fault grounds other than adultery.¹⁸ In 1969, California became the first state to eliminate all fault grounds and permit divorce based on “irreconcilable differences.”¹⁹ California’s law actually meant that either spouse could get a divorce simply by filing for one, even if the other spouse resisted.²⁰ By 1985, every state allowed couples to divorce without proving fault,²¹ and today only four states require mutual consent for such a no-fault divorce.²² A system that required fault in theory and consent in practice has become one that almost always sanctions unilateral no-fault divorce.

According to critics, this shift to no-fault divorce has hurt children by increasing divorce rates and by leaving custodial parents with fewer resources. Sharply curtailing or eliminating no-fault divorce would, on the critics’ account, significantly reduce these harms.

A. Increased Divorce

Critics assert that when parents break up, children suffer. Some authors

15. See, e.g., Galston, *supra* note 10, at 13.

16. See IRA MARK ELLMAN ET AL., FAMILY LAW 165-66 (2d ed. 1991). Fault grounds typically included some or all of the following: cruelty, desertion, adultery, neglect, and drunkenness. See Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 66 (1976). A few states had quietly adopted provisions allowing divorce without fault prior to 1967. See HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 81 (1988).

17. See MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 251-52 (1972); Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 661-62 (1984).

18. See JACOB, *supra* note 16, at 40-41.

19. See Family Law Act, ch. 8, 1969 Cal. Stat. 3324.

20. See J. HERBIE DIFONZO, BENEATH THE FAULT LINE 168 (1997). This has been the reality under no-fault laws elsewhere as well. See *id.* at 172.

21. See MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW 189 (1989). Many states preserve fault grounds alongside no-fault grounds. See, e.g., CONN. GEN. STAT. § 46b-40 (1997); MO. REV. STAT. § 452.320 (1997). Because the no-fault grounds establish the easiest and least costly means to divorce, spouses usually use the fault grounds only to achieve their financial goals, not to obtain divorces that otherwise could not occur. See ELLMAN ET AL., *supra* note 16, at 187. For a discussion of the role of fault-based financial distributions as a deterrent to marriage-destroying conduct or divorce, see *infra* notes 161, 181.

22. See Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1277 n.24 (1996) (listing Mississippi, New York, Ohio, and Tennessee as the exceptions).

suggest that divorce always or almost always harms children,²³ often relying on the much acclaimed, pessimistic work of Judith Wallerstein.²⁴ Others recognize that divorces that end marriages "involving physical abuse or extreme emotional cruelty" can benefit children,²⁵ but treat such divorces as a small minority²⁶ or an afterthought.²⁷ On critics' accounts, divorce generally scars children for life.²⁸

The next step in this critique asserts that no-fault divorce has increased divorce rates. Demographic data appear to connect the rise in divorce rates with the shift to no-fault divorce. Lynn Wardle argues that "it is apparent that the significant rise in the divorce rate in the United States did not begin until the no-fault divorce movement was well-underway."²⁹ William Galston cites the most recent state-by-state analysis of divorce rates, which found that the average rate of divorce after the enactment of no-fault legislation was about twenty percent higher than before.³⁰

Explaining these societal trends at the individual level, critics argue that the no-fault regime has encouraged divorce by reducing its costs.³¹ The expense of divorce is now lower,³² delays are shorter,³³ and legal barriers are few.³⁴ As a result of these reduced costs, critics say that individuals are both more likely to engage in marriage-destroying conduct³⁵ and, at a given

23. See, e.g., Younger, *supra* note 10, at 90; Dora Sybella Vivaz, Note, *Balancing Children's Rights into the Divorce Decision*, 13 VT. L. REV. 531, 579 (1989).

24. Wallerstein has tracked children of 50 divorced parents for more than two decades. See JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN AND CHILDREN A DECADE AFTER DIVORCE* (1989); JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980); Barbara Vobedja, *Children of Divorce Heal Slowly, Study Finds*, WASH. POST, June 3, 1997, at E1 (discussing Wallerstein's recent follow-up report) She has found that "almost half of the children [in her study] entered adulthood as worried, underachieving, self-deprecating, and sometimes angry young men and women." WALLERSTEIN & BLAKESLEE, *supra*, at 299. For examples of critics who have relied on her work, see Allen M. Parkman, *Reform of the Divorce Provisions of the Marriage Contract*, 8 BYU J. PUB. L. 91, 104 n.59 (1995); and Vivaz, *supra* note 23, at 531 n.2.

25. Galston, *supra* note 10, at 15.

26. See, e.g., Talbot, *supra* note 14, at 33 (discussing critics' often repeated assertion that 15% of divorces involve high levels of conflict).

27. See, e.g., Scott, *supra* note 10, at 32-33 (devoting less than a paragraph to the issue)

28. See, e.g., Galston, *supra* note 10, at 15 (stating that divorce negatively impacts "school performance, high-school completion, college attendance and graduation, labor-force attachment and work patterns, depression and other psychological illnesses, crime, suicide, out-of-wedlock births, and the propensity to become divorced"); see also Scott, *supra* note 10, at 29-31 (listing ills associated with divorce).

29. Wardle, *supra* note 10, at 118.

30. See Galston, *supra* note 10, at 17 (citing Paul A. Nakonezny et al., *The Effect of No-Fault Divorce Law on the Divorce Rate Across the 50 States and Its Relation to Income, Education, and Religiosity*, 57 J. MARRIAGE & FAM. 477, 485 (1995)).

31. See Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879, 889 (1988); Scott, *supra* note 10, at 21; Scott, *supra* note 9, at 727; Wardle, *supra* note 10, at 124; Galston, *supra* note 10, at 17-18.

32. See CONSTANCE AHRONS, *THE GOOD DIVORCE* 40 (1994).

33. See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 76 (1987)

34. See *supra* notes 18-22 and accompanying text.

35. See, e.g., Haas, *supra* note 31, at 889; Scott, *supra* note 10, at 50-54

level of marital decay, more likely to opt for divorce.³⁶ Thus critics assert that no-fault divorce fosters divorce, which hurts children.³⁷

B. *Greater Financial Burdens*

The second argument against no-fault divorce focuses on finances. Women retain physical custody of children following ninety percent of divorces,³⁸ and generally suffer a large drop in their standard of living after divorce.³⁹ This decline hurts children directly, by reducing the resources available to them,⁴⁰ and indirectly, by straining mothers psychologically.⁴¹

Many authors have blamed these results in part on no-fault divorce. At the level of societal trends, critics cite both longitudinal⁴² and cross-sectional⁴³ studies showing that women fare worse under no-fault divorce. At the level of individual behavior, the argument against no-fault assumes that mothers resist divorce while fathers seek it.⁴⁴ This ostensibly occurs because women "lose value" on the marriage market over time.⁴⁵ The fault regime gave women opposed to divorce a valuable bargaining chip: their consent. By threatening to contest a divorce, a wife could force her husband to confront the prospect

36. See, e.g., Scott, *supra* note 10, at 48-50; Galston, *supra* note 10, at 19. To be sure, the Coase Theorem predicts that if transaction costs are low, a husband and wife will decide to divorce when shared costs from marriage outweigh shared benefits, regardless of the legal regime. See RICHARD A. POSNER, *OVERCOMING LAW* 407 (1995); H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437, 438 (1986). However, because spouses are not able to exchange all of their gains from marriage, such as gains from the presence of children, a unilateral divorce regime may allow some divorces that a fault or consent regime would prevent. See Martin Zelder, *Inefficient Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce*, 22 J. LEGAL STUD. 503, 505-06 (1993).

37. Some critics also assert that no-fault laws have encouraged divorce by destigmatizing it. See Galston, *supra* note 10, at 18. This argument, stressing law's effect on culture rather than on cost-benefit calculation, is not inconsistent with the perspective that this Note develops. But it does not justify the highly restrictive measures proposed by critics. Law may be able to affect culture without sharply restricting conduct. Moreover, even if sharp restrictions were necessary to motivate cultural change, they might not be justified if their costs—especially their costs for children—were too great. See *infra* Part IV.

38. See Scott, *supra* note 10, at 33.

39. Recent studies of both old and new data have shown that women on average suffer about a 30% decline in their standard of living following divorce, largely because they must still care for children. See Saul Hoffman & Greg Duncan, *What Are the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641, 641 (1988); Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528, 534 (1996).

40. See Paul R. Amato, *Children's Adjustment to Divorce: Theories, Hypotheses, and Empirical Support*, 55 J. MARRIAGE & FAM. 23, 32-33 (1993).

41. See Judith Desimone-Luis et al., *Children of Separation and Divorce: Factors Influencing Adjustment*, 3 J. DIVORCE 37, 37 (1979).

42. See WEITZMAN, *supra* note 11, at 167-68 (describing California time-series data).

43. See Galston, *supra* note 10, at 18 (citing Peters, *supra* note 36, at 449 tbl.6 (comparing settlements for women in states with various divorce restrictions in the late 1970s)).

44. See Ann Laquer Estin, *Economics and the Problem of Divorce*, 2 U. CHI. L. SCH. ROUNDTABLE 517, 541-42 (1995); Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 130, 135 & 255 n.17 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

45. See Lloyd Cohen, *Marriage, Divorce and Quasi Rents; or "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 278-87 (1987).

of a costly, embarrassing, and uncertain proceeding, and extract a decent financial settlement as the price of an easy, collusive divorce.⁴⁶ Without at least a de facto consent requirement, critics argue, children will suffer economically from divorce.

C. *Proposals for Change*

To protect children from psychological and emotional harms, child-centered critics all aim to eliminate fast, unilateral, no-fault divorce. For families with children, the most radical measures would eliminate unilateral no-fault divorce entirely⁴⁷ or permit it only after prolonged waiting periods of four or more years.⁴⁸ Other proposals would permit unilateral no-fault divorce, but only after a waiting period of two years.⁴⁹ Under all these proposals, mandatory waiting periods would be waived or dramatically shortened when one spouse is guilty of statutory fault,⁵⁰ and sometimes also on the basis of consent.⁵¹ In contrast to the "covenant marriage" legislation enacted in Louisiana, the proposals offered by child-centered critics are generally mandatory.⁵² Given the child-oriented perspective, this makes sense: If divorce hurts all or almost all children, then the task of a child-protecting law is to make divorce more difficult in all families with children, not only those that want a tougher law.⁵³

46. See Parkman, *supra* note 24, at 94.

47. See, e.g., S. 1409, 43d Leg., 1st Reg. Sess. (Ariz. 1997); H.R. 1066, 1997 Sess. (N.C.), H.R. 2624, 1997 Sess. (Va.); A. 2547, 207th Leg., 1st Sess. (N.J. 1996); H.R. 4432, 88th Leg., 1995 Sess. (Mich.)

48. See, e.g., H.R. 472, 64th Sess. (Vt. 1997); Becker, *supra* note 11 (proposing to allow unilateral divorce only if spouses cannot agree after "several years"); Maggie Gallagher, *Why Make Divorce Easy?*, N.Y. TIMES, Feb. 20, 1996, at A19 (proposing a five-to-seven year waiting period); Galston, *supra* note 10, at 22 (proposing a five-year waiting period).

49. See, e.g., Scott, *supra* note 10, at 90-91. Such a proposal became law in Louisiana. See LA REV STAT. ANN. § 9:307 (West 1997).

50. See, e.g., N.C. H.R. 1066; Mich. H.R. 4432; Gallagher, *supra* note 48, Galston, *supra* note 10, at 22. But see Scott, *supra* note 10, at 92 (arguing against a fault-based bypass of the waiting period)

51. See, e.g., Ariz. S. 1409; Gallagher, *supra* note 48; Galston, *supra* note 10, at 22

52. The sponsor of the Louisiana legislation initially hoped to require "covenant marriage," accepting a choice regime only as a necessary compromise. See James Gill, *Covenant Marriage: Will It Work?*, TIMES-PICAYUNE (New Orleans), July 20, 1997, at B7; cf. Younger, *supra* note 10, at 90-91 (proposing a mandatory regime); Galston, *supra* note 10, at 22 (same).

53. Choice might by itself help children in two ways. First, parents whose children have the most to gain and least to lose from restrictions on divorce might be most likely to choose the covenant option. But there is no evidence that people at the threshold of marriage have this level of foresight. See Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (stating a survey result showing that "the median response of marriage license applicants was 0% when assessing the likelihood that they personally would divorce"). Common sense suggests that those least likely to divorce may select the most restrictive regime, so that a tough law will tend to govern those it is least likely to affect. A choice regime could also help children if the act of choosing strict terms by itself reduced the likelihood that parents would divorce. But on this plausible account, the content of the high-commitment option is less important than its presence. Even if that option were little more restrictive than current law, the benefits of choice could be achieved without the costs of a restrictive regime.

II. TWO VISIONS OF LIFE AND LAW

The child-centered case against no-fault divorce, like the view it opposes, rests on a distinctive vision of human nature and legal authority. Carl Schneider has forcefully argued that no-fault divorce presumes that unregulated individuals will do what is best for their families,⁵⁴ and thus reflects a “‘complacently positive attitude toward human nature [and] social order.’”⁵⁵ This part argues that the real optimists are the critics of no-fault divorce who believe that law can help children by reducing divorce. After identifying these critics’ assumptions, this part develops the darker sensibility of a skeptical liberalism.

A. *The Optimism of No-Fault Criticism*

The argument that tougher divorce laws can help children by stopping divorce reflects considerable optimism about both the accuracy of legislative classification and the extent of human rationality. The criticisms of no-fault divorce rest on a series of generalizations about human experience: Children suffer from divorce; people will divorce less when the costs of divorce are greater; marriage-destroying conduct can be identified and labeled “fault.” Such generalizations mirror the scientific aspiration of economic analysis, its effort to construct an elegant theory based on a few axioms.⁵⁶ These generalizations justify sweeping policy prescriptions.

The critics’ confidence in their own powers of generalization is matched by their optimism about both human rationality and the appeal of family life. Like economic analysts of law, critics of no-fault divorce identify two ways that people are rational: They have stable ends,⁵⁷ and they identify and pursue the least costly means to those ends.⁵⁸ Critics posit that people who choose to divorce when faced with a short waiting period will try to make their marriages work when faced with a longer one. For this to happen, these individuals must be able to learn about and understand different legal regimes, and must consistently view the longer wait in the stricter regime as a cost.

54. See Carl E. Schneider, *Marriage, Morals, and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503, 561-62.

55. *Id.* at 558 (quoting DENNIS H. WRONG, *THE PROBLEM OF ORDER: WHAT UNITES AND DIVIDES SOCIETY* at ix (1994)). Elsewhere, Schneider has argued that modern family law and no-fault divorce law reflect doubts about law’s enforcement power and fears about human frailty. See Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1837-38 (1985). This Note echoes these arguments.

56. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 17 (4th ed. 1992) (“[A]bstraction is of the essence of scientific inquiry, and economics aspires to be scientific.”).

57. Cf. GARY S. BECKER, *A TREATISE ON THE FAMILY* at ix-x (rev. ed. 1991) (noting the importance of stable preferences in economic analysis); JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 65-66 (1979) (same).

58. See Scott, *supra* note 10, at 32; Galston, *supra* note 10, at 19; cf. ANTHONY T. KRONMAN, *THE LOST LAWYER* 227 (1993) (describing the efficiency assumption); POSNER, *supra* note 56, at 12-16 (same).

Moreover, in order for the incremental increase in cost to change behavior, a substantial desire to preserve the marriage must weigh against the wish to separate. People who have utterly given up on their marriages will not reconcile if divorce becomes slightly more difficult. The critics' reform proposals can succeed only if people are both generally committed to their families and rational.

These reflections suggest why no-fault's critics believe that divorce law can play a powerful role in helping children. If the legislator can identify social problems and their causes in individual conduct, and if people will change their conduct in response to changes in its perceived costs, then laws altering the costs of different behaviors can predictably improve outcomes. One result of proper incentives may be some harshness toward those not improved, but that is a price the critics are willing to impose.⁵⁹

B. *The Alternative of a Skeptical Liberalism*

A trio of authors offers a counterpoint to this vision. Despite their differences, Isaiah Berlin, Michael Oakeshott, and Judith Shklar had much in common. They were essayists, not systematizers. They argued that theory often teaches less than history, especially this century's history. Each was at once a liberal committed to individual autonomy, and a conservative doubtful about the state's power to shape conduct sensibly.⁶⁰ These "skeptical liberals"⁶¹ grounded apprehension about law's power in part in observation of three social facts that no-fault's critics occlude: irreducible social complexity, societal trends that often dwarf law's power, and irrational passions not responsive to legal incentives.

59. See Wardle, *supra* note 10, at 120-21 (arguing for greater focus on "marital stability" and less on "divorce facilitation"). Writing in 1860, Horace Greeley argued for harsh divorce laws by analogy: "'It is very hard,' said a culprit to the judge who sentenced him, 'that I should be so severely punished for merely stealing a horse.' 'Man,' replied the judge, 'you are *not* so punished for merely stealing a horse, but *that* horses may not be stolen.'" NELSON MANFRED BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 92 (1962) (quoting the *New York Tribune* of Apr. 7, 1860).

60. Each author defends liberty and questions tutelary legislation with equal ferocity. See ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118, 122-31, 171-72 (1969) (famously defining and defending "negative liberty" as freedom from coercion), MICHAEL OAKESHOTT, *On Being Conservative*, in *RATIONALISM IN POLITICS AND OTHER ESSAYS* 407, 427 (rev. ed. 1991) ("[T]he office of government is not to impose beliefs and activities upon its subjects, not to tutor or to educate them, not to make them better . . ."); Judith N. Shklar, *The Liberalism of Fear*, in *LIBERALISM AND THE MORAL LIFE* 21, 33 (Nancy L. Rosenblum ed., 1989) (rejecting "educative government that aims at creating specific kinds of character and enforces its own beliefs").

61. Commentators have emphasized the combination of skepticism and liberalism in all three authors' thought. See CLAUDE J. GALIPEAU, ISAIAH BERLIN'S LIBERALISM 55 (1994); Seyla Benhabib, *Judith Shklar's Dystopic Liberalism*, in *LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR* 55, 57 (Bernard Yack ed., 1996) [hereinafter *LIBERALISM WITHOUT ILLUSIONS*]; Jeremy Rayner, *The Legend of Oakeshott's Conservatism: Sceptical Philosophy and Conservative Politics*, 18 *CANADIAN J. POL. SCI.* 313, 337-38 (1985). Of course, grouping three brilliant and idiosyncratic thinkers together under one programmatic banner does violence to their work, but it also helps illuminate some of their ideas and a great deal about contemporary regulation of the family.

Attacking abstraction, these authors first stress the irreducible complexity of modern life and the inevitable tradeoffs that generalized policies entail. “[D]iversities and occasions of conflict,” not “order and coherence,” “distinguish our current manner of living.”⁶² This does not make social science impossible, but it does require that the social scientist respect diversity, rather than distance herself from it. “[G]enerality is apt to be uninformative. Insight lies in the dense and the particular.”⁶³ The complexity in our social life reproduces itself in the moral realm, where the moralist must recognize the possibility that loss is inevitable: “[I]f the ends of men are many, and not all of them are in principle compatible with each other, then the possibility of conflict—and of tragedy—can never wholly be eliminated from human life”⁶⁴ The policymaker alert to this moral and social complexity recognizes losses that the critic of no-fault can ignore: “[T]here is no such thing as an unqualified improvement.”⁶⁵ Instead, “any study of society shows that every solution creates a new situation which breeds its own new needs and problems.”⁶⁶

Extending their argument about complexity, these authors stress the irreducible role of nonlegal systems in shaping behavior and the concomitant limits on the power of laws to improve conduct.⁶⁷ While the critics emphasize the influence of law on conduct, these authors stress the nonlegal forces that limit law’s power: “[C]hoices are limited by the circumstances of men and their environment.”⁶⁸ Legislating therefore requires a “developed historical and sociological sense [to] show[] what can and cannot be achieved given a particular social condition, or the material conditions, of a nation.”⁶⁹ Laws that are very effective in one time or place may be impotent in another, and what plainly “cannot be achieved” is the transformation of the norms and practices of a people by the law.⁷⁰ “[C]ulture sets boundaries which governments overstep at their peril.”⁷¹

62. OAKESHOTT, *supra* note 60, at 425-26.

63. John Dunn, *Hope Over Fear: Judith Shklar as Political Educator*, in LIBERALISM WITHOUT ILLUSIONS, *supra* note 61, at 45, 47; *see also* JUDITH N. SHKLAR, ORDINARY VICES 228 (1984) (eschewing high theory and commending “a more concrete way of thinking about politics, one closer to men and events”).

64. BERLIN, *supra* note 60, at 169.

65. OAKESHOTT, *supra* note 60, at 411.

66. ISAIAH BERLIN, *The Pursuit of the Ideal*, in THE CROOKED TIMBER OF HUMANITY 1, 14 (1992).

67. This position parallels Robert Ellickson’s critique of “legal centralism,” the view that “governments are the chief sources of rules and enforcement efforts.” ROBERT C. ELLICKSON, ORDER WITHOUT LAW 138 (1991).

68. Isaiah Berlin, *Reply to Robert Kocis*, 31 POL. STUD. 388, 391 (1983).

69. GALIPEAU, *supra* note 61, at 123; *cf.* JUDITH N. SHKLAR, AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION 13 (1991) (describing the struggle between formally equal institutions and illiberal popular dispositions).

70. OAKESHOTT, *supra* note 60, at 430 (stating that the government that “‘commands for truth’ is incapable of doing so (because some of its subjects will believe its ‘truth’ to be error)”).

71. JUDITH N. SHKLAR, MONTESQUIEU 105 (1987) (describing Montesquieu’s view); *cf.* ELLICKSON, *supra* note 67, at 281-82 (noting a “wide variety of reasons [that] legal interventions can flop”).

Along with particular cultural constellations, irrational elements of human nature are on this view daunting obstacles to law's incentivizing aspirations. The skeptical liberal sensibility depends less on a "model of rational egoism," of the sort on which no-fault's critics rely, than on "theories of violent and mindless passions and the extraordinary unlikelihood of self-control."⁷² These authors find in people not stable ends, but a welter of conflicting desires; not calculation sensitive to shifts in costs, but delusions that defeat incentives; not a constant commitment to goods like the family, but an equally constant inclination toward vice. Shklar's "liberalism of fear" reflects her "deep skepticism about our capacities for public and private rationality" and her awareness of "the everyday vices and prejudices that defeat our attempts to rationalize our social lives."⁷³ Berlin describes humanity as a "crooked timber," quoting Kant: "Out of timber so crooked as that from which man is made nothing entirely straight can be built."⁷⁴ Impulsive and irrational individuals cannot make the calculations or apply the self-control needed to respond to adjustments in legal regimes. The limitations of reason are also limitations on law.⁷⁵

In a chilling exposition of this argument, Shklar suggests that state efforts to improve moral character through coercion will sometimes not only fail, but also perversely increase suffering and undermine virtue. Rulers inflict great pain in the name of noble goals.⁷⁶ Those ruled respond to that pain with an irrational backlash, "an uncontrollable 'physiological reaction' that paralyzes judgment and makes room for all of the basest and most irrational human passions."⁷⁷ The effort to cure moral weakness with the rod thus may produce only the inferior character of the slave whose "every impulse is hemmed in by fear, cruelty, and a massive dishonesty."⁷⁸

Because legal efforts to improve conduct often fail or backfire, these authors finally question what no-fault's critics affirm, that the law should in many circumstances sacrifice compassion in a particular case to secure better

72. Stephen Holmes, *Ordinary Passions in Descartes and Racine*, in *LIBERALISM WITHOUT ILLUSIONS*, *supra* note 61, at 95, 95.

73. Bernard Yack, *Liberalism Without Illusions: An Introduction to Judith Shklar's Political Thought*, in *LIBERALISM WITHOUT ILLUSIONS*, *supra* note 61, at 1, 2.

74. BERLIN, *supra* note 66, at xi (internal quotation marks omitted) George Kennan echoes Berlin's assessment in a reflection on politics, calling "man" a "cracked vessel" whose "contradictions destroy the unity and integrity of his undertakings, confuse his efforts, place limits on his possibilities for achievement, and often cause one part of his personality to be the enemy of another" GEORGE F. KENNAN, *AROUND THE CRAGGED HILL: A PERSONAL AND POLITICAL PHILOSOPHY* 27 (1993).

75. See KENNAN, *supra* note 74, at 54-55 ("The people who want government's head to be in the clouds should remember that its feet are mired, understandably but inevitably, in the clay.")

76. See SHKLAR, *supra* note 63, at 27, 35-37 (describing various cruelties of missionaries and philanthropists).

77. Yack, *supra* note 73, at 3 (quoting SHKLAR, *supra* note 71, at 84-85)

78. SHKLAR, *supra* note 63, at 236; see also *id.* at 242 ("[Fear] is the underlying psychological and moral medium that makes vice all but unavoidable.")

conduct in the future.⁷⁹ The faith in law as incentive is largely fantasy: Society is frequently too complex, the law's role in social life too limited, and the individual too impetuous for legal incentives to encourage moral conduct reliably. Rather than seeking to improve individuals, law must often focus on the narrower project of "damage control," or not doing more harm.⁸⁰ There is work enough for law in cleaning up the diverse messes that people invariably make.

This "skeptical liberalism" is best understood as a sensibility or a set of intuitions, not a theory of justice or social organization. This sensibility may prove more revealing in some domains of law than others. Some areas of society may manifest with particular intensity the conditions that motivate caution against paternalistic legislation: an especially tangled web of factors contributing to social goods and problems, particularly sharp limitations on law's power, and passions that run unusually high. Although constructing a general theory for identifying the presence of these conditions is beyond the scope of this Note, the next part argues that the aspect of family life relating to divorce is one sphere in which the concerns expressed by Shklar, Oakeshott, and Berlin prove quite relevant.

III. A CASE AGAINST RESTRICTIVE DIVORCE LAWS

Empirical research and historical experience confirm the three cautions of skeptical liberalism. The complex relationship between divorce and child welfare recalls the warning against confident generalizations that obscure tough tradeoffs. For children of parents who break up, divorce is not the only or often the dominant source of harm, and laws that make divorce more difficult will not serve children if they increase the harms from sources other than divorce. A law that helps children must be a scalpel, not a bludgeon. Yet, the history of divorce regulation confirms the second caution of skeptical liberalism, that social norms and economic realities may sharply limit law's power. Demographic data suggest that legal change has never had more than a small effect on rates of divorce, and that long-term social trends are the chief predictors of family breakdown patterns. Clinical studies of the divorce process help explain why law is not an effective instrument for stopping divorce: As the third dimension of the skeptical liberal paradigm suggests, individuals often

79. See BERLIN, *supra* note 60, at 171 n.1 (agreeing that the state should not "'torment the living, under the pretence of promoting the happiness of them who are not born'" (quoting Jeremy Bentham)). Compare Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 633, 674 (1984) (discussing the tension between deterrence and compassion, and arguing that conventional analysis, which ignores law's coercive function, produces "an unduly placid and benign picture of law"), with SHKLAR, *supra* note 63, at 244 ("No liberal ever forgets that governments are coercive.").

80. Shklar, *supra* note 60, at 27; see also Stanley Hoffmann, *Judith Shklar as a Political Thinker*, in LIBERALISM WITHOUT ILLUSIONS, *supra* note 61, at 82, 89 (discussing the injunction to "do no harm").

lack the calculating self-control to respond rationally to legal incentives. Rather than improving most couples' conduct, restrictive divorce laws inspire perverse and cruel behavior in some families, and exacerbate the pain of divorce in many others. In seeking to force people not to harm their children, restrictive divorce laws cause those children new harms.

A. *Against Abstraction: Children and Divorce*

Without more, the claim that "divorce hurts children" is both too strong and too simplistic. Studies do suggest that divorce harms many children, but not as many or as much as the critics claim. Wallerstein's often-quoted results overrepresent parents with unusually serious problems.⁸¹ A large but less-cited literature has compared the outcomes within less biased samples of children from divorced and intact families. Two comprehensive analyses of this literature by Paul Amato and Bruce Keith found that divorce did have a negative impact on children across a wide range of factors.⁸² Yet Amato and Keith also found that more sophisticated studies showed smaller effects,⁸³ that effects had diminished since the 1950s and 1960s,⁸⁴ and that the net effect of divorce on children was "weak."⁸⁵ That weakness has two dimensions: the average size of the effect on children is small,⁸⁶ and the number of children seriously affected is limited.⁸⁷ Many researchers agree that "it is wrong to conclude that divorce places children at great risk for experiencing psychological disorder."⁸⁸

The limited effects of divorce have two implications for legal reform, suggesting the merits of a cautious approach. First, law's power to improve life

81. See WALLERSTEIN & KELLY, *supra* note 24, at 328 (describing how a majority of the study's subjects had significant emotional problems); Andrew J. Cherlin, *It's Not a Sentence to Life at Emotional Hard Labor*, BALTIMORE SUN, July 9, 1997, at 13A (criticizing attempts to generalize about all children from Wallerstein's work).

82. See Paul R. Amato & Bruce Keith, *Parental Divorce and Adult Well-Being: A Meta-Analysis*, 53 J. MARRIAGE & FAM. 43, 54 (1991) [hereinafter Amato & Keith, *Adult Well-Being*], Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-Being of Children: A Meta-Analysis*, 110 PSYCHOL. BULL. 26, 30 (1991) [hereinafter Amato & Keith, *Well-Being of Children*].

83. See Amato & Keith, *Well-Being of Children*, *supra* note 82, at 36.

84. See *id.* at 34.

85. Amato & Keith, *Adult Well-Being*, *supra* note 82, at 55; Amato & Keith, *Well-Being of Children*, *supra* note 82, at 30.

86. See Amato & Keith, *Well-Being of Children*, *supra* note 82, at 30.

87. See FRANK F. FLURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 69 (1991). A typical recent study found that divorce was associated with a 39% increase in the risk of psychopathology among young adults, but also that 89% of children of divorce did not suffer clinically significant psychological problems. See P. Lindsay Chase-Lansdale et al., *The Long-Term Effects of Parental Divorce on the Mental Health of Young Adults: A Developmental Perspective*, 66 CHILD DEV. 1614, 1628-29 (1995). The authors concluded that "in the vast majority of cases, there is substantial recovery following divorce." *Id.* at 1629.

88. ROBERT E. EMERY, *RENEGOTIATING FAMILY RELATIONSHIPS: DIVORCE, CHILD CUSTODY, AND MEDIATION* 204 (1994); see also Cherlin, *supra* note 81 ("We shouldn't scare divorced parents with the false information that their children are doomed to face a difficult life.")

is limited. Because the negative impact of divorce itself is modest, the positive impact of reducing divorce rates, even if law could do it, would be modest as well. Second, when improvements are possible, they have costs. If the decline in the harms of divorce over time results even in part from legal changes that made divorce less difficult for parents, then laws restricting divorce will hurt children of parents who divorce in spite of the law.

As the last point suggests, a law seeking to help children cannot focus exclusively on stopping divorce. Factors associated with divorce but distinct from it cause many of the difficulties that children of divorce experience.⁸⁹ Numerous studies have shown, for example, that many years *before* divorce, children of parents who eventually divorce have more psychological and behavioral problems than children of parents who remain together.⁹⁰ Most scholars agree that predivorce differences account for much, though not all, of the differences between children of divorced and intact families.⁹¹ Divorce obviously cannot be the cause of these predivorce problems.

The law here faces the tradeoffs that Berlin and Oakeshott anticipate and that the critics' focus on divorce occludes. Legal change that seeks to reduce the divorce rate may increase the incidence of other factors harming children. Some things that hurt children of divorce, such as the apparently high incidence of severe psychological difficulties among divorcing parents,⁹² are largely unresponsive to legal change.⁹³ Other factors that harm children, such as the custodial parent's post-divorce psychological adjustment,⁹⁴ may be affected by the law, but not in the way critics hope: If divorce becomes more difficult to obtain, then parents may have more emotional trouble, not less. A law restricting divorce thus will not reduce some harms to children of divorce and may intensify others.

A restrictive law may adversely affect the most important predictor of child welfare in divorcing families: parental conflict.⁹⁵ Fighting between

89. See Lawrence A. Kurdek, *Issues in Proposing a General Model of the Effects of Divorce on Children*, 55 J. MARRIAGE & FAM. 39, 40-41 (1995) ("My own prediction . . . is that the identification of changes in resources and stressors associated with divorce-related life transitions that directly or indirectly affect children's well-being will enable us to abandon our long-standing obsession with family structure.").

90. See, e.g., Nazli Baydar, *Effects of Parental Separation and Reentry into Union on the Emotional Well-Being of Children*, 50 J. MARRIAGE & FAM. 967, 976 (1988); Jeanne H. Block et al., *The Personality of Children Prior to Divorce: A Prospective Study*, 57 CHILD DEV. 827, 832 (1986); Andrew J. Cherlin et al., *Longitudinal Studies of Effects of Divorce on Children in Great Britain and the United States*, 252 SCIENCE 1386, 1388 (1991).

91. See, e.g., Paul R. Amato & Alan Booth, *A Prospective Study of Divorce and Parent-Child Relationships*, 58 J. MARRIAGE & FAM. 356, 363 (1996).

92. See Benjamin B. Lahey et al., *Conduct Disorder: Parsing the Confounded Relation to Parental Divorce and Antisocial Personality*, 97 J. ABNORMAL PSYCHOL. 334, 336 (1988).

93. Psychosis, for example, is largely genetic. See Kenneth S. Kendler & Scott R. Dichl, *Schizophrenia: Genetics*, in 1 COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 942, 942 (Harold I. Kaplan & Benjamin J. Sadock eds., 6th ed. 1995).

94. See Amato, *supra* note 40, at 28.

95. See *id.* at 30-31.

parents hurts children in myriad ways.⁹⁶ Parental conflict usually diminishes after divorce,⁹⁷ and “[t]he eventual escape from conflict may be one of the most positive outcomes of divorce for children.”⁹⁸ Divorce actually improves the well-being of children who “live in a household filled with continual conflict between angry, embittered spouses.”⁹⁹ That characterization includes the cases of sustained physical and emotional abuse on which the critics of no-fault divorce focus, but it is also broader, including conflict well short of abuse.¹⁰⁰ Although researchers do not know precisely how many divorces put an end to marriages involving sustained high conflict,¹⁰¹ those who venture guesses suggest it is a significant number, approximately thirty percent.¹⁰² In addition, it appears that very intense conflict *usually* immediately precedes divorce even in marriages that were fairly quiet until the very end.¹⁰³ If legal change were to stop divorce only by preserving marriages with high levels of old or new conflict, children would not benefit.

This complex reality undercuts optimism about law’s power to improve society. Other things being equal, reducing divorce would be good for children, though not as good as critics claim. But reducing divorce is less good for children if so doing piles new burdens on custodial parents in families that do divorce. And it is no good at all if the reduction in divorce is achieved only by preserving high-conflict marriages. Other things are not always equal, and they matter a great deal.

96. See Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 PSYCHOL. BULL. 310, 319-24 (1982).

97. See FURSTENBERG & CHERLIN, *supra* note 87, at 26 (“By the end of the second year following separation, in all but a small minority of cases the disputes are limited to occasional flare-ups.”)

98. E. Mavis Hetherington, *Divorce: A Child’s Perspective*, 34 AM. PSYCHOLOGIST 851, 855 (1979)

99. FURSTENBERG & CHERLIN, *supra* note 87, at 71-72. *see also* Paul R. Amato & Alan Booth, *The Consequences of Parental Divorce and Marital Unhappiness for Adult Well-Being*, 69 SOC. FORCES 895, 895 (1991); Hetherington, *supra* note 98, at 855; James L. Peterson & Nicholas Zill, *Marital Disruption, Parent-Child Relationships, and Behavior Problems in Children*, 48 J. MARRIAGE & FAM. 295, 298-303 (1986); Michael Rutter, *Parent-Child Separation: Psychological Effects on the Children*, 12 J. CHILD PSYCHOL. & PSYCHIATRY & APPLIED DISCIPLINES 233, 255 (1971)

100. In one well-known study, the authors defined as “high conflict” any marriage in which the parents characterized themselves as “not too happy.” Peterson & Zill, *supra* note 99, at 297. Another study showed that adults who perceived their parents’ marriages simply as “not too happy” were much less likely to have happy marriages than adults whose parents had divorced. Alan Booth & John N. Edwards, *Transmission of Marital Quality over the Generations: The Effect of Parental Divorce and Unhappiness*, 1 J. DIVORCE, Spring 1990, at 41, 50, 55.

101. Telephone Interview with Robert E. Emery, Professor of Psychology, University of Virginia (Aug 22, 1997).

102. See CARLA B. GARRITY & MITCHELL A. BARIS, *CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE* 43-44 (1994)

103. See FURSTENBERG & CHERLIN, *supra* note 87, at 21. Lawrence A. Kurdek & Albert E. Siesky, Jr., *An Interview Study of Parents’ Perceptions of Their Children’s Reactions and Adjustments to Divorce*, 3 J. DIVORCE 5, 7 (1979). Wallerstein reports that during the “acute” phase of divorce just prior to one parent’s exit from the home, “well over half of the children in our study witnessed physical violence between their parents. Before this time, 75 percent of the children had never seen physical violence at home.” WALLERSTEIN & BLAKESLEE, *supra* note 24, at 8

B. *The Law in Society: Regulation and Divorce Rates*

The sociological sensibility of skeptical liberalism recognizes that in some spheres of life, social and cultural influences may sharply limit the power of law. Until recently, “overwhelming evidence” appeared to demonstrate the sharp limits on law’s power over marital breakdown, showing that legal changes in America and abroad had had “little or no effect on divorce rates.”¹⁰⁴ America’s divorce rate climbed almost constantly between 1865 and 1980,¹⁰⁵ growing even in many periods when the law did not change.¹⁰⁶ Studies from abroad show that where strict divorce laws have clashed with changing morals, the morals have won in a rout.¹⁰⁷ Historians identify varied nonlegal forces that have driven increases in the divorce rate regardless of legal climate. These include economic factors, particularly women’s emerging social equality and increased employment; demographic factors, such as longer lifespans; and ideological factors, like the ascendancy of aspirations for romantic love.¹⁰⁸ Simply reciting these nonlegal factors underscores the historically circumscribed effects of regulation on divorce.

Critics now claim that new evidence refutes the suggestion that legal changes have had little impact on divorce rates. These claims are not decisive. Wardle points to the sharp rise in the divorce rate between 1968 and 1975.¹⁰⁹ For purposes of considering the effect of legal changes, however, those years actually consist of two periods: 1968 to 1969 and 1970 to 1975. The rise in the divorce rate was striking throughout: about 0.3 divorces per 1000 population, or 6% to 12%, per year.¹¹⁰ In the first two-year period and the two years immediately prior to it, however, very little legal change occurred: Only four states—New York, North Carolina, Kansas, and Delaware—altered their laws,¹¹¹ and between 1968 and 1970 the increases in the divorce rates in those states account for at most 14% of the increase in the divorce rate

104. Thomas B. Marvell, *Divorce Rates and the Fault Requirement*, 23 L. & SOC’Y REV. 543, 547 (1989); see also RHEINSTEIN, *supra* note 17, at 406 (“Experienced observers have long known . . . that a strict statute law of divorce is not an effective means to prevent or even to reduce the incidence of marriage breakdown.”).

105. See ANDREW J. CHERLIN, MARRIAGE, DIVORCE, REMARRIAGE 22 fig.1-6 (rev. ed. 1992).

106. See BLAKE, *supra* note 59, at 226.

107. See JOHN EEKELAAR, REGULATING DIVORCE 22 (1991) (describing Spain’s restrictive divorce laws and high separation rate); RHEINSTEIN, *supra* note 17, at 262 (same for Italy); Anthony Faiola, *Chile Debates Dropping Divorce Ban That Foes Say Takes High Social Toll*, WASH. POST., Aug. 5, 1997, at A12 (same for Chile).

108. See, e.g., RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY 582-634 (1988).

109. See Wardle, *supra* note 10, at 118; see also *supra* text accompanying note 29.

110. See U.S. BUREAU OF THE CENSUS, VITAL STATISTICS OF THE UNITED STATES: MARRIAGE AND DIVORCE 1976, at 2-6 (1977) [hereinafter MARRIAGE AND DIVORCE 1976]; U.S. BUREAU OF THE CENSUS, VITAL STATISTICS OF THE UNITED STATES: MARRIAGE AND DIVORCE 1971, at 2-6 (1972) [hereinafter MARRIAGE AND DIVORCE 1971].

111. See Nakonezny et al., *supra* note 30, at 480 tbl.1.

nationally.¹¹² The floodgates of legal reform broke only in 1970.¹¹³ Changes in legal restrictions cannot be the cause of a trend in divorce rates that antedates virtually all legal change.

On close examination, the new study on which Galston relies also suggests that nonlegal trends were the chief cause of the recent spike in divorce rates. The study overstates any effect of laws by using a biased measure of the divorce rate after legal change.¹¹⁴ But even if the study did show that a significant increase in the divorce rate followed passage of no-fault laws, it fails to disaggregate the effects of legal change and the effects of the year in which legal change occurred. If, as this Note suggests, divorce rates rapidly increased between 1968 and 1975 chiefly as a result of nonlegal factors, then states changing their laws in that period would see greater increases than states acting before or after: The years, not the laws, would matter most.

The new study supports this hypothesis. Among the five states that passed reforms before 1968 or the twelve states that passed them after 1975, the average increases in the divorce rate following the legal enactments were 0.3 and 0.2 per 1000, respectively.¹¹⁵ These rates of change are not significantly higher than the average national rates of increase over these years.¹¹⁶ Among states passing reforms in the critical middle period (1968 to 1975), the average increase was 1.1 per 1000, much higher than in states changing their laws before or after those years.¹¹⁷ Thus, rates of change ostensibly attributable

112. This figure was calculated using the data in MARRIAGE AND DIVORCE 1971, *supra* note 110, at 2-6. The 14% number overstates any actual increase in divorce in the two states, because before 1968 New York residents frequently traveled to other states to get divorced. See BLAKE, *supra* note 59, at 171 (estimating that 35% of divorces granted to New York residents in 1950 were in courts of other states) New Yorkers who would have divorced elsewhere prior to the legal change and then divorced in New York are counted in the 14% figure.

113. See JACOB, *supra* note 16, at 59, 80 (describing how other states quickly followed California's example).

114. The study's measure of the divorce rate after legal change is the average rate for the three years immediately following the law's passage. See Nakonezny et al., *supra* note 30, at 479. During the immediate aftermath of legal change making divorce easier, divorces quickly occur that would have eventually occurred anyway. See BECKER, *supra* note 57, at 333-34. The magnitude of the effect reported in the study is therefore exaggerated.

115. This figure was calculated from Nakonezny et al., *supra* note 30, at 480 tbl 1.

116. For example, between 1961 and 1967, when most of the early states changed their laws, the national divorce rate crept upward by about 0.06 per 1000 per year. See U.S. BUREAU OF THE CENSUS, VITAL STATISTICS OF THE UNITED STATES: MARRIAGE AND DIVORCE 1966, at 2-6 (1967), MARRIAGE AND DIVORCE 1971, *supra* note 110, at 2-6. Although this number seems much lower than the 0.3 figure in the Nakonezny et al. study, when properly understood it is not. Because that study measures an average for three years before and three years after a law's passage, it will associate with the law an increase in the divorce rate greater than the average annual increase in any period when the divorce rate is rising. At a time like the early 1960s, when the national rate was rising fairly steadily, a measurement of national changes using Nakonezny et al.'s method would produce an increase four times the annual change. That is, the mean for the three years prior to the year selected would be the figure for the second year prior, and the mean for the three years after the year selected would be the figure for the second year after, and there would be four years in between. Four times the average annual change between 1960 and 1967 is 0.24—roughly the average that Nakonezny et al. found.

117. This figure was calculated from Nakonezny et al., *supra* note 30, at 480 tbl 1 by averaging Nakonezny et al.'s figures for the 33 states enacting laws between 1968 and 1975.

to laws are closely linked to years. Like the national data, the state-by-state study thus suggests that national trends cresting around 1968, not legal changes (which were not then national), were the key cause of the sharp upturn in the divorce rate.¹¹⁸

Although the reasons that law is not effective at stopping marital breakdown are complex, one of them is the widely shared commitment to liberty that Berlin, Shklar, and Oakeshott articulate with particular eloquence.¹¹⁹ Some people unable to end their marriages in law have always ended them in fact by separating.¹²⁰ Usually the law has permitted formalization of separations, though sometimes it does not.¹²¹ Never in modern America, however, has the state sought to force unhappy spouses to live together.¹²² Such an effort would invade privacy in a way unthinkable to a society that respects even a modicum of individual liberty. Precisely because critics of current law respect personal freedom and would not force unhappy couples to remain physically united,¹²³ their proposed reforms would in practice simply drive some couples to delay divorce and others to separate without divorcing. The evidence suggests that both results occur with some frequency: Legal changes have historically produced temporary shifts in

118. This hypothesis is also supported by evidence showing that the four states that did not join the national move toward unilateral no-fault divorce did not depress their divorce rates relative to the national average. The following table compares divorce rates in 1967, before any of these four states or virtually any others had changed their laws, and in 1983, at least five years after all four states had changed their laws and after nearly all other states had also changed theirs.

	STATE DIVORCE RATE AS A PERCENTAGE OF NATIONAL AVERAGE	
	1967	1983
Mississippi	108%	106%
New York	15%	73%
Ohio	108%	102%
Tennessee	123%	129%

These figures were calculated from U.S. BUREAU OF THE CENSUS, VITAL STATISTICS OF THE UNITED STATES: MARRIAGE & DIVORCE 1984, at 2-6 (1985); and MARRIAGE & DIVORCE 1971, *supra* note 110, at 2-6.

The current divorce rates in all four states are close to the averages for the regions in which those states are located as identified by the U.S. Census Bureau. See U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES—1996, at 107 tbl.153 (1996) (showing that in 1994 the New York rate was 3% higher, the Ohio rate 12% higher, the Tennessee rate 8% higher, and the Mississippi rate 7% lower than regional averages).

119. See *supra* note 60 and accompanying text.

120. See GLENDON, *supra* note 21, at 148.

121. See HARRY D. KRAUSE, FAMILY LAW 353-56 (3d ed. 1995).

122. In Puritan Massachusetts, courts did order couples to live together. See PHILLIPS, *supra* note 108, at 284-85. For a moderately sympathetic account of the "writ for restoration of conjugal rights," see Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777, 812-13.

123. None of the major legislative or academic proposals to tighten divorce law, see *supra* notes 47-53 and accompanying text, would grant such authority to the state.

divorce rates that dissipate over time,¹²⁴ and separation rates predictably rise when divorce laws tighten.¹²⁵ The law's limited power over divorce reflects the limited scope of the law in a free society.

C. *The Recalcitrance of Vice: Law and Individual Conduct*

The psychology of divorce also limits law's power. If ever there is a time when people are likely to look far more like the crooked timber and cracked vessels of the skeptical liberals than the decent maximizers of the reformers, the period of marital breakdown is that time. As the skeptical liberal might anticipate, divorcing individuals are often "too tormented, distracted, and bewildered to focus steadily on the difference between a cost and a benefit."¹²⁶ They are therefore unable to respond to legal changes in the calculating way that reformers require. Three forms of human limitation mock law's efforts to save marriages in order to help children: lack of attention to the consequences of actions, nonconscious motivational processes, and imperfect reasoning.

The first limit on responsiveness to legal change is the common failure to focus either on the law or on the consequences of personal conduct. It is not at all clear that most people know much about divorce law.¹²⁷ Everyday life has countless stresses, and even if people would be wise to learn the broad outlines of the legal regime, they may be unable or unwilling to gather the energy to do so. Persons too distracted to learn the law cannot alter their conduct on its account.

More critically, even when people do know about divorce law, that knowledge will not affect conduct not seen as likely to precipitate marital breakdown.¹²⁸ Marrying couples typically believe they will never

124. See BECKER, *supra* note 57, at 333-34.

125. See PHILLIPS, *supra* note 108, at 604-05 & fig.14-3 (showing that the rate of separations in France decreased precipitously when divorce was legalized in 1884). RHEINSTEIN, *supra* note 17, at 453 (showing that states with stricter divorce laws had higher separation rates during the 1960s). In the 1950s, when the divorce rate nationally was low and New York had one of the strictest laws in the United States, informal abandonment was a major problem in New York City. See BLAKE, *supra* note 59, at 202. RHEINSTEIN, *supra* note 17, at 271. Today in Chile, where divorce is illegal, "it is estimated that nearly half of all married adults have separated unofficially." Faiola, *supra* note 107. These data suggest that some hard-to-identify fraction of any shift in divorce rates during periods of legal change merely reflects the conversion of separations under strict law into divorces under liberal law, or vice versa.

126. Holmes, *supra* note 72, at 96.

127. See Baker & Emery, *supra* note 53, at 441 (reporting that marriage license applicants surveyed had a knowledge of divorce laws "only slightly better than chance"). cf. ELLICKSON, *supra* note 67, at 144-45 (reviewing studies and stating that "[o]rdinary people know little of the private substantive law applicable to decisions in everyday life"); Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991, 1000 (1989) (noting a "general feeling . . . that people do not know much about the law or legal system").

128. Cf. Elster, *supra* note 7, at 34 ("It is far from clear that married people make a rational assessment of the probability of divorce and adjust their behavior accordingly.")

divorce.¹²⁹ When their marriages do break down, the cause is often an aggregation of small decisions, many made without any thought that they might eventuate in divorce.¹³⁰ Many spouses see or claim to see only retrospectively how their relationships broke down.¹³¹ Even then, some still report that they are “[n]ot sure what happened.”¹³² It is easy to understand why: Human cognitive capacity is limited, and more immediate concerns than the risk of a divorce often monopolize people’s thinking.¹³³ Thus, either because they do not learn the law or do not see that their actions may have legal consequences, many people will continue to undermine their marriages without any thought about such consequences.

In a second pattern of conduct that resists legal modification and evokes Berlin’s favorite quotation,¹³⁴ the end of marriage may be a series of “crooked transactions.”¹³⁵ Unlike the critics’ imagined spouses whose preferences concerning marriage have some constancy and clarity, the typical individuals on this account are driven to destroy their marriages by “nonconscious motivational mechanisms that shape [their] desires ‘behind [their] backs.’”¹³⁶ Thus, in about eighty percent of divorces, one spouse decides to end the relationship before the other wants it to end,¹³⁷ yet even the initiating spouse often does not immediately articulate the desire for a divorce. He or she “wants out of the relationship but denies that wanting and cannot or will not declare the true intention.”¹³⁸ Lacking a “deliberate intent . . . to harm the marital relationship,”¹³⁹ but seeking to resolve a

129. See Baker & Emery, *supra* note 53, at 443.

130. See Regina L. Donovan & Barry L. Jackson, *Deciding To Divorce: A Process Guided by Social Exchange, Attachment and Cognitive Dissonance Theories*, J. DIVORCE, Fall 1990, at 23, 30-31 (noting that a decision to divorce is often “the end result of a series of smaller decisions made by an individual . . . in the absence of the person’s feeling like he/she has made any definite decision”); Joseph Federico, *The Marital Termination Period of the Divorce Adjustment Process*, 3 J. DIVORCE 93, 94 (1979) (describing central moments in the divorce process as ones of which “the person may be unaware”).

131. Cf. Joseph Hopper, *The Rhetoric of Motives in Divorce*, 55 J. MARRIAGE & FAM. 801, 804 (1993) (finding “little correspondence” between predivorce experiences and post-divorce descriptions of motives).

132. Gay C. Kitson & Marvin B. Sussman, *Marital Complaints, Demographic Characteristics, and Symptoms of Mental Distress in Divorce*, 46 J. MARRIAGE & FAM. 87, 93 (1982).

133. See Donovan & Jackson, *supra* note 130, at 31 (discussing how the limits of cognitive capacity make the use of optimizing strategies difficult during the divorce process); see also IRVING L. JANIS & LEON MANN, *DECISION MAKING: A PSYCHOLOGICAL ANALYSIS OF CONFLICT, CHOICE, AND COMMITMENT* 22-27 (1977) (reaching the same conclusion for decisionmaking generally).

134. See *supra* text accompanying note 74.

135. Federico, *supra* note 130, at 98. The discussion that follows chiefly relies on the accounts in *id.* and JOSEPH GUTTMANN, *DIVORCE IN PSYCHOSOCIAL PERSPECTIVE: THEORY AND RESEARCH* 59-61 (1993). Other authors have offered similar descriptions of the divorce process. See, e.g., FURSTENBERG & CHERLIN, *supra* note 87, at 22; WILLIAM J. GOODE, *AFTER DIVORCE* 135-36 (1956); DIANE VAUGHAN, *UNCOUPLING: TURNING POINTS IN INTIMATE RELATIONSHIPS* 91-100 (1986).

136. JON ELSTER, *SOLOMONIC JUDGEMENTS: STUDIES IN THE LIMITATIONS OF RATIONALITY* 20 (1989).

137. See FURSTENBERG & CHERLIN, *supra* note 87, at 21-22.

138. Federico, *supra* note 130, at 98; see also GUTTMANN, *supra* note 135, at 59 (stating that one party may “want to dissolve the relationship yet stay in it”).

139. Federico, *supra* note 130, at 99.

muddle of mixed feelings,¹⁴⁰ the spouse then "implement[s] what (s)he is likely to recognize, *in retrospect*, as strategies for terminating the marital relationship."¹⁴¹ Not intending to deceive, spouses nonetheless say one thing and do another: "There is a driven quality to their behavior. They may apologize, ask for forgiveness, beg for understanding or patience, be analytic or rational to the end, but the basic point is that the acting-out continues and may escalate."¹⁴² Those "impelled" in this way ruin their marriages through actions such as "[t]riggering controversies or fights," stopping only when divorce is certain.¹⁴³ Because the veneer of "analytic or rational" consideration does not control the underlying impulsion to divorce, legal manipulation of costs whose comprehension requires calculation, such as the financial repercussions or likelihood of divorce, is not likely to affect the basic pattern of conduct. Increases in costs cannot change conduct that is not governed by calculation of costs at all.

In a final pattern of conduct that resists legal restriction, the attempt at deliberation is thwarted less by unconscious motivations than by imperfect reasoning processes. A familiar form of cognitive bias is the tendency to engage in "wishful thinking," focusing on gains and ignoring losses.¹⁴⁴ When marriages begin, people are typically optimistic, and they do not learn the law of divorce or alter their conduct in response to it.¹⁴⁵ As marriages end, fixation on gains from divorce may be so powerful, and consideration of costs so limited, that measures incrementally increasing losses have little effect. Some psychologists have theorized that people considering divorce weigh three things: the benefits of marriage, the potential benefits of divorce, and the potential costs of divorce.¹⁴⁶ Importantly, research much more strongly confirms the importance of the first two factors than that of the third. Perceived barriers to divorce apparently play little role in divorce decisionmaking.¹⁴⁷ Because the calculation of barriers is not an important

140. See GUTTMANN, *supra* note 135, at 59 (describing the role of cognitive dissonance in divorce decisionmaking). Contemporary psychology emphasizes that the drive to resolve cognitive dissonance may alter pre-decisional as well as post-decisional processes. See JANIS & MANN, *supra* note 133, at 83-85.

141. Federico, *supra* note 130, at 130 (emphasis added), see also VAUGHAN, *supra* note 135, at 114 (noting that the initiator's goal often is "to try, but to fail").

142. Federico, *supra* note 130, at 104.

143. GUTTMANN, *supra* note 135, at 60; see also Federico, *supra* note 130, at 100-03 (discussing "provocation" and "sabotage" strategies for terminating marriages)

144. See JANIS & MANN, *supra* note 133, at 91-92, 107-09

145. See Baker & Emery, *supra* note 53, at 448.

146. This is called "social exchange theory." See Stan L. Albrecht & Phillip R. Kunz, *The Decision To Divorce: A Social Exchange Perspective*, 3 J. DIVORCE 319, 320-22 (1980); George Levinger, *A Social Psychological Perspective on Marital Dissolution*, in DIVORCE AND SEPARATION: CONTEXT, CAUSES AND CONSEQUENCES 37, 37-48 (George Levinger & Oliver C. Moles eds., 1979)

147. See Robert G. Green & Michael J. Sporkowski, *The Dynamics of Divorce: Marital Quality, Alternative Attractions, and External Pressures*, J. DIVORCE, Winter 1983, at 77, 77 (finding that barriers had a significantly smaller effect on the divorce decision than attractions to marriage or divorce); Gay C. Kitson et al., *Withdrawing Divorce Petitions: A Predictive Test of the Exchange Model of Divorce*, J. DIVORCE, Fall 1983, at 51, 61 (finding that the five strongest influences on the decision to withdraw a divorce petition were attractions to marriage or to alternatives, not barriers to divorce)

part of the decision to divorce, laws incrementally increasing barriers to divorce are not likely to affect decisionmaking. The failure of rationality, the willful blindness to costs, is too profound.

Taken together, these findings support the skeptical liberal intuition that legal restrictions on divorce will stop little marital breakdown because people are too cognitively limited, too impassioned, or too deluded to respond rationally to legal change. By the time couples soberly contemplate the possibility of divorce and the implications of law, their marriages are likely to be at a very late stage of breakdown.¹⁴⁸ At that point, relationships are often very hostile.¹⁴⁹ Extending a high-conflict marriage will not help children, yet the reconciliation and reduction in conflict that would help them are improbable once conflict has escalated.¹⁵⁰ At the point late in the divorce process when people are most likely to acknowledge and reason about the law, the question is less whether law can stop separation than whether it will intensify the destruction caused by the separation process.

D. *The Perverse Effects of Divorce Restrictions on Children*

It is when the law's power to improve conduct is at a low ebb that the skeptical liberal charge to "do no harm" makes most sense. Even when law cannot improve morals, it can still inflict harm and arouse vice. As their marriages collapse, people are not likely to respond to law. But because divorce requires legal formalization, individuals who have decided to end their marriages have no choice but to adjust their conduct to the legal regime. In the marital "endgame," when law most matters, the incentives created by tough divorce laws are unfortunately perverse. These laws encourage further

Some have argued that the recent reduction in legal barriers explains these findings, see Albrecht & Kunz, *supra* note 146, at 328, but two sets of data provide some evidence that the tendency to ignore such barriers is simply a fact of divorce decisionmaking. First, even before the shift to no-fault, the great majority of spouses did not identify the law as a significant factor in their decisions to divorce. See GRAHAM B. SPANIER & LINDA THOMPSON, PARTING: THE AFTERMATH OF SEPARATION AND DIVORCE 97 (1984) (finding, in a state with a fault-based law, "no evidence that individuals are inclined to avoid or postpone divorce or to attempt reconciliation as a result of the current adversary statute"). Second, in the one study that compared the perceptions of benefits and barriers to divorce in couples where one spouse sought the divorce and the other resisted it, the "leaver" and "left" perceived different gains from marriage and divorce, but identical barriers to divorce. See Leora E. Black et al., *An Exploratory Analysis of the Construct of Leavers Versus Left as It Relates to Levinger's Social Exchange Theory of Attractions, Barriers, and Alternative Attractions*, J. DIVORCE, Spring 1991, at 127, 136.

148. See GOODE, *supra* note 135, at 138 (showing that a majority of couples went from "serious consideration to final decision" on divorce in less than four months); cf. Bernard L. Bloom et al., *Marital Separation: A Community Survey*, 1 J. DIVORCE 7, 15-16 (1977) (reporting a survey result indicating that 87% of separations end with divorce).

149. See *supra* note 103 and accompanying text.

150. Judith Wallerstein makes a similar point in an interview, noting that long waiting periods "never" produce reconciliation in broken-down marriages. Katha Pollitt, *Can This Marriage Be Saved?*, NATION, Feb. 17, 1997, at 9, 9.

destructive conflict, and this conflict in turn increases children's suffering from divorce.

At first blush, a waiting period may seem likely to do little damage because a person resolved to divorce can begin a separation and then wait for the divorce. Typical waiting-period proposals prevent this relatively harmless outcome, however, because they offer exceptions for the panoply of traditional fault grounds, and sometimes also for mutual consent.¹⁵¹ Because "[p]eople wishing to divorce are unwilling to wait longer than necessary," the great majority of couples in regimes offering waiting periods and expedited grounds use the grounds, foregoing the wait.¹⁵² Instead of stopping or delaying divorce, waiting periods thus often drive couples to use the mechanisms of consent and fault regimes.¹⁵³

Consent and fault mechanisms provoke parents to engage in conduct that causes additional harms to children. Above all, these rules generate greater parental conflict. In a no-fault regime, the initiator of divorce may feel an internal compulsion to destroy the marriage before leaving it, but he or she has no legal need to do so. In a consent or fault system, spousal consent becomes crucial, either formally under a mutual consent provision or informally under the de facto consent regime of a fault system.¹⁵⁴ As four-fifths of divorces are unilaterally initiated,¹⁵⁵ the initiating spouse may not be able to get consent by asking for it, or may be afraid of asking for consent until certain that it is forthcoming. Since kind conduct in these circumstances may only strengthen the resolve of the noninitiating spouse to save the marriage, the initiator who needs consent has an inducement to embitter his or her partner.¹⁵⁶

151. See *supra* text accompanying notes 50-51.

152. EEKELAAR, *supra* note 107, at 37. In Ohio, which grants consensual no-fault divorce after two years or immediate divorce on proof of fault, one study found that in 1978 only 13% of divorcing spouses used the consensual provision. See ELLMAN ET AL., *supra* note 16, at 194. At a time when Britain had a law granting divorce after five years on unilateral petition, two years based on mutual consent, or immediately because of fault, 73% of divorcing spouses used a fault ground, and fewer than 8% used the unilateral provision. See EEKELAAR, *supra* note 107, at 37. In the similarly mixed systems of Australia and Canada, studies likewise showed that "more divorces were based on offence grounds than the separation provisions." JOHN EEKELAAR, *FAMILY LAW AND SOCIAL POLICY* 42 (2d ed. 1984).

153. Unlike most critics of no-fault divorce, Elizabeth Scott acknowledges that a fault-based exception to a waiting period will effectively scuttle the waiting period in many cases. See Scott, *supra* note 10, at 92. Yet Scott does not follow this insight to its conclusion: Although ambiguous on the point, her proposed regime would apparently permit legal separation—and hence alimony and child support—only upon proof of fault. See *id.* at 93 (suggesting separation "[f]or those cases in which the *offensive behavior* destroys the value of the relationship" (emphasis added)); cf. LA. REV. STAT. ANN. § 9:307 (West 1997) (requiring fault for separation). Especially when combined with a long waiting-period requirement in which legal separation would prove valuable for many couples, such a rule would encourage fault-based separation proceedings, with the attendant effects of fault processes.

154. See *supra* notes 16-17 and accompanying text.

155. See FURSTENBERG & CHERLIN, *supra* note 87, at 21-22.

156. This incentive persists even though one party can informally leave the other without consent. For one thing, even when separation does occur, the need for consent pushes one spouse to pressure the other to grant a divorce. More critically, in most instances under fault regimes, as a practical matter one spouse has not separated until the two have agreed on divorce. See GOODE, *supra* note 135, at 179 (noting, in a

Supporting this argument empirically, the leading study of divorce during the 1950s suggests that husbands in the old fault regime did behave poorly in order to get a divorce. In the typical case, the husband first decided to get a divorce, then worked to "make himself so obnoxious that his wife is willing to ask for and even insist upon a divorce."¹⁵⁷ The patterns of conduct he employed, the study suggests, included heavy drinking and failure to provide adequate economic support to the family.¹⁵⁸ Such conduct plainly does not benefit children.

This behavior and its support in law have a cruel logic familiar from Shklar's work.¹⁵⁹ Instead of expressing the ongoing affection for the family that critics anticipate, the conduct reflects a relentless drive to exit marriage. The law feeds this vicious behavior. Initiating spouses may be horrified to find themselves destroying people they once adored.¹⁶⁰ At the moment when spouses have become more unkind than they imagined they could ever be, the law will have engendered the cruelty that Shklar anticipates from moralistic restrictions.¹⁶¹

sample during the fault era, that more than 60% of separations occurred only after a final decision to divorce had been reached); SPANIER & THOMPSON, *supra* note 147, at 49 (noting, in a study of a state with a fault regime, that separation typically occurs when one spouse has "reached a level of certainty about the breakup"). The initiating spouse apparently seeks to secure consent in advance. Perhaps the initiator wishes to know that divorce is certain before taking the major step that separation involves. Perhaps he or she wishes to preserve the leverage of continued cohabitation until the absolute decision to divorce. Whatever its basis, the continued cohabitation of two spouses prior to the divorce decision gives the spouse wanting a divorce an incentive to behave as miserably as possible toward the spouse not wanting one.

157. GOODE, *supra* note 135, at 135-36.

158. *See id.* at 149.

159. And from law and economics. The commentators who suggest that spouses will reach mutually satisfactory agreement on terms of marriage overlook the possibility, familiar from discussion of bilateral monopoly, that parties trapped in a conflict with each other may have incentives to engage in strategic and destructive (or "inefficient") behavior. *See* William M. Landes & Richard A. Posner, *Saviors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Altruism*, 7 J. LEGAL STUD. 83, 91 (1978) (describing the difficulty of reaching mutually advantageous agreements in bilateral monopoly situations).

160. *See* GOODE, *supra* note 135, at 136 (describing the typical husband as "not aware that he is following out any such plan [to convince his wife to divorce him]").

161. One might argue that financially punishing fault, as the fault systems do and the mixed systems permit, *see supra* note 21, will prevent one spouse from driving the other out of the marriage. If conduct labeled by statute as "cruel" produces negative financial consequences, for example, then it may be thought that a spouse will not engage in such conduct.

Although the rules governing finances are beyond the scope of this Note, it is worth explaining that this thought is dubious for now-familiar reasons. First, many people will not consider a financial penalty at all, instead focusing on exiting the marriage however they can. *See supra* Section III.C. Many others will have too little income to care about such a penalty. *Cf.* Herbert Jacob, *Another Look at No-Fault Divorce and the Post-Divorce Finances of Women*, 23 L. & SOC'Y REV. 95, 98 (1989) (noting that "most divorced women . . . receive little or nothing from [marital property and child support] even under the best of circumstances"). If the law seeks to minimize the damage to children from divorce, then it will assure a reasonable financial award regardless of fault, and the implications of a fault-based penalty will diminish further.

Most importantly, the notion that the law can identify and block all of the roads that one spouse might take to hurt the other rests upon a fantasy of moral clarity that skeptical liberalism questions and lived experience refutes. Although egregious wrongs like adultery are easy to identify, the indignities that one spouse inflicts upon the other often will not be labeled "fault." *See* Joseph Goldstein & Max Gitter, *On Abolition of Grounds for Divorce: A Model Statute & Commentary*, 3 FAM. L.Q. 75, 79 (1969). Even when wrongs are so labeled, the other spouse may well respond in kind. *See* Federico, *supra* note 130, at 103

Legal restriction will induce particularly destructive behavior in the high-conflict families that are already hurting children most. Battered women are often afraid to confront their husbands with abuse allegations in the public way that fault proceedings require.¹⁶² These women are, of course, also unable to obtain the consent of their batterers to divorce, and often will lack the financial resources simply to leave the household without financial support guaranteed by law.¹⁶³ As a result of a fault or consent system, therefore, many battered women will remain trapped in their marriages. Children will suffer more as their mothers are abused.¹⁶⁴

A restrictive divorce regime will also perversely affect families with high levels of conflict short of abuse. Spouses in high-conflict relationships have an unusually high incidence of psychological difficulties, including personality disorders and pathologically hostile-dependent relationships.¹⁶⁵ Because persons in such relationships are less likely to agree to split up,¹⁶⁶ the need to procure consent as a condition of divorce may become an additional source of conflict. If such couples do enter an adversarial legal proceeding, it is likely to become a drawn-out and intensely acrimonious affair.¹⁶⁷ This extended conflict, in and out of court, will further harm children.

(describing a situation whose "prototype" is one in which "the Provoker . . . starts an affair and then files for divorce after learning that the Provokee has started an affair"). In that case, the court will have great difficulty determining who is "more" at fault. Cf. KRAUSE, *supra* note 121, at 345-46 (describing difficulties when both spouses have committed fault under the old system). More generally, one person may commit fault such as adultery, but the other person may then take the actions that make continuing the marriage impossible. See SPANIER & THOMPSON, *supra* note 147, at 70-71 (noting that "[a]lthough separated men and women view their spouses' extramarital experiences as contributing to marital problems, they do not blame their spouses' sexual behavior for the final demise of their marriage") In those circumstances, the spouse who finally "caused" marital breakdown has little to fear from a fault proceeding, because the other spouse is already legally blameworthy. See KRAUSE, *supra* note 121, at 346. Because relationships are so much more complex than fault rules, financial penalties will not stop mutually destructive conduct.

162. See Linda J. Lacey, *Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott*, 66 TUL. L. REV. 1435, 1443-46 (1992).

163. See Suzanne K. Steinmetz, *The Violent Family*, in VIOLENCE IN THE HOME: INTERDISCIPLINARY PERSPECTIVES 51, 59 (Mary Lystad ed., 1986) ("[T]here is a constant decrease in violence as income levels go up."); Michael J. Strube & Linda S. Barbour, *Factors Related to the Decision To Leave an Abusive Relationship*, 46 J. MARRIAGE & FAM. 837, 837-38 (1984) ("[T]he fewer the resources a woman had, the less likely she was to leave the abusive relationship.").

164. See Louise Silvern & Lynn Kaersvang, *The Traumatized Children of Violent Marriages*, 68 CHILD WELFARE 421, 422 (1988).

165. See JANET R. JOHNSTON & LINDA E.G. CAMPBELL, *IMPASSES OF DIVORCE* 40 (1988) (stating that "high-conflict divorcing parents have characterlike disorders" and "the propensity for forming complex hostile-dependent relations"); Lynn Gigy & Joan B. Kelly, *Reasons for Divorce: Perspectives of Divorcing Men and Women*, 18 J. DIVORCE & REMARRIAGE, Winter/Spring 1992, at 169, 181 (noting that persons in "high conflict/demeaning" relationships report more paranoid symptoms than average). cf. John G. Gunderson & Katherine A. Phillips, *Personality Disorders*, in COMPREHENSIVE TEXTBOOK OF PSYCHIATRY, *supra* note 93, at 1425, 1435, 1437, 1440 (discussing the tendency of persons with personality disorders to have significant interpersonal problems).

166. Cf. STEVEN R.H. BEACH ET AL., *DEPRESSION IN MARRIAGE* 78-79 (1990) (describing how a marital "dyad containing a depressed member [has limited ability] to make progress in resolving preexisting marital distress").

167. See JOHNSTON & CAMPBELL, *supra* note 165, at 39-42 (describing viciousness of high-conflict legal proceedings).

Fault-based judicial proceedings also activate destructive impulses even in families where conflict is not pathological.¹⁶⁸ Because adversary processes require one spouse to prove the other "guilty" of some fault, lawyers in such cases often encourage parents to hurl vicious accusations at each other, enlisting the children on their side if possible.¹⁶⁹ There is considerable evidence that fault processes increase parental conflict, reduce parental equipoise, and trap children in public shouting matches between their parents.¹⁷⁰ All of these outcomes plainly harm children.¹⁷¹

Finally, the critics' view that a fault or consent system would help children financially rests on a last misleading generalization. Viewed as a whole, the historical evidence on the financial effects of the shift to no-fault is inconclusive. Some studies show that women in no-fault states receive slightly smaller settlements on average,¹⁷² but others find no difference.¹⁷³ Where the shift to no-fault divorce does appear to correlate with a small decline in settlements, that decline may be the result of changes in the financial regime that accompanied the shift to no-fault, not of no-fault per se.¹⁷⁴ It is thus unclear how much, if at all, the relaxation of divorce restrictions hurt women or children.

Even if fault and consent systems did help women and children twenty years ago, the situation would be different today. The argument that restrictive systems financially help women and children rests on the empirical claim that most marriages end with men seeking divorce and women resisting it.¹⁷⁵ This claim is just an old sexual stereotype. During the fault era, men did initiate divorce more often than women.¹⁷⁶ Today, women are more likely than men

168. See Elster, *supra* note 7, at 42 ("Social psychology research does not confirm the view that aggression can be relieved by being expressed. . . . If anything, acting out leads to more aggression.").

169. See SPANIER & THOMPSON, *supra* note 147, at 94 (noting in a study of a state with fault law that "advice [by lawyers] to exaggerate marital problems during the process of divorce was not an uncommon occurrence"); cf. Linda K. Girdner, *Strategies of Conflict: Custody Litigation in the United States*, J. DIVORCE, Fall 1985, at 1, 8 (describing the tactics of "pumping," "coaching," and "poisoning" children).

170. See EEKELAAR, *supra* note 152, at 45-48; JOHNSTON & CAMPBELL, *supra* note 165, at 40; ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 277-78 (1992); SPANIER & THOMPSON, *supra* note 147, at 92; Elaine A. Anderson, *An Exploration of a Divorce Statute: Implications for Future Policy Development*, J. DIVORCE, Fall 1989, at 1, 14; Graham S. Saayman & R. Vanessa Saayman, *The Adversarial Legal Process and Divorce, Negative Effects upon the Psychological Adjustment of Children*, J. DIVORCE, Winter 1989, at 329, 329-30.

171. It is true, as some authors have pointed out, that parental conflict often persists in other locales, such as custody fights. See Wardle, *supra* note 10, at 99-102. If the goal is to help children, however, then this unfortunate fact commends efforts to alleviate destructive conflict in these other forums, not to add another arena for acrimony to divorce. Mediation has had some success. See DESMOND ELLIS & NOREEN STUCKLESS, *MEDIATING AND NEGOTIATING MARITAL CONFLICTS* 52-61 (1996).

172. See Peters, *supra* note 36, at 449.

173. See Jacob, *supra* note 161, at 108-11.

174. See Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *DIVORCE REFORM AT THE CROSSROADS*, *supra* note 44, at 75, 77 (showing that when changes in grounds and in financial rules are disaggregated, the rules, not the grounds, were the determinants of settlement sizes).

175. See sources cited *supra* note 44.

176. See GOODE, *supra* note 135, at 133.

to seek divorce,¹⁷⁷ even in families with children.¹⁷⁸ For this simple reason, a legal system that disadvantages the partner who wants to divorce will not help women and children. In fact, if historians are right that women have increasingly sought divorce as their financial prospects have improved,¹⁷⁹ and if women's employment rate and earnings relative to men's continue to rise,¹⁸⁰ then the proportion of children benefiting from a fault or consent regime is likely to shrink. There is no consistent connection between fault and consent, on the one hand, and children's financial well-being, on the other.¹⁸¹

One financial effect of a fault system is guaranteed, however. Fault divorces will always cost more than no-fault divorces.¹⁸² These financial costs will, of course, leave custodial parents more vulnerable and less able to care for their children. But this is only the last way that sharp restrictions on divorce, rather than controlling the damage to children from divorce, are likely to increase that damage.

IV. CONTROLLING THE DAMAGE

The skeptical liberal sensibility commends restraints on the state not because freedom always produces good, but because coercion can produce greater evils than freedom. It is a bad thing for children that divorce rates rapidly increased during the 1960s and 1970s, even if it is not as bad as critics say. But tight restrictions on divorce would be worse on account of the social complexity and individual perversity that skeptical liberals emphasize. Most people reach the decision to divorce through psychologically skewed processes not responsive to legal manipulation. Restrictive divorce laws do affect the divorce process after the decision to divorce, but at that point they serve

177. See FURSTENBERG & CHERLIN, *supra* note 87, at 22. GUTTMANN, *supra* note 135, at 61. VAUGHAN, *supra* note 135, at 221 n.34.

178. In the Pennsylvania study of divorced families with children, 64% of women and 47% of men reported that women had first suggested divorce, while only 27% of women and 34% of men reported that men had first suggested it. See SPANIER & THOMPSON, *supra* note 147, at 53.

179. See CHERLIN, *supra* note 105, at 48-51; PHILLIPS, *supra* note 108, at 614-15.

180. See CHERLIN, *supra* note 105, at 50 fig.2-4.

181. The financial penalties of a fault system also would not generally protect women. Ideal enforcement of that system is impossible for reasons explained above. See *supra* note 161. Moreover, although women are almost always the victims of a most egregious form of marital fault—spousal physical abuse—they are almost as likely as men to commit other kinds of fault, such as adultery. See SPANIER & THOMPSON, *supra* note 147, at 63; Albrecht & Kunz, *supra* note 146, at 326. Ailsa Burns, *Perceived Causes of Marriage Breakdown and Conditions of Life*, 46 J. MARRIAGE & FAM. 551, 561 (1984). Women are also more likely to seek exit from marriages due to interpersonal problems that, however awful, may not constitute legally cognizable fault. See FURSTENBERG & CHERLIN, *supra* note 87, at 19-20. The many custodial mothers who have committed fault might be penalized with reduced financial awards in a fault system, and the many who wish to divorce but cannot prove their husbands "guilty" would be forced to purchase divorces by bargaining away financial benefits. In both instances, children would suffer.

182. Compare AHRONS, *supra* note 32, at 40 (estimating the cost of a no-fault divorce in Tennessee at \$300), with Sarah Hornaday, *Divorce Bill Costly for Poor Texans*, AUSTIN AM.-STATSMAN, Apr. 10, 1997, at B9 (estimating the cost of a fault divorce in Texas under a proposed fault law at \$5000 to \$10,000).

chiefly to inflame passions and drain family resources in ways that harm children.

If laws aiming to stop divorce by altering instrumental incentives necessarily fail, it may appear that the law is entirely unable to help children by reducing rates of divorce. This conclusion would be too strong. Legal restrictions may not be able to alter an instrumental calculation that either does not occur or occurs only erratically, but instrumental calculations are not the only objects of law's influence.

Law can also contribute, in a modest way, to the ideological framework within which individuals make choices, whether rational and calculating or deluded and emotional.¹⁸³ To be sure, the power of laws over conduct-directing norms should not be overstated.¹⁸⁴ Given the richness of everyday life, people may not know what the law is, and if they do know, it may not change the way they see an issue.¹⁸⁵ Even when the law penetrates norms, it still may not affect complex patterns of conduct.¹⁸⁶ In a diverse civil society with many opposed norm-generating institutions, law—especially liberal law—necessarily plays a limited role in altering ideologies. But it may play a role nonetheless.

The notion that law has made some small contribution to conduct by influencing background norms is consistent with both the data on divorce rates and the skeptical liberal conception of personality. Among the many trends beyond divorce law whose surge around 1968 likely sent the divorce rate upward,¹⁸⁷ the much publicized legal change in New York may have signaled a new tolerance of divorce that subtly influenced conduct throughout the country. Indeed, the increase in the divorce rate nationally following legal changes in just a few states suggests that the law affected the divorce rate, if it did so at all, by destigmatizing divorce, not by directly restricting conduct.¹⁸⁸ This hypothesis is consistent with the recognition that conduct during divorce may not be driven by conscious calculation. Individuals caught up in a dimly grasped divorce process may still vary their conduct depending

183. See GLENDON, *supra* note 33, at 5-9, 138-39 (describing how law's storytelling power can alter norms).

184. See EEKELAAR, *supra* note 107, at 22 ("Law may indeed affect social reality, but the nature and extent of this relationship is uncertain and problematic."); GLENDON, *supra* note 33, at 139 (noting that law contributes in a "modest . . . way" to moral beliefs).

185. See *supra* note 127 and accompanying text.

186. See Weisbrod, *supra* note 127, at 1005 ("Scholars whose concern is law/society issues suggest that law may not be very important in causing particular behavior.").

187. See CHERLIN, *supra* note 105, at 48-53 (emphasizing the effect of women's employment on divorce rates); cf. WILLIAM L. O'NEILL, *COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960's* at 360 (1971) (describing 1968 as "the hard year").

188. The legal rules in the few states changing their laws obviously did not apply to nonresidents. The shift in values throughout the period is well-known. See PHILLIPS, *supra* note 108, at 625-26 (describing the destigmatization of divorce during the 1960s); Galston, *supra* note 10, at 17 (noting the decline from the 1960s in the percentage of Americans who believe parents should stay together "for the sake of their children").

on cultural norms. For example, although the “impulsion to divorce” is not a product of means-ends rationality, it may reflect a norm that sets individual happiness above all.¹⁸⁹ Similarly, even though wishful thinking may not vary with barriers to divorce, it may respond to shifts in the perceived benefits of divorce caused, for example, by a reduction in stigma.¹⁹⁰ Even people who are not calculating are influenced by community norms that the law shapes.

Although the law can thus affect norms in some measure, restrictive regulation remains an improper way to do so for several reasons. The law’s influence on norms is still necessarily modest. The costs of influencing norms through restriction is high.¹⁹¹ The many children of the many parents who divorce in spite of the law will suffer gravely from restrictive laws. Finally, restrictive regulation is not even a necessary element of norm-altering legislation. Scholars have noted the power of government expression even absent coercion.¹⁹² The data from the 1960s suggest that the New York law’s expressive dimension may have affected persons not directly regulated. Legal regulation can accordingly seek to support cultural norms that encourage parents to work out their problems, without imposing legal requirements that trap those unable to do so. Symbolic measures in this spirit probably would not have a large effect, but the critical point for the skeptical liberal is that these kinds of laws would not cause further harm to children.

A law committed to controlling damage could harmlessly signal that parents should try to work out problems in several ways. First, the state could require marital counseling before divorce, provided that either financial assistance or a waiver for indigency were made available.¹⁹³ If the amount of counseling required were limited and financial aid were available, then a counseling requirement would not substantially lengthen the breakdown process, drain family resources, or create incentives for parents to fight as do fault and consent requirements. Yet requiring some counseling would signal a societal commitment to treating divorce as a last resort.¹⁹⁴

189. Cf. Federico, *supra* note 130, at 97 (describing the decision to divorce as “an individual process motivated by individual concerns”).

190. Even when a person is wishfully thinking about only the benefits of divorce, those benefits will appear smaller as a result of social stigma. For example, the individual contemplating divorce in a traditional society can anticipate only the life of a pariah, not that of an accepted member of the community. See PHILLIPS, *supra* note 108, at 625-27. Cultural norms can thus penetrate processes of wishful thinking in a way that legal changes alone, which do not alter the perceived benefits of life following divorce, cannot.

191. Cf. Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025 (1996) (“[I]f legal statements produce bad consequences, they should not be enacted even if they seem reasonable or noble.”).

192. See Dan-Cohen, *supra* note 79, at 634-36; Philip B. Heymann, *How Government Expresses Public Ideas*, in *THE POWER OF PUBLIC IDEAS* 85, 96-97 (Robert B. Reich ed., 1988).

193. Mandatory counseling has recently been proposed in some legislatures. See H.R. 268, 1997 Reg. Sess. (Ala.); H.R. 1172, 19th Leg., Gen. Sess. (Haw. 1997); see also Scott, *supra* note 10, at 75 (discussing the merits of mandatory counseling).

194. In addition to its symbolic benefits, required counseling would likely do some instrumental good by helping to ensure that parents have tried their best to avoid divorce. Cf. Jessica Pearson, *Ten Myths*

There is a second small change that might have positive symbolic effects without negative repercussions. Currently, most states permitting divorce after a waiting period require "separation" for the entire period.¹⁹⁵ To the extent the law's language matters, this description of the waiting period as a "separation" has come to suggest a way station on the road to divorce, and so perhaps serves to reinforce the inevitability of the result. In substance, separation may help couples grasp the gravity of divorce, but that purpose can be achieved with a separation just before divorce. Demanding separation in order to begin the waiting period requires couples who are not certain about divorce to break up more quickly so that they can obtain a divorce sooner. In this instance, the state is actually encouraging marital breakdown, not merely permitting it. If the waiting period were reconceived as a "reflection period" in which couples would seek counseling, and if actual separation were optional until the end of the period (for example, one month before divorce), then a few couples might avert divorce. Just as important, none would be driven into new conflict by the addition of this option.¹⁹⁶

Finally, a reflection period of one year or less¹⁹⁷ for families with children can signal that divorce should be carefully considered without increasing conflict, provided that two other rules are in place. First, exceptions should not be available based upon consent or fault.¹⁹⁸ These grounds provide irresistible and destructive incentives for parents: to heighten conflict in order to end marriages more quickly and, later, to stage destructive court battles. Second, immediate formal separation without proof of fault should be available, and where desired should include not only alimony and child

About Family Law, 27 FAM. L.Q. 279, 286-87 (1993) (arguing that the success of mediation "depends more upon the quality of the program and the issue being mediated than whether the program is voluntary or mandatory").

It may be objected that state-sponsored counseling involves troubling government interference in private life. Indeed, such counseling was an element of the initial no-fault reforms and failed partly because of its intrusiveness. See DIFONZO, *supra* note 20, at 163-64, 168-69. To avoid this problem, states could encourage people to choose counseling services from a panoply of nongovernmental organizations, religious and secular. Because these institutions can be sensitive to cultural variation in a way that government is not, they are ideal providers of counseling.

195. In some of these states, separation is the only no-fault basis for divorce. See, e.g., MD. CODE ANN., FAM. LAW § 7-103 (1996) (requiring a one-year separation if there is no prospect of reconciliation, two years otherwise); N.C. GEN. STAT. § 50-6 (1995) (requiring, except in cases of insanity, that parties live "separate and apart" for one year before divorcing); VA. CODE ANN. § 20-91 (Michie 1995) (requiring a one-year separation if the divorce is unilateral or if there are children). Many proposals to mandate waiting periods, including the Louisiana law just implemented, also require separation throughout the waiting period as a condition of divorce. See, e.g., LA. REV. STAT. ANN. § 9:307(A)(5) (West 1997) (requiring that spouses live "separate and apart continuously without reconciliation for a period of two years").

196. In other words, the law would "do no harm." See *supra* note 80 and accompanying text.

197. One year is not substantially longer than the wait for most civil litigation. See GLENDON, *supra* note 21, at 189.

198. Current waiting-period proposals do create such exceptions. See *supra* notes 50-51 and accompanying text.

support, but also distribution of marital property.¹⁹⁹ This is the only way to ensure that the custodial parent has access to fully adequate financial resources, and that parents in high-conflict families, including battered women, can exit marriages without jumping through the hoops of fault and consent. Under this proposal, parents who want it would be able to obtain, immediately and without proof of fault or consent, the security of legal divorce, without the decree permitting remarriage. By limiting the application of a waiting period requirement to families with children, society could also spotlight the negative effects of marital breakdown on children.²⁰⁰ Such a law would encourage parents to consider divorce carefully for their children's sake, not to hurt their children inadvertently to get a divorce.

V. CONCLUSION

Halting steps like these will not eliminate high levels of divorce that were decades in the making. But achieving such change through law is a hazardous goal. Not making people better, but learning to live with "ourselves as we have come to be,"²⁰¹ is the work that both skeptical liberalism and the facts about divorce commend to government. It is because liberal citizens must learn to accept limits on their use of law to improve moral life that liberalism is "extremely difficult and constraining, far too much so for those who cannot endure contradiction, complexity, diversity, and the risks of freedom."²⁰² But restraint is a genuine virtue: Where divorce is the issue, it is better to live with the problems of relatively unregulated private life than to impose the greater problems of strict regulation. Expecting too much from people and their government does children no favors.

199. Some states currently have laws allowing separation without fault and permitting distribution of property thereafter. *See, e.g.*, CONN. GEN. STAT. § 46b-81 (1995), KY REV. STAT ANN § 403.050 (Michie 1984); *see also* UNIF. MARRIAGE & DIVORCE ACT § 307, 9A U.L.A. 239 (1987). Some states, however, do not. *See, e.g.*, N.C. GEN. STAT. § 50-7 (1995) (requiring fault for separation), *Clifford v. Clifford*, 42 Haw. 279 (1958) (forbidding property distribution upon separation). Scott's plan would apparently condition separation upon fault, *see supra* note 153, and provide only for the "protection," not the distribution, of assets at separation, *see Scott, supra* note 10, at 93.

200. This suggestion builds on proposals by some of no-fault's critics to create distinct marital regimes for couples with and without children. *See Scott, supra* note 10, at 80-82, Galston, *supra* note 10, at 22.

201. OAKESHOTT, *supra* note 60, at 424.

202. SHKLAR, *supra* note 63, at 5.

