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How small of all that human hearts endure,
that part which laws or kings can cause or cure.
—Samuel Johnson, Lines Added to Goldsmith's Traveller[1]

In the 1970s, a movement to reform divorce laws swept the United States, leading to the widespread adoption of no-fault grounds for divorce. Between 1970 and 1975, more than half of the states adopted some modern no-fault ground for divorce, and by 1985, *every* American jurisdiction except one had adopted some generally available, explicit non-fault ground for divorce.[2] This abrupt and profound change in the formal American divorce laws resulted from widespread dissatisfaction with the prior prevailing "marital-fault" scheme of divorce law and from the expectation that a no-fault system of divorce law would reduce animosity, increase personal dignity, and enhance respect for the law and its institutions.[3] However, no-fault grounds for divorce have failed substantially to achieve these purposes.[4] In addition, no-fault divorce laws have been accompanied by increased rates of divorce and significant inequities in the economic consequences of divorce, often referred to as the "feminization of poverty."[5]

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1. *Quoted in* J. BARTLETT, FAMILIAR QUOTATIONS 428 (1968).

2. *See infra* notes 8-53 and accompanying text. Arkansas is the lone holdout, *see infra* note 50 and accompanying text.

3. *See infra* notes 54-82 and accompanying text.

4. *See infra* notes 83-136 and accompanying text.

5. *See infra* notes 137-64 and accompanying text.

These and other undesired consequences of no-fault divorce have led to many criticisms of particular aspects of no-fault divorce in the United States. In recent years, family law scholars and practitioners have raised serious questions about the degree to which no-fault divorce laws have achieved their purposes and whether no-fault divorce laws have caused specific unintended or underestimated injuries to divorcing individuals, their families, and society.[6] While this scholarship has focused on specific flaws or facets of no-fault divorce, those specific problems strongly suggest the need to reexamine seriously the basic premises of contemporary no-fault divorce laws and the conundrum of modern divorce law—i.e., the conflicts between policies to promote marriage stability and policies to alleviate distress when marriages have failed, and the tensions between the goal of nonregulation of private choices and regulation of the public consequences of those choices. However, these fundamental issues have not received serious scholarly consideration for nearly a quarter century.

This article addresses these fundamental issues. Part I traces the history of the adoption of no-fault divorce in the United States and reviews the reasons for the adoption of no-fault divorce laws. The number of state legislatures that adopted no-fault grounds for divorce in a very short period of time clearly indicated the widespread dissatisfaction with the traditional requirement of proving personal fault in order to obtain a divorce. The adoption of no-fault divorce grounds was intended primarily to reduce the acrimony of divorce proceedings, eliminate a major incentive for perjury, close the "gap" between the written divorce law and the law as actually enforced, and reflect the modern notion that charging and proving marital misconduct should not be necessary to obtain a divorce when the parties have mutually agreed to divorce. However, no radical alteration in the concept of the lasting commitment of marriage was intended.

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6. *See, e.g.*, M. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW (1987); Golden & Taylor, *Fault Enforce Accountability*, FAM. ADVOC., Fall 1987, at 11; Redman, *Coming Down Hard on No-Fault*, FAM. ADVOC., Fall 1987, at 7; Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990); *see infra* notes 138-49 and accompanying text (criticisms of the "feminization of poverty" that has occurred under no-fault). In addition to these generally accessible national publications, many articles published in local bar journals also criticize no-fault divorce. *See, e.g.*, Fuller, *Is There Fault in No-Fault?*, FLA. B.J., Oct. 1988, at 77; Redman, *The Fault of Fault*, THE ADVOCATE (Idaho B.A.), Feb. 1987, at 5.

Part II considers the intended and unintended effects of no-fault divorce. While the adoption of no-fault grounds for divorce eliminated the need (indeed the opportunity) to formally express hostility (fault) regarding the failure of the marriage or to lie about that failure, hostility and perjury have not disappeared from divorce proceedings, but have only been shifted to other (perhaps more vulnerable) parts of the process. In addition, rather than merely closing the gap between the law on the books and the law as practiced, the adoption of no-fault divorce grounds has, in at least some states, radically transformed divorce law. Moreover, it appears that the adoption of no-fault divorce has either caused or exposed some serious economic inequities which disproportionately burden custodial mothers and their children. Finally, no-fault divorce reforms have generally contributed to dramatic increases in the rate of divorce in the United States.

Part III examines the fundamental premises of contemporary no-fault divorce in the context of three dilemmas of the divorce conundrum. The first dilemma is the tension between policies of law that promote marriage stability and policies that alleviate the distress of marital failure. Divorce law must balance these competing interests because failure to achieve a reasonable balance leads to abuse. Unfortunately, many first generation no-fault divorce laws fail to strike a reasonable balance between these conflicting policy goals. Second, the principle of equality necessary for fairness in divorce must be distinguished from the "higher law" of love required for fairness in marriage. Fairness in divorce emphasizes "equal getting," i.e., the economic and material benefits of the relationship, whereas the essence of marriage is giving, sharing, and becoming one. The law can enforce equality upon divorce, but it cannot enforce loving in marriage. However, the law can avoid harming or weakening the marriage relationship. Unfortunately, quickie no-fault divorce laws foster the illusion that divorce is easy; unilateral no-fault divorce laws promote a casual commitment to marriage, and many no-fault divorce laws fail to distinguish between a cry for help and irremediable marital breakdown. Finally, there is a difference between respecting privacy and neglecting public interests. No-fault divorce laws largely seem to ignore the public consequences of unilateral private choices.

In my search for answers to the hard questions constituting the divorce conundrum, I have discovered that none of them

could be adequately discussed in less than a book. I also have discovered that many books, including some very good books, have been written about some of these questions,[7] and yet the answers are still not clear, much less agreed upon. I have also learned that a significant body of data and theory has been produced by scholars and professionals in other disciplines that most lawyers, like myself, have not fully explored. I offer my exploratory consideration of these issues to call attention to the existence of these important questions, nurture the dialogue, and stimulate further research and discussion of the dilemmas of modern no-fault divorce. Thus, in the conclusion to this article, I identify four aspects of contemporary no-fault divorce laws that are urgently in need of reconsideration and reform, in the hope that other scholars and professionals will join the search for solutions to these problems.

I. THE NO-FAULT DIVORCE REVOLUTION IN THE UNITED STATES: WHAT HAPPENED AND WHY?

The reform of divorce laws that occurred in the United States primarily in the 1970s is widely known as the no-fault divorce "revolution."[8] It is common knowledge that most states amended their divorce laws in a relatively short period and that the amendments reflected acceptance of a non-fault theory of marriage breakdown. But how that happened and the reasons given for the adoption of modern "no-fault" divorce grounds are not as widely remembered. Those points are an important foundation for any serious attempt to assess modern no-fault divorce law.

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7. *See* N. BLAKE, THE ROAD TO RENO (1962); M. GLENDON, *supra* note 6; M. GLENDON, THE NEW FAMILY AND THE NEW PROPERTY (1985); H. JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES (1988); PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY, THE REPORT OF A GROUP APPOINTED BY THE ARCHBISHOP OF CANTERBURY IN JANUARY, 1964 (London S.P.C.K. 1966) [hereinafter PUTTING ASUNDER]; M. RHEINSTEIN, MARRIAGE STABILITY, DIVORCE AND THE LAW (1972); L. WEITZMAN, THE DIVORCE REVOLUTION (1985); *see also* DIVORCE REFORM AT THE CROSSROADS (H. Kay & S. Sugarman eds. 1990).

8. *See, e.g.*, L. WEITZMAN, *supra* note 7; H. JACOB, *supra* note 7.

Professor Max Rheinstein, a leading critic of the traditional fault-based divorce laws and advocate of divorce law reform, was a little more cautious, suggesting that "the word 'revolution' is bandied around a bit too easily these days," but even he admitted that the changes that the law of divorce underwent in the early 1970's, "are indeed sensational." M. RHEINSTEIN, *supra* note 7, at vii.

A. *What Happened: A Short History of the Adoption of No-Fault Divorce Laws in the United States*

In 1969, California became the first jurisdiction in America (and in the western world) to adopt a modern, purely "no-fault" divorce law when it passed the Family Law Act of 1969, which became effective in 1970.[9] Previously the statutory grounds for divorce in California, as in most other states, consisted of several specific fault grounds, plus insanity.[10] The 1969 Act eliminated all fault grounds for divorce and provided that, apart from the rare case of "incurable insanity," marriage could be terminated only upon the ground of "irreconcilable differences which have caused the irremediable breakdown of the marriage."[11] The statute defined "irreconcilable differences" and "irremediable breakdown" in the broadest terms.[12] The new, simplified judicial procedure was called an action for "dissolution of marriage" instead of an action for divorce, and evidence of marital misconduct was declared to be "improper" and "inadmissible."[13]

The movement to modify California's divorce law actually began in 1963 "as an effort . . . to stem the rising tide of divorce

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9. *See* CAL. CIV. CODE §§ 4000-5138 (West 1983). California was not only the first American state to adopt a "pure" no-fault divorce law, it was the first jurisdiction to do so in the modern world. M. GLENDON, *supra* note 6, at 66; L. WEITZMAN, *supra* note 7, at x. Before California adopted its provision, a handful of states had adopted no-fault grounds for divorce, but unlike California's enactment and most subsequently enacted modern no-fault divorce grounds, these earlier no-fault grounds reflected the powerful anti-divorce philosophy of the fault system, were narrowly drafted, and were strictly construed. *See* 3 L. WARDLE, C. BLAKESLEY & J. PARKER, CONTEMPORARY FAMILY LAW § 21:04, at 2 (1988); Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 44-51 (1966) (discussing the early "incompatibility" statutes of Alaska, New Mexico, Oklahoma, and the Virgin Islands); *id.* at 37 n.17 (discussing nineteenth-century "omnibus clauses" in various state divorce statutes); M. RHEINSTEIN, *supra* note 7, at 32-48, 313-15 (summarizing nineteenth-century divorce laws in the United States); *see also infra* notes 40, 132 and app. 1.

10. The grounds were adultery, extreme cruelty, wilful desertion, wilful neglect, habitual intemperance, conviction of a felony, or incurable insanity. *See* Goddard, *A Report on California's New Divorce Law: Progress and Problems*, 6 FAM. L.Q. 405, 406 (1972).

11. CAL. CIV. CODE §§ 4506, 4507 (West 1983).

12. "Irreconcilable differences" were defined as "those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved." *Id.* at § 4507; *see also id.* § 4508 (even if there appears to be "a reasonable possibility of reconciliation" the proceeding may be postponed to accommodate reconciliation efforts "not to exceed 30 days"). *Compare* Comment, *Proposed Revised Uniform Marriage and Divorce Act*, § 302, 7 FAM. L.Q. 135, 146 (1973) (noting the difficulty of defining "irretrievable breakdown").

13. CAL. CIV. CODE §§ 4501, 4509.

[and] to lessen the very high divorce rate of the state as a whole and of some counties in particular."[14] Legislative hearings in 1964 and an inconclusive legislative report in 1965 focused on "the incidence of family instability" and recommended further study.[15] In 1966, the Governor of California appointed a Governor's Commission on the Family to study the problem and recommend a solution. Some members of the Commission, including Professor Herma Hill Kay of Boalt Hall Law School at the University of California at Berkeley, strongly favored the adoption of no-fault divorce grounds.[16] In December 1966, the Commission submitted its final report recommending the elimination of all fault-grounds for divorce, as well as the adoption of an extensive family court system.[17] Although a bill implementing the recommendations of the Commission was introduced the following year, it lay quietly in the legislature until 1969, when, revised to eliminate the creation of the controversial family court system, it passed with surprisingly little public opposition.[18]

Nineteen sixty-six was a watershed year for no-fault divorce reform. While the California Governor's Commission was meeting in 1966 and preparing its report endorsing no-fault divorce grounds, it received a significant boost from the publication of the widely-heralded report of a group of distinguished individuals appointed by the Archbishop of Canterbury to make recommendations regarding reform of the fault-grounds for divorce in England. Their 1966 report, entitled *Putting Asunder: A Divorce Law for Contemporary Society*, acknowledged the shortcomings of the existing fault-based divorce system and suggested that divorce morally could be granted when there was such a complete "failure in the marital relationship" that the substance of the relationship had come "unmistakably and irreversibly to an end."[19] However, the Archbishop's group also recommended that a thorough judicial "inquest" be conducted by the courts before granting divorce upon such grounds and rejected the con-

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14. M. RHEINSTEIN, *supra* note 7, at 373-74; *see also* L. WEITZMAN, *supra* note 7, at 16, 18.

15. M. RHEINSTEIN, *supra* note 7, at 374-75.

16. H. JACOB, *supra* note 7, at 51-53.

17. *Id.* at 52-56; M. RHEINSTEIN, *supra* note 7, at 375-77.

18. H. JACOB, *supra* note 7, at 56-61; *see also* L. WEITZMAN, *supra* note 7, at 18-19. Budgetary concerns were the major reason the family court system never received the support of lawmakers. *Id.* at 19.

19. PUTTING ASUNDER, *supra* note 7, paras. 54-55, at 38-39; *see also id.* at 35-39.

cept of unilateral divorce (or even a right to divorce upon mutual consent).[20] The report of the Archbishop's group was referred to the English Law Commission, which issued another report endorsing the marital breakdown principle and recommending that English divorce law be reformed to permit divorce with "the maximum of fairness, and the minimum of bitterness, distress, and humiliation" when it was determined that a marriage was irretrievably broken.[21] Three years later, the British Parliament passed the Divorce Reform Act, 1969, which provided that divorce could be granted upon one ground only, "irretrievable breakdown." The Act further provided that irretrievable breakdown had to be shown by proof of traditional marital fault, living separate and apart for five years, or living separate and apart with mutual consent for two years.[22] These developments in England did much to legitimize divorce reform in the United States, and while California's no-fault divorce law constituted a much more radical departure from the traditional divorce methods than the English law, the divorce reform movement in England undeniably helped clear the path for California's divorce reform.[23]

The California divorce reform also benefited from the reform of New York's divorce laws in 1966 and 1968. Before 1966, New York had not significantly reformed its substantive divorce law since it had been drafted by Alexander Hamilton in 1787.[24] Divorce was permitted only upon proof of adultery. In 1965, the state legislature conducted public hearings at which strong support was provided for reforming New York divorce law. After "considerable maneuvering" to defuse any significant opposition, a divorce reform bill was passed in 1966 that added other "fault" grounds for divorce, including cruel and inhuman treatment that threatened the physical or mental well-being of the

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20. *Id.* at paras. 20-22, 34-35.

21. THE LAW COMMISSION, REFORM OF THE GROUNDS OF DIVORCE: THE FIELD OF CHOICE para. 15, at 10 (1966 & Her Majesty's Stationery Office reprint 1967) (Command Paper 3123).

22. M. RHEINSTEIN, *supra* note 7, at 347-52, *see also* M. GLENDON, *supra* note 6, at 69-71.

23. *Id.*; *see* H. CLARK, THE LAW OF DOMESTIC RELATIONS § 13.6, at 511-13 (2d ed. 1988); M. GLENDON, *supra* note 6, at 63, 66, 69-71, 79-81; H. JACOB, *supra* note 7, at 46; L. WEITZMAN, *supra* note 7, at 18-19. The report of the Archbishop's group, especially, reduced the moral opposition to no-fault divorce when it concluded that "it seems to us not an unworthy or improper conception for the law of a secular society to uphold." PUTTING ASUNDER, *supra* note 7, para. 54, at 38.

24. N. BLAKE, *supra* note 7, at 64-96, 189-202; H. JACOB, *supra* note 7, at 30.

plaintiff and abandonment for two or more years. The divorce reform law also permitted divorce upon living apart for two years pursuant to a decree of separation or written separation agreement.[25]

Conceptually, the adoption of "living apart" as a ground for divorce in New York constituted the acceptance of the no-fault concept of divorce, although the required two-year length of separation rendered this development of little practical significance. Functionally, the acceptance of mental cruelty as a legitimate ground for divorce, albeit framed in "fault" terms, represented the tacit acceptance of the general availability of divorce for personal reasons because allegations of mental cruelty were rarely contested successfully. The adoption of these new grounds for divorce in New York, especially after nearly 200 years of steadfast adherence to the idea that divorce should be permitted only for the most serious breach of marital trust, contributed to the sense that the time for significant divorce reform had come.[26] Further reforms facilitating divorce were adopted in New York in 1968, and in 1970, the separation period for non-fault divorce-by-separation was reduced from two years to one year, turning New York's conceptual non-fault provision into a practical no-fault divorce ground as well.[27]

The no-fault divorce movement was further enhanced when the prestigious National Conference of Commissioners on Uniform State Laws (NCCUSL) endorsed no-fault divorce. By 1966, the NCCUSL had begun its own consideration of divorce law reform. By 1967, Professor Robert J. Levy of the University of Minnesota Law School had been appointed reporter for the drafting committee and had prepared a monograph recommending that irremediable marriage breakdown be adopted as the exclusive ground for divorce.[28] Professor Levy was later joined by Professor Herma Hill Kay, who had been instrumental in California's trail-blazing no-fault reform effort. The proposals Professors Levy and Kay submitted to the NCCUSL committee were "little different from the approach of breakdown pure and simple that was to become the law of California."[29] By the time

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25. H. JACOB, *supra* note 7, at 40-41.

26. *See generally id.* at 32-42; M. RHEINSTEIN, *supra* note 7, at 353-64.

27. M. RHEINSTEIN, *supra* note 7, at 355.

28. *Id.* at 383-84; *see also* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 184-87 (1965).

29. M. RHEINSTEIN, *supra* note 7, at 384.

the NCCUSL debated its committee's proposal, California had already acted.[30] In 1970, shortly after the nation's first modern no-fault divorce law took effect in California, the NCCUSL voted to propose a Uniform Marriage and Divorce Act (UMDA) in which the sole ground for divorce was a modern no-fault ground. While acknowledging "the State's interest in the stability of marriages," the NCCUSL proposed to "totally eliminate[] the traditional concept that divorce is a remedy granted to an innocent spouse."[31] The UMDA draft that was approved by the NCCUSL in 1970 authorized the dissolution of marriage solely upon the ground "that the marriage is irretrievably broken."[32] Moreover, it explicitly provided that property division, spousal maintenance, and child support decisions were to be made "without regard to marital misconduct."[33] Thus, in some respects, it represented a more radical or more complete departure from prior concepts of marriage and divorce than the California law.

For various reasons, the American Bar Association initially declined to endorse the proposed UMDA.[34] Extensive negotiations between the NCCUSL and the ABA followed, and in 1973, the NCCUSL adopted relatively minor revisions to the UMDA.[35] The following year, the ABA approved the revised UMDA.[36]

Altogether, these developments ignited a movement to reform divorce laws that quickly spread throughout the United States.[37] After California adopted its no-fault divorce law in

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30. H. JACOB, *supra* note 7, at 75.

31. UNIF. MARRIAGE AND DIVORCE ACT, Prefatory Note, 9A U.L.A. 147, 148 (1987) [hereinafter U.M.D.A.].

32. *Id.* at § 302(a)(2).

33. *Id.* at §§ 307-309.

34. *See* H. JACOB, *supra* note 7, at 75-79; Foster, *Divorce Reform and the Uniform Act*, 7 FAM. L.Q. 179, 183-88 (1973); Levy, *Comments on the Legislative History of the Uniform Marriage and Divorce Act*, 7 FAM. L.Q. 409 (1973); Merrill, *Section 305: Genesis and Effect* 18 S.D.L. REV. 538 (1973); Podell, *The Case for Revision of the Uniform Marriage and Divorce Act*, 7 FAM. L.Q. 169, 171 (1973). Reportedly there was some rivalry between the NCCUSL and the ABA committees, between the perspectives of the academics (represented by the former) and the perspectives of the practitioners (represented by the latter), and between personalities. Apparently there was substantial agreement that breakdown of marriage should be the basis for all divorce; the disagreement mainly concerned how to define "breakdown" and the guidelines needed. Foster, *supra*, at 183. The ABA Committee urged, unsuccessfully, that "irretrievable breakdown" be defined or the type of breakdown be specified. H. JACOB, *supra* note 7, at 77.

35. U.M.D.A. § 302, 9A U.L.A. 181, 183.

36. H. JACOB, *supra* note 7, at 75-77.

37. By 1969, observers noted that "[h]ardly a legislative session in any state goes by without a proposal to reform admittedly archaic divorce laws." Goldstein & Gitter, *On*

1969, "[n]o-fault divorce spread like a prairie fire."[38] Between 1971 and 1977, eight states adopted the UMDA at least in part[39] and more than three times that number of states adopted some other form of no-fault divorce. By 1989, forty-nine states and the District of Columbia had explicitly adopted some "modern no-fault" ground for divorce.[40]

Currently, statutes in twenty American jurisdictions provide that divorce is generally available *solely* upon modern no-fault grounds.[41] In fifteen of these states, "irretrievable breakdown" of the marriage,[42] or "irreconcilable differences" between the spouses[43] is the sole statutory ground for divorce. In two other jurisdictions, the sole ground for divorce is that the parties have lived separate and apart for a short period of time (i.e., not more

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Abolition of Grounds for Divorce: A Model Statute and Commentary, 3 FAM. L.Q. 75, 75 (1969).

38. H. JACOB, *supra* note 7, at 80.

39. U.M.D.A., Prefatory Note, 9A U.L.A. 147-48. The eight states which have adopted the UMDA at least in part are Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington.

40. *See generally infra* apps. 1 and 1A. In compiling a list of states with no-fault divorce laws, the definitions are all-important, and the diversity of legislation on the subject is so great that the statutes elude the best efforts at categorization. For definitional purposes in this article, a statute is considered a "modern no-fault statute" if it provides for divorce upon one of the generic modern "marital breakdown" grounds, i.e., "irretrievable breakdown," "irreconcilable differences," or "incompatibility;" or if it provides for divorce upon proof that the parties have lived separate and apart for a relatively short period of time, no more than one year; or if it provides for divorce using some combination of these approaches.

41. Some of these states provide for divorce in rare situations upon other grounds, e.g., permanent insanity. *See, e.g.*, FLA. STAT. ANN. § 61.052 (West 1985); NEV. REV. STAT. § 125.010 (1987).

42. ARIZ. REV. STAT. ANN. § 25-312 (Supp. 1989) (irretrievable breakdown); COLO. REV. STAT. § 14-10-106 (1987) (irretrievable breakdown); DEL. CODE. ANN. tit. 13, § 1505 (1981) ("marriage is irretrievably broken" by separation and when reconciliation is "improbable"); FLA. STAT. ANN. § 61.052 (West 1985) (irretrievable breakdown or mental incompetence); IOWA CODE ANN. § 598.5 (West 1985) ("breakdown of marriage to the extent that legal objects of matrimony are destroyed"); KY. REV. STAT. ANN. § 403.140 (Michie/Bobbs-Merrill 1984) ("irretrievably broken"); MICH. COMP. LAWS ANN. § 552.6 (West 1988) ("breakdown of the marriage relationship to the extent that the objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved"); MINN. STAT. ANN. § 518.06 (West 1990) ("irretrievable breakdown"); MO. ANN. STAT. §452-320 (Vernon 1986) ("irretrievably broken"); MONT. CODE. ANN. § 40-4-104 (1989) ("irretrievably broken"); NEB. REV. STAT. § 42-353 (1988) ("irretrievably broken"); WASH. REV. CODE § 26.09.030 (1986) ("irretrievably broken").

43. CAL. CIV. CODE § 4506 (West 1983) ("[i]rreconcilable differences, which have caused the irremediable breakdown of the marriage"); OR. REV. STAT. § 107.025 (1984) ("irreconcilable differences between the parties have caused the irremediable breakdown"); WYO. STAT. § 20-2-104 (1987) ("irreconcilable differences in the marital relationship").

than one year).[44] In the other three exclusively no-fault states, irretrievable breakdown (or incompatibility) and living separate and apart for a short period of time are alternative grounds for divorce.[45]

In thirty states, the legislatures have added at least one modern no-fault ground for divorce as an alternative to fault-grounds for divorce. Nineteen of these states simply have added marital breakdown, incompatibility, or irreconcilable differences to the traditional grounds for divorce.[46] One state added both a modern breakdown provision and a modern "short separation" provision as alternatives to the traditional fault grounds for divorce.[47] Three others have added a combined requirement of

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44. D.C. CODE ANN. § 16-904 (1989) (separation by mutual agreement for six months or involuntary separation of one year); N.C. GEN. STAT. § 50-6 (1987) ("lived separate and apart for one year").

45. HAW. REV. STAT. § 580-41 (1985) (irretrievable breakdown, or two-year separation, or expiration of separation decree and no reconciliation); *id.* § 580-42 (Supp. 1989) (mutual or uncontested irretrievable breakdown); NEV. REV. STAT. § 125.010 (1987) (incompatibility or one-year separation, or insanity); WIS. STAT. ANN. § 767.07 (West 1981) (irretrievable breakdown or one year separation).

46. ALA. CODE § 30-2-1 (1989) (incompatibility, or two-year separation); ALASKA STAT. § 25.24.050 (1983) (incompatibility of temperament); CONN. GEN. STAT. § 46b-40 (1986) (irretrievable breakdown or one and one-half year separation due to incompatibility); GA. CODE ANN. § 19-5-3 (1982) (irretrievable breakdown); IDAHO CODE §§ 32-603, -610 (1983) (irreconcilable differences or five-year separation); IND. CODE ANN. § 31-1-11.5-3 (Burns 1987) (irretrievable breakdown, conviction, insanity, or impotence); KAN. STAT. ANN. § 60-1601 (1983) (incompatibility, mental illness, or failure to perform material marital duty); ME. REV. STAT. ANN. tit. 19, § 691 (1981) (irreconcilable marital differences); MISS. CODE ANN. § 93-5-2 (Supp. 1990) (irreconcilable differences); N.H. REV. STAT. ANN. § 458:7-a (1983) (irreconcilable differences causing irremediable breakdown of marriage); N.M. STAT. ANN. § 40-4-1 (1989) (incompatibility), N.D. CENT. CODE § 14-05-03 (1981) "(irreconcilable differences); OHIO REV. CODE ANN. § 3105.01 (Anderson 1989) (one year separation or incompatibility); OKLA. STAT. ANN. tit. 12, § 1271 (West 1988) (incompatibility); R.I. GEN. LAWS § 15-5-3.1 (1988) (irreconcilable differences or three years separation); S.D. CODIFIED LAWS ANN. § 25-4-2 (Supp. 1990) (irreconcilable differences): TENN. CODE ANN. § 36-4-101 (1984) (irreconcilable differences or three years separation); TEX. FAM. CODE ANN. § 3.01 (Vernon 1975) ("marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marriage relationship"); *id.* at § 3.06 (living apart for three years); UTAH CODE ANN. § 30-3-1(h) (1989) ("irreconcilable differences of the marriage").

47. W. VA. CODE § 48-2-4 (1986) (irreconcilable differences or a one year separation).

Additionally, seven of the states that added a modern marital breakdown provision to their fault grounds for divorce (Alabama, Connecticut, Idaho, Rhode Island, Tennessee, Texas, and Utah, *see* statutes cited *supra* note 46) also have a "living separate and apart" ground for divorce, but the period of separation required is so long, i.e., from 18 months to 5 years, that they cannot be considered "modern no-fault" in the sense that they do not facilitate divorce. As a practical matter, most persons seeking to terminate a marriage would sue for divorce on one of the fault grounds before waiting that long for a nominally no-fault divorce.

both irretrievable breakdown and a short separation to the traditional grounds for divorce.[48] The remaining seven of these thirty states have added living separate and apart for a short period of time as the sole no-fault ground for divorce to the list of traditional grounds for divorce.[49]

In total, forty-one states have adopted modern no-fault language (breakdown, incompatibility or irreconcilable differences) as the exclusive or an alternative ground for divorce (including seven states that have adopted both modern no-fault terms and short separation periods), and eight other states and the District of Columbia have adopted a short separation period as their modern no-fault ground for divorce. Only one state, Arkansas, does not have a modern no-fault divorce provision of any kind.[50]

Thus, it is undeniable that the basis for and method of obtaining divorce in the United States was "fundamentally altered" by the no-fault divorce reform laws enacted in the states.[51] Divorce became easier to obtain and could be most easily obtained (or only obtained) without any showing of marital fault. Moreover, while it is beyond the immediate scope of this article, many states also amended their statutes to recognize ex-

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48. ILL. REV. STAT. ch. 40, para. 402 (Supp. 1990) (irreconcilable differences causing irretrievable breakdown leading to a separation period of six months if voluntary, two years if involuntary); MASS. GEN. LAWS ANN. ch 208, §§ 1A, 1B (West 1987) (irretrievable breakdown one month if joint petition, six months if not); 23 PA. CONS. STAT. § 201 (Supp. 1990) (irretrievable breakdown plus 90-day separation if mutual consent or two-year separation if no mutual consent).

49. LA. REV. STAT. ANN. § 9.301 (West 1965) (one year); MD. FAM. LAW, CODE ANN. § 7-103 (1984) (one year living separate if no prospect of reconciliation, two years otherwise); N.J. STAT. ANN. § 2A:34-2 (West 1987) (one and one-half years); N.Y. DOM. REL. LAW § 170 (McKinney 1988) (one year); S.C. CODE ANN. § 20-3-10 (Law. Co-op. 1985) (one year); VT. STAT. ANN. tit. 15, § 551 (1989) (six months). VA. CODE ANN. § 20-91 (Supp. 1989) (one-year separation if involuntary, six months if agreement and there are no children).

50. *See* ARK. STAT. ANN. § 9-12-301 (1987) (living separate and apart for three years is a ground for divorce). However, desertion for only one year is also a ground for divorce and would present a more attractive option to persons anxious to escape a painful marriage than the three-year non-fault ground.

51. H. JACOB, *supra* note 7, at 166. Of course, this describes only the substantive grounds for divorce in the statutes. It does not take into account procedural restrictions (except time of separation required for divorce on grounds of separation) or how the substantive grounds are interpreted by the courts, which can make an enormous practical difference affecting the ease or difficulty with which divorce may be obtained. Nor does this brief review reveal the interaction between the grounds for divorce and other substantive rules (such as those governing property division, alimony, and child custody and support) which have powerful, practical effects upon the ability and willingness of the parties to seek or come to terms regarding divorce. *See infra* notes 87-92 and accompanying text.

plicitly the shared interest of both spouses in the property acquired during marriage, acknowledge the economic contributions of homemakers, and eliminate consideration of "fault" in determining the economic consequences of divorce.[52] Also paralleling the adoption of no-fault divorce grounds, many states modified the basis for awarding child custody during these years, adopting rules that enhance the potential for fathers to obtain sole custody, a much greater share of custody, or greater visitation powers.[53]

The remarkably brief period of time in which most state legislatures adopted some form of no-fault divorce clearly indicates the widespread dissatisfaction with the traditional requirement of proving personal fault to obtain a divorce. The reasons for that dissatisfaction and the reasons why no-fault divorce struck such a responsive chord in the United States merit consideration.

B. Why? The Reasons and Arguments Given to Support the Adoption of Modern No-Fault Divorce Grounds

A review of legal literature advocating or discussing the adoption of no-fault divorce grounds in the 1960s and 1970s reveals four general reasons or arguments for the adoption of no-fault divorce grounds.[54]

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52. H. JACOB, *supra* note 7, at 104-22. Between 1971 and 1982, 23 states adopted marital property statutes, 19 eliminated "fault" from consideration in property distribution upon divorce, 5 required equal distribution, and 22 states required consideration of the contributions of the wife as homemaker. *Id.* at 121-22.

53. The maternal preference or "tender years" doctrine was generally abolished, and 23 states adopted joint custody laws. *See generally id.* at 129-42.

54. It may not be possible to accurately determine how persuasive any (or all) of these reasons were in effecting the adoption of no-fault divorce laws in the United States. But these were the principal arguments for no-fault divorce that were heard throughout America while no-fault laws were being adopted.

Just as the views and objectives of the proponents of no-fault divorce varied, the opposition to no-fault divorce was diverse. An exploration of the reasons for opposition is beyond the scope of this paper. However, some of the apparent legal arguments were skepticism that changing the grounds for divorce would reduce hostility and anguish in divorce, fears about using "carte blanche" grounds for divorce, moral opposition to the idea that marriage should be terminable for any but the most serious reasons, and occasionally concerns about the effect on women and children. *See generally*, H. JACOB, *supra* note 7, at 55-60, 85-103; Podell, *supra* note 34, at 170-71; Bodenheimer, Book Review, 7 FAM. L.Q. 112, 120 (1973) (reviewing M. RHEINSTEIN, MARRIAGE STABILITY, DIVORCE AND THE LAW (1972)); Comment, *supra* note 12, at 146. Interestingly, some of these arguments appear to have been well founded. *See infra* notes 84-102, 137-49 and accompanying text. It does not appear that the no-fault reform movement generated any significant institutional opposition; the Catholic church was not usually a major foe of no-fault di-

First, no-fault divorce grounds were deemed desirable to reduce the hostility and distress of persons involved in divorce. Requiring proof of marital fault in all cases, subject to harsh and antiquated defenses (e.g., recrimination, condonation, collusion, connivance) which historically could preclude divorce even if fault were proven, was widely criticized for breeding costly, bitter, counterproductive litigation that impeded reconciliation. The adversary system and fault-laying substantive grounds proved unworkable. As two advocates of no-fault divorce wrote:

> Perhaps the most damaging result of a "fault"-based divorce procedure is that it exacerbates the aggressive forces that may be already undermining the family. It dissipates family emotional and financial resources at a time when they are most needed. The hatred, bitterness, and resentment fed by a drawn-out divorce are likely to destroy the possibility of reconciliation and distort the negotiations and proceedings designed to resolve the very difficult and emotionally-freighted issues of finance and child custody.[55]

A later observer likewise noted:

> [A] widespread cause for dissatisfaction with the divorce law was that it forced family disputes into the adversarial mode of court actions. Most divorce cases already had an uncomfortably high degree of emotional conflict. Many divorce attorneys felt that the requirements of the adversarial system heightened that conflict to unacceptable levels. . . . The system seemed designed to promote and exacerbate conflict, rather than to provide a way to find compromises and to get the divorce in as painless a fashion as possible.[56]

Not only were adult spouses victims of divorce hostility, but children of the parties suffered because of the animosities engendered and expressed in the divorce process. The interests of children were poorly represented and were often ignored in the conflict.[57] As Professor Levy wrote:

> As debilitating as the existing hodgepodge of laws on divorce and marriage may be for the lives of the participants, the de-

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vorce. *See* H. JACOB, *supra*, at 57-59, 98; L. WEITZMAN, *supra* note 7, at 18 & n.17.

55. Goldstein & Gitter, *supra* note 37, at 81; *see also id.* at 79-80.

56. H. JACOB, *supra* note 7, at 68; *see also id.* at 50; THE LAW COMMISSION, *supra* note 21, paras. 15-32, at 10-18; M. RHEINSTEIN, *supra* note 7, at 334-35; Wadlington, *supra* note 9, at 83.

57. H. JACOB, *supra* note 7, at 68; *see also* Hawke, *Divorce Procedure: A Fraud on Children, Spouses and Society*, 3 FAM. L.Q. 240, 245 (1969).

> structive effect upon children is incalculable. If the time for improvement and uniformity in this field were not at hand for the sake of the marriage partners, it is surely at hand for the sake of the children.[58]

Second, advocates of no-fault divorce argued that adoption of no-fault was necessary to protect the integrity of the legal system. There was, in fact, a "tide of discontent" over "the trail of perjury and subterfuge that [traditional fault-based divorce grounds] ha[d] brought into the courts."[59]

> [A]ttorneys throughout the country resented the extensive manufacturing or doctoring of evidence to fit the narrow provisions of existing divorce law. Divorce lawyers were under considerable pressure everywhere to put an acceptable gloss to domestic discord that accompanied divorce petitions. In most states, the easiest way to do that was to base the divorce action on the mental cruelty provisions of the divorce law, which led attorneys to suggest to clients that they testify that their spouse had been disparaging and that they suffered many sleepless nights as a consequence; alternatively, a fictitious slap to the face evidenced physical cruelty. . . . Another cause for the manufacture of supporting evidence lay in state laws which did not allow as quick a divorce as the client demanded; in response, attorneys arranged phony out-of-state residences so that the more lenient laws of another state could be used. These practices were no secret. Judges in every state quietly accommodated divorce lawyers by not probing into the truthfulness of the evidence they offered . . . .[60]

Thus, advocates of no-fault divorce argued that the integrity and respectability of the legal system and all involved with it would be improved if no-fault divorce grounds were adopted because "sham grounds," "sham residence," "collusion, perjury and hypocrisy" would disappear.[61]

Third, the gap between the law-as-written and the law-as-

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58. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 181 (1965), *quoted in* M. RHEINSTEIN, *supra* note 7, at 383.

59. Stone, *Moral Judgments and Material Provision in Divorce*, 3 FAM. L.Q. 371, 371 (1969); *see also* H. CLARK, *supra* note 23, at 410; THE LAW COMMISSION, *supra* note 21, para. 25(c)-(d), at 14; H. JACOB, *supra* note 7, at 35, 50; PUTTING ASUNDER, *supra* note 7, paras. 41-42, at 29-30; M. RHEINSTEIN, *supra* note 7, at 60-66, 406; *id.* at 383 (citing HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS); Goldstein & Gitter, *supra* note 37, at 80; Hawke, *supra* note 57, at 243-44; U.M.D.A., Prefatory Note, 9A U.L.A. 148; Wadlington, *supra* note 9, at 32, 81-82.

60. H. JACOB, *supra* note 7, at 67-68.

61. Goldstein & Gitter, *supra* note 37, at 80.

applied was the focus of another major argument for the adoption of no-fault divorce. Realistically, divorce by mutual consent was generally available without fault before 1970, through collusion or migratory divorce. In states like California, in which mental cruelty was a ground for divorce, ninety-five percent of all divorces were obtained on that ground, which functioned as a *de facto* no-fault ground.[62] Nationally, unilateral, uncontested, or mutual consent divorces constituted approximately ninety percent of all divorce cases.[63] There was, in reality, a "dual law" of divorce: one on the books (strict, fault-based, adversarial) and another in practice (permissive, uninterested, and accommodating) if the parties had worked out the terms of their divorce to their mutual satisfaction.[64] Most states allowed divorce to be granted upon the ground of "cruelty," which could be very loosely interpreted, and a handful of states had already adopted "incompatibility" or other cautious non-fault divorce grounds before California's "pure" no-fault statute was enacted.[65] "The cooperation of the courts ha[d] made it possible for the great bulk of divorces to be obtained upon the ground of mutual consent . . . ."[66]

Moreover, the inability of the law to enforce its policy beyond the realm of formalities was obvious: it could not force an unhappy spouse to live with a despised partner; abandonment—sometimes known as the "poor man's divorce," "common law divorce," or "*de facto* divorce"—has long been practiced.[67] Nor had the law effectively prevented a legally married person from taking another partner and beginning another (illegitimate) family.[68] The English Law Commission estimated that

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62. Goddard, *supra* note 10, at 406.

63. M. RHEINSTEIN, *supra* note 7, at 63; Hawke, *supra* note 57, at 240, 243; Llewellyn, *Behind the Law of Divorce: II*, 33 COLUM. L. REV. 249, 283 (1933). In England, uncontested divorces amounted to 93% of all divorces in 1960. THE LAW COMMISSION, *supra* note 21, para. 20, at 12.

64. M. RHEINSTEIN, *supra* note 7, at 51-105; Foster, *supra* note 34, at 180; *see also* sources cited *infra* notes 108-09.

65. M. RHEINSTEIN, *supra* note 7, at 101-05. Even today, cruelty is still a statutory ground for divorce in more than half of the states (27 states). H. CLARK, *supra* note 23, at 507.

66. M. RHEINSTEIN, *supra* note 7, at 105.

67. *Id.* at 35-36, 65-85, 406-07; Goldstein & Gitter, *supra* note 37, at 80, 85.

68. M. RHEINSTEIN, *supra* note 7, at 35-36, Goldstein and Gitter, *supra* note 37, at 80, 85. Actually, the law could punish (deter) unlawful relations, e.g., by bigamy prosecution. *See* Williams v. North Carolina, 325 U.S. 226 (1945). However, by the 1970s, the moral climate in the country generally did not support the use of such harsh punitive measures.

nearly 20,000 children were born out of wedlock every year because access to divorce was so restrictive that their parents simply cohabited as lovers without bothering to get a divorce from their legal spouses.[69] Thus, advocates of no-fault divorce argued that adoption of no-fault divorce would bring the written law into conformity with the law-as-applied.[70]

The fourth argument asserted that basic notions of marriage and divorce had changed and that no-fault divorce more accurately reflected modern conceptions of terminating marital relations than did the prior laws. The notions that marital breakdown was the "fault" of one spouse entirely and that divorce was both a remedy awarded to the innocent spouse and a judgment imposed against the faulty spouse were widely rejected.[71] As two critics wrote:

> Founding the grant or denial of divorce upon a showing of the "fault" of one of the parties places judges in the position of having to fix the blame and decide which party, if either, is the more "deserving" of divorce. But the breakdown of a marriage is seldom the "fault" of one of the partners. It results, rather, from a much more complex interaction between two, and frequently more than two, personalities. Even if "blameworthiness" were taken into account it is often impossible to tell who is the "guilty" party, for one cannot know what conduct, intangible and even unintended, on the part of the "innocent" party may have driven the "guilty" party to his "blameworthy" act. We all know how unjust and useless is the effort to determine "Who started it?" amongst our quarrelling friends or children. For purposes of granting or denying divorce, nothing and no one in the judicial process can make that kind of determination more just or useful.[72]

Thus, by 1960, it was widely believed "that the fault grounds for divorce were usually symptoms rather than causes of the diffi-

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69. M. RHEINSTEIN, *supra* note 7, at 335 (quoting THE LAW COMMISSION, *supra* note 21, at para. 36).

70. *See generally* H. JACOB, *supra* note 7, at 34, 38-41, 48, 102, 145-47, 166-67; PUTTING ASUNDER, *supra* note 7, at 18, 35.

71. *See, e.g.*, U.M.D.A., Prefatory Note, 9A U.L.A. 148; PUTTING ASUNDER, *supra* note 7, paras. 43-45, at 30-32; Hawke, *supra* note 57, at 243; Wadlington, *supra* note 9, at 81-82; *see also* M. RHEINSTEIN, *supra* note 7, at 383-85; Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 299 (1987).

72. Goldstein & Gitter, *supra* note 37, at 79; *see also* L. WEITZMAN, *supra* note 7, at 23.

culties in marriages"[73] and that the fault-based divorce system was "obsolete and mischievous."[74]

Replacing the old fault-notion of divorce was the assertion that divorce was a private matter that the state had no legitimate interest to restrict when the marriage was irretrievably broken and the parties to the marriage had agreed to terminate the marriage.[75] The thrust of this privacy argument went to protecting parties from unnecessary distress and embarrassing public disclosures. It was argued that requiring disclosure of "the most intimate and often embarrassing details of marital life" is "abhorrent to the community," violated the spirit of family privacy, and worked only to "demean the marriage relationship, humiliate the parties, and damage the residual family relationships."[76] The state's interest in protecting marriages did not justify requiring disclosure of the marriage's failings if it was undisputed by the parties that the marriage was irretrievably broken.

In addition to these four major reasons, advocates of no-fault divorce also asserted the need for greater uniformity among the states regarding divorce[77] and made "bandwagon" arguments in favor of the adoption of no-fault divorce reforms. The inconvenience of multi-state divorce laws had been criticized long before the 1960s; in fact, since the nineteenth century there have been numerous, yet unsuccessful, attempts to adopt one uniform divorce standard for the entire country as a matter of constitutional law or to amend the U.S. Constitution to give Congress the power to enact uniform divorce laws.[78] The proposal of a "Uniform Marriage and Divorce Act" by the NCCUSL in 1970 and its endorsement by the ABA in 1974 clearly were intended, at least in part, to achieve greater interstate consistency in divorce law. Additionally, advocates of no-fault divorce also called attention to the recent adoption of no-fault principles

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73. H. CLARK, *supra* note 23, at 410.

74. M. RHEINSTEIN, *supra* note 7, at 384 (citing Professor Robert Levy's initial report to the NCCUSL).

75. *See* Wadlington, *supra* note 9, at 82. *But see* PUTTING ASUNDER, *supra* note 7, para. 34, at 48 ("[W]e must emphatically reject divorce by mutual consent.").

76. Goldstein & Gitter, *supra* note 37, at 82.

77. *See* H. JACOB, *supra* note 7, at 68.

78. *See, e.g.*, H. Ames, *The Proposed Amendments to the Constitution of the United States During the First Century of Its History* in 2 Annual Report of the American Historical Association for the Year 1896 190 (1897); Proposed Amendments to the Constitution of the United States, Sen. Doc. No. 93, 69th Cong., 1st Sess. (1926); *see also* M. RHEINSTEIN, *supra* note 7, at 28-48; *see generally* N. BLAKE, *supra* note 7, at 130-51.

in workers' compensation and automobile accident insurance law;[79] and as various states adopted liberalizing grounds for divorce, no-fault divorce was portrayed as an irresistible trend. Professor Doris Jonas Freed periodically reported the status of the adoption of no-fault divorce laws in what has been called "the authoritative catalogue of divorce statutes in the United States."[80] Her "catalogues" were published by the Family Law Section of the ABA in *Family Law Quarterly* during the critical reform years of the 1970's. In these catalogues, Professor Freed reported that no-fault divorce laws already had been adopted in most American states, helping to convey the impression that most states had very quickly jumped aboard the no-fault bandwagon.[81]

Thus, no-fault divorce reforms were promoted for very practical and moderate reasons. Substantively, no-fault reforms were intended to achieve recognition of the real status of affairs in the law-as-applied as well as in the families of America, not to alter them. No-fault divorce law reforms were not generally expected or intended to effect a radical alteration in divorce or in the concept of the lasting commitment to marriage.[82]

II. Evaluating the Success of No-Fault Divorce

Evaluating the success of no-fault divorce reform is no simple task. Divorce is an emotional/moral subject that cannot easily be discussed objectively or with disinterested detachment. Moreover, the perspectives of those who advocated, opposed, or participated in the adoption of no-fault divorce reforms may be different from "outsiders" who do not have the same interest at stake.[83] However, it has been more than two decades since the

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79. *See* H. Jacob, *supra* note 7, at 80-82 (noting that once no-fault divorce became fashionable, it spread rapidly, and noting the exaggeration of the acceptance of no-fault divorce); Wadlington, *supra* note 9, at 84-85 (noting the abandonment of fault in workers' compensation and automobile accident insurance).

80. H. Jacob, *supra* note 7, at 81.

81. *See infra* app. 1. Thus, "almost as soon as the NCCUSL and ABA had ratified the no-fault model law, a decisive majority of states were declared to possess it." H. Jacob, *supra* note 7, at 82.

82. *See generally* H. Jacob, *supra* note 7, at 60-61, 78-79, 101-03, 162-73.

83. "Those who promoted the reforms have largely succeeded in dictating the terms of their evaluation. By those standards, most of the changes have had their intended effects: less fraud and hostility in the divorce process . . . ." *Id.* at 164.

In a companion article, Professor Levy attacks some of the assertions made by Professor Jacob in *Silent Revolution* (*see supra* note 7), including the claim that the no-fault divorce reforms were revolutionary (it appears that everyone but Professor Levy

no-fault divorce reform began and a dozen years since the movement "peaked;" this passage of time provides a safe distance from which one who did not participate in the controversy may try to consider fairly the movement's effectiveness.

In evaluating the effects of no-fault divorce grounds, two questions must be asked. First, did the adoption of no-fault divorce grounds accomplish the purposes for which they were enacted? Second, have there been unintended adverse consequences? It appears that none of the purposes which led to the adoption of no-fault grounds for divorce have been fully achieved. It also appears that the no-fault divorce reform movement has had some undesirable effects that were unintended or inadequately anticipated.

A. The Adoption of No-Fault Divorce Grounds Has Achieved Some, But Not All, of the Purposes for Which They Were Intended

As noted above, four principal purposes or arguments supported the adoption of no-fault grounds for divorce. No-fault divorce laws have effected significant change, some of it positive, regarding all four purposes. But total success has not been achieved for any of the principal purposes, and the overall lack of success has been substantial.

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thinks they were) and silent (actually, Professor Jacob was referring to the social changes and political processes, not accusing Professor Levy and his colleagues in the NCCUSL of conspiracy, as Professor Levy seems to believe). Professor Levy also criticizes Professor Jacob's work for failing to include many details that Professor Levy thinks ought to be included in the record. *See* Levy, *A Reminiscence About the Uniform Marriage and Divorce Act—And Some Reflections About Its Critics and Its Policies*, 1991 B.Y.U. L. REV. 43. In addition, Professor Levy attacks some of the assertions made by Professor Weitzman in *The Divorce Revolution*, *see supra* note 7, including the claim that her study showed that men experienced a 42% improvement in their post-divorce standard of living while women experienced a 73% decline in their standard of living.

While I have not hesitated to note my disagreement with Professors Jacob and Weitzman when appropriate (e.g., I have expressed my misgivings about the reliability of the exact economic consequence calculations of Professor Weitzman, *see infra* note 145), I have found their books—*Silent Revolution* and *The Divorce Revolution*—to be very helpful and generally reliable. Most of the information and analysis of these two books on which I have relied have been corroborated by the independent research of other noted scholars (e.g., Max Rheinstein, Mary Ann Glendon, and the authors of the numerous scholarly works cited in this article).

1. Termination of marriage is still acrimonious

It is frequently stated that no-fault divorce reform has reduced the amount or intensity of hostility, acrimony, and unnecessary adversity in divorce proceedings.[84] The conventional wisdom holds that this primary purpose of no-fault divorce reform has been achieved. For example, Professor Lenore Weitzman's popular book, *The Divorce Revolution*, asserts that "there is clearly less hostility and acrimony and, on the whole, all of our respondents—California men, women, lawyers, and judges—expressed positive feelings about the no-fault law."[85] Likewise, the authors of a comprehensive evaluation of Nebraska's no-fault law reported that approximately two-thirds of the responding state court judges reported that there was less animosity under the no-fault divorce law.[86] But the authors of the Nebraska study further noted that there was a higher percentage of contested cases since the adoption of a no-fault divorce ground in Nebraska and suggested that "[s]ince fighting over who caused the breakup is futile, 'those who want a fight, now use collateral issues as the battle ground.' Fights over custody and support are more prevalent and are often just as acrimonious and humiliating as those over grounds, if not more so."[87]

Anthropologist Paul Bohannon reported similar findings in a survey taken of self-identified "matrimonial lawyers" regarding the effects of no-fault divorce on their own family law practices.[88] Ninety-one percent reported that custody disputes had either increased (53%) or remained the same (38%) as before the adoption of no-fault divorce grounds, and 88% reported increased bitterness (44%) or at least as much bitterness (44%) in custody disputes. In addition, 92% of the attorneys reported that the number of property disputes had either gone up (36%) or remained the same (56%) as before the adoption of no-fault

84. *See* Goddard, *supra* note 10, at 414-15; H. JACOB, *supra* note 7, at 151.

85. L. WEITZMAN, *supra* note 7, at 382-83; *see also id.* at ix, 37-40, 401.

86. Frank, Berman & Mazur-Hart, *No-Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary*, 58 NEB. L. REV. 1, 49 (1978).

87. *Id.* at 50-51.

88. Bohannon, *Matrimonial Lawyers and the Divorce Industry* in TAX, FINANCIAL & ESTATE PLANNING DEVELOPMENTS IN FAMILY LAW—1981 EDITION 127 (J. DuCanto ed. 1981). Interestingly, the questionnaire was devised by Lenore Weitzman, who emphasizes that no-fault has reduced the hostility of divorce. *See supra* note 85 and accompanying text.

divorce grounds, and 58% reported that there was greater bitterness (35%) or as least as much bitterness (23%) in property disputes as before. Moreover, 90% reported that disputes over spousal support had either increased (34%) or remained the same (56%) as before the adoption of no-fault. Overall, 64% of the respondents reported that the acrimony and hostility of divorce had either increased or remained the same since no-fault divorce laws were introduced.[89] Professor Bohannon concluded that

> there isn't much change in the emotional dimensions of divorce from what there was in the early 1960's, but . . . there is a very considerable improvement in the support groups to be found in the community. . . .
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> . . . But the experience itself isn't much easier; perhaps it can't be made so. It may be impossible by external social means to change the psychological pain of divorce without changing the nature of marriage. And that is not happening. Today, the search for intimate relationships is just as great as it ever was.[90]

Thus, while there unquestionably is less hostile litigation regarding the *grounds* for divorce under no-fault laws, it appears that this has been due primarily to a transfer of hostility into other facets of the divorce proceeding rather than to any substantial reduction in the acrimony of the proceeding overall. Under no-fault, the conflict and assertion of blame for the failure of family and marital expectations is "hidden" or asserted indirectly in disputes over child custody, child support, property settlement, and alimony. A valuable message conveyed by no-fault divorce grounds is that it is not *necessary* to formally and publicly charge fault (blame) for marital failure.[91] However, the shift of conflict from marital fault to child custody has not really been progress, given the emotional damage inflicted on innocent

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89. Bohannon, *supra* note 88, at 89. While 66% of the attorneys reported that the use of private investigators had dropped off, "it is even more interesting when you talk to private investigators to discover that the amount of their time taken up with domestic matters has *not* been much reduced. . . . However, the specific things they *do* have changed: The concerns and motives of people who pay investigators for matrimonial investigations are different." *Id.* at 132 (child-snatching investigations instead of gathering evidence of adultery).

90. *Id.* at 134.

91. Of course, there is a difference between requiring and permitting. *See generally* Scott, *supra* note 6, at 81-87 (discussing and contrasting private ordering and mandatory rules); *see also infra* note 110 and accompanying text.

and impressionable children.[92] Moreover, open and direct conflict regarding marital failure is arguably better (at least more honest, more capable of effective management, and more likely to achieve catharsis) than disguised or indirect conflict.

Of course, the total elimination of acrimony in connection with divorce is unrealistic (and was not the promise or expectation of the no-fault divorce reformers). Anger and resentment generally accompany the failure of intimate emotional expectations and result from the disappointments and injuries that have led to that failure as well. It would be unrealistic not to expect some divorcing human beings to look for outlets to express the hurt they feel upon rejection or seek some formal expression of acquittal, support, or revenge.[93] And one of the powerful functions of the courts is to provide a means for the peaceful expression of such powerful feelings of vindication and retribution.

Dean Lee Teitelbaum made this point several years ago at another Family Law Symposium held at the J. Reuben Clark Law School when he told a memorable story about a family contest over a will. The *real* issue concerned the desire of non-beneficiary children to obtain official recognition that they had not neglected their parent, who had left them nothing in the will. They did not need or want the property they were fighting over, but the will contest was the only means of obtaining formal vindication regarding a powerful emotional issue. Thus, eliminating the part of the divorce process that allowed the parties to address openly these critical aspects of marriage breakdown, without providing an alternative process or means to do that, was a tragic oversight. It should come as no surprise that the closing of one door to judicial vindication and retribution in divorce has only led to the breaking open of others.

More importantly, it does not appear that the adoption of no-fault has had any significant impact in reducing the profoundly negative psychological impact of divorce on adults and children.[94] Only the death of a spouse is generally reported to be more stressful for adults than divorce; separation and divorce

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92. *See generally* Scott, *supra* note 6, at 25-34.

93. *See* Podell, *supra* note 34, at 169-70. The attempt by divorcing parties to assert tort claims for injuries allegedly inflicted during the marriage is another manifestation of this dynamic. *See generally* Clark, *Marital Privilege: New Remedy for Old Wrongs*, 16 CUMB. L. REV. 229, 233-36 (1986); Note, *Interspousal Torts and Divorce: Problems, Policies, Procedures*, 27 J. FAM. L. 489, 489 (1989).

94. *See infra* notes 194-205 and accompanying text.

are consistently rated more stressful than going to jail, losing a job, personal injury, illness, mortgage foreclosure, and all other distressing life experiences except death of a spouse.[95] For children, the emotional trauma of divorce is equally severe, leaving scars that may last a lifetime.[96] There is no indication that the adoption of no-fault grounds for divorce has in any way lessened the general, long-term psychological pain and sequela of divorce for either adults or children. The legal process of terminating marriage may now be simpler, quicker, or "less hostile" in the sense that the causes of individual anger and hurting are now legally irrelevant and therefore less apparent to lawyers and judges who no longer have to consider such things. However, in view of the enormous anger, anguish, and emotional pain that divorcing parties and their children experience, these legal process benefits are of dubious value.

Yet, the interested legal and psycho-therapeutic professional associations and most of their members generally assert that no-fault divorce has reduced the hostility of divorce litigation.[97] It is safe to say that no-fault divorce at least has made their jobs less tainted by the kind of hostility and acrimony that made them particularly unpleasant before the adoption of no-fault grounds for divorce. (Indeed, one wonders whether the legal profession has not been the major beneficiary of the no-fault divorce reforms.)[98] However, it is doubtful that there is any less suffering by divorced spouses and their children or that there has been any real, significant reduction in the amount of animosity and hostility in divorce litigation since the adoption of no-fault. On the contrary, it appears that there may be more litigation in connection with divorce now than there was before no-fault divorce reforms were enacted.[99]

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95. Holmes & Rahe, *The Social Readjustment Rating Scale*, 11 J. PSYCHOSOMATIC RES. 213, 216 table 3 (1968); *see also* LIFE STRESS AND ILLNESS (E. Gunderson & R. Rahe eds. 1974).

96. *See infra* notes 201-05 and accompanying text.

97. Perhaps this is just an assumption. *See* H. JACOB, *supra* note 7, at 156 ("legal scholars and practitioners simply took for granted that the new laws were working well").

98. It is noteworthy that there was no "grassroots" public movement to reform divorce laws; the prime-movers were members of the legal profession. *See* H. JACOB, *supra* note 7, at 83-88; M. GLENDON, *supra* note 6, at 66.

99. Not only does it seem that since the adoption of no-fault reforms there is more litigation at the time of divorce (due to an explosion of litigation regarding collateral issues such as custody and property division), *see supra* notes 87-90 and accompanying text, but it seems to me that there is more follow-up litigation in the years following divorce.

The belief that "things are better now" regarding hostility in divorce litigation is perpetuated in part by the fostering of an illusion about how much hostility there was in the "bad old days." In fact, approximately ninety to ninety-five percent of all divorces before the adoption of no-fault grounds were uncontested.[100] In the overwhelming majority of cases before the adoption of no-fault divorce grounds, there was no hostile litigation;[101] there was no litigation at all. (That probably was due, at least in part, to skillful out-of-court settlement and hostility-management by competent attorneys—what Professor Mnookin has called "bargaining in the shadow of the law.")[102]

Cases in which scandalous charges and counter-charges of fault were made and divorcing parties attacked each other personally and viciously appear to have been relatively infrequent. Even when "fault" was litigated, most courts, lawyers, and couples knew that there was a difference between legal fault and vindictive personal assault. But, of course, there were abuses, e.g., exceptionally nasty lawyers, extraordinarily bitter clients, exceptionally insensitive judges, and especially outrageous cases. (Such abuses still exist, of course.) Those are the anecdotal cases that are recalled when former advocates of no-fault divorce reform say that there is less hostility now. By comparing the ordinary post-no-fault divorce case to those extraordinary pre-no-fault cases, the appearance of a great improvement is created.

2. There is less perjury about divorce grounds, but perhaps no less dishonesty in divorce proceedings

The "doctoring" of testimony to establish a "fault" ground for divorce was one of the most highly-resented aspects of the old "fault" divorce scheme.[103] Some divorce-seeking clients resented having to publicly charge and prove that their spouses had committed serious marital misconduct. When such grounds were absent and the parties wanted a divorce nonetheless, they also resented having to stretch the facts (or fabricate them) under oath to obtain a mutual-consent divorce or having to go to another jurisdiction and "pretend" to be a resident of that state

100. *See supra* notes 62-63 and accompanying text.

101. However, perjury was not uncommon. *See infra* notes 103-04 and accompanying text.

102. Mnookin, *Child Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975).

103. *See supra* note 59 and accompanying text.

or jurisdiction to obtain a divorce. Many lawyers who wanted to provide their legal services to assist such clients to obtain divorces resented having to participate in such unseemly, dishonest practices to help their clients obtain the legal relief they desired. The desire to eliminate deceit and hypocrisy in the law was widely proclaimed by no-fault reformers.

The adoption of no-fault grounds for divorce has provided a way for lawyers and clients to obtain mutual-consent divorces without stooping to such disreputable practices. There is no need to lie or even "finesse" the truth to obtain the termination of an unhappy marriage. Because there is no advantage to be obtained from lying, lawyers may once again exhort their clients to tell the truth. Because testimony about marital misconduct is legally irrelevant and inadmissible in many no-fault states, judges need not worry that divorce-seeking parties may be lying about the "faults" of their spouses in order to obtain a judicial decree of domestic freedom. Thus, it is fair to assume that no-fault divorce laws have reduced the total amount of perjury in divorce proceedings.

However, the adoption of no-fault grounds for divorce has not eliminated the discrepancy between the written law and the law in practice or the incentive for parties to stretch the truth to get what they want in divorce proceedings. In the first place, a significant credibility gap has developed between the statutory standard of judicial inquiry into whether a marriage is "*irretrievably* broken" or whether differences are "*irreconcilable*" and the type of inquiry (really non-inquiry) that actually occurs in typical no-fault divorce cases.[104] There is no more judicial scrutiny of no-fault grounds than there was of the fault grounds. It appears that one legal fiction (judicial scrutiny of no-fault grounds) has been substituted for another (judicial scrutiny of fault grounds).[105]

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104. Frank, Berman & Mazur-Hart, *supra* note 86, at 65-69.

105. For instance, the Final Report of the California Governor's Commission on the Family, which recommended the adoption of no-fault divorce grounds, contains this astonishing declaration regarding the irreconcilable differences/irremediable breakdown standard:

> We cannot overemphasize that this standard does not permit divorce by consent, wherein marriage is treated as wholly a private contract, terminable at the pleasure of the parties without any effective intervention by society. The stand we propose requires the community to assert its interest in the status of the family, and permits dissolution of the marriage only after it has been subjected to a penetrating scrutiny and the judicial process has provided the par-

Moreover, there are indications that no-fault grounds for divorce have only caused the lying to shift (as did the hostility) from the part of the proceeding dealing with the grounds for divorce to the collateral aspects, especially child custody and visitation disputes. For instance, the practice of one parent falsely accusing the other parent of child abuse, especially child sexual abuse, appears to have increased since the adoption of no-fault divorce grounds.[106] Getting "control" or asserting "power" in custody matters has assumed even greater emotional significance since the elimination of marital fault has deprived spouses of the opportunity for official vindication of their comparative recti-

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ties with all of the resources of social science in aid of conciliation.

CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY, FINAL REPORT 23 (1966), *quoted in* H. JACOB, *supra* note 7, at 55. Because the courts were unwilling to investigate seriously the condition of the marriage when such an investigation was explicitly required by the grounds for divorce, it took remarkable imagination for the Governor's Commission to suggest that the courts would make "penetrating scrutiny" when those grounds were circumvented or eliminated. And since the legislative and judicial branches were unwilling to reallocate scarce public resources to encourage conciliation when it was the official policy of the state to discourage divorce except for marital misconduct, it bordered on the facetious to suggest that the judicial process would "provide[] the parties with all of the resources of social science in aid of conciliation" when no-fault divorce became the official policy. *Id.* These advocates of no-fault divorce offered a fairy tale version of life under no-fault.

106. Myers, *Allegations of Child Sexual Abuse in Custody and Visitation Litigation: Recommendations for Improved Fact Finding and Child Protection*, 28 J. FAM. L. 1, 20 (1990) ("There is increasing concern that a wave of fabricated charges of child sexual abuse is sweeping the country."); *id.* at 21 ("Allegations of child sexual abuse occur in a small but increasing number of custody cases."). Studies indicate that about 8% of general child sexual abuse reports are probably fictitious, whereas in custody cases the estimates of false accusations range from 20 % to approximately 50 %. *Id.* at 21-22 (citing Green, *True and False Allegation of Sexual Abuse in Custody Disputes*, 25 J. AM. ACAD. C. PSYCHIATRY 449 (1986); Benedek & Schetky, *Allegations of Sexual Abuse in Child Custody and Visitation Disputes*, in EMERGING ISSUES IN CHILD PSYCHIATRY AND LAW 145 (E. Benedek & D. Schetky eds. 1985); Jones & Seig, *Child Sexual Abuse Allegations in Custody and Visitation Disputes*, in SEXUAL ABUSE ALLEGATIONS IN CUSTODY AND VISITATION CASES 22 (B. Nicholson & J. Bulkley eds. 1988). Professor Myers warns against overreacting to the problem of false accusations. *See also* Levy, *Using "Scientific" Testimony to Prove Child Sexual Abuse*, 23 FAM. L.Q. 383, 387 (1989); Michaels & Walton, *Child Abuse Allegations: How to Search for the Truth*, FAM. ADVOC., Fall 1987, at 35; letter from Robert J. Howell, Ph.D., to Utah State Senator Cary G. Peterson (Jan. 7, 1986).

> During the past few years, I have become increasingly concerned with the issue of child abuse laws and the misuse of these laws. . . . I have been flooded with mainly men, but some women, who have been charged with sexual abuse. Most of these charges are made at the time of divorce when everybody is angry at everybody else.

Id. Even children are manipulated into making such false accusations, which is terribly destructive for the child. *See* Moss, *Are the Children Lying?*, A.B.A. J., May 1, 1987, at 59.

tude. Because the abandonment of maternal-preference rules and the adoption of "joint custody" have increased the legal risk that comparatively faultless mothers may lose a greater share of the post-divorce parental control of their children, the incentive to irresponsibly accuse the other parent of serious parental dereliction (in lieu of marital dereliction) has increased.[107]

Thus, it appears that the adoption of no-fault divorce grounds has eliminated both the incentive to lie and the practice of lying about grounds for divorce. However, the dishonesty and hypocrisy in divorce has not been eliminated, and some of the lying may simply have shifted from the ground-for-divorce phase to other phases of the divorce proceeding.

3. The adoption of no-fault grounds for divorce in many states did not merely conform the written law to the law as practiced

Advocates of no-fault divorce generally argued that adoption of no-fault grounds for divorce would not constitute an appreciable liberalization of the divorce law, but would merely be the "logical extension of existing practice."[108] However, in many states, the no-fault divorce laws that were enacted have done much more than explicitly authorize no-fault divorce by mutual consent (or by uncontested divorce), which was the variety of *de facto* no-fault divorce previously available.[109] In more than one-

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107. Gordon, *False Allegations of Abuse in Child Custody Disputes*, 135 NEW L.J. 687 (1985) ("For many parents engaged in seriously contested child custody disputes, false allegations of child abuse have become an effective weapon for achieving an advantage in court.").

The seriousness of the long-neglected problem of child abuse is so great that such accusations cannot be ignored. The enactment of child abuse reporting laws in recent years has stimulated many people to report child abuse who previously would not have done so (in part out of fear that they would not be believed). Since the number of reports of child abuse has increased in recent years, it is to be expected that the number of false reports of child abuse has also increased. Myers, *supra* note 106, at 20-22. That, alone, does not represent a worsening of the problem. The concern is narrower—i.e., increase in the *rate* of false child abuse reports made by one parent against another *in connection with child custody disputes*. In that context, the potential for malicious accusations is unique and the conflict of interest of the contesting parents presents an exceptional incentive for false reporting.

108. H. JACOB, *supra* note 7, at 78, 167 (Jacob's thesis is that no-fault reformers were successful because they presented their reforms as modest, routine improvements in the law, down-playing any significant substantive impact); M. RHEINSTEIN, *supra* note 7, at 313-16. "As Herma Hill Kay put it: 'It was impossible to make divorce easier in California than it already was.' " H. JACOB, *supra*, at 46.

109. *See supra* notes 59-64 and accompanying text. *See also* M. RHEINSTEIN, *supra*

third of the states, the *only* ground for divorce is a no-fault ground.[110] In those states, judicial scrutiny of the causes of marital failure is not permitted. Whereas the former practice allowed the parties the choice to avoid airing their dirty laundry if they could work out their feelings by other means, the current law in many states goes further and denies all parties the choice to ask for a judicial determination (no matter how limited) of comparative marital rectitude.

An even greater change wrought by the adoption of no-fault is the legalization of unilateral no-fault divorce on demand. Under the former law, parties could obtain a divorce without judicial scrutiny of the question of marital misconduct only if both parties mutually agreed to it. Now the vast majority of states have adopted no-fault divorce laws that make it possible for one party unilaterally to obtain a no-fault divorce, despite the dissatisfaction and objections of the other spouse.[111]

Thus, it appears that the no-fault divorce reformers overshot their mark if they really intended to close the gap between law-as-written and law-as-applied. Under divorce practice, no-fault divorce could be (but did not have to be) obtained by mutual consent; divorces were not unilateral. However, rather than merely conforming the statutory law to that practice, the no-fault divorce reforms generally have introduced nonconsensual, unilateral no-fault divorce, and in forty percent of the states, no other method of marriage termination is permitted. Thus, while the expressed goals of the reformers were generally modest, the results in most states have been radical.[112]

4. The adoption of no-fault divorce laws has not reflected modern marriage notions nor enhanced privacy

Certainly reformers were correct when they asserted that ideas about marital relations have changed and that the requirement that "fault" be publicly charged and proved in every case

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note 7, at 247-59; McLindon, *Separate But Equal: The Economic Disaster of Divorce for Women and Children*, 21 FAM. L. Q. 351, 352 (1987).

110. *See supra* note 41 and accompanying text.

111. *See* Frank, Berman & Mazur-Hart, *supra* note 86, at 65-67; M. GLENDON, *supra* note 6, at 65-78, 104-05. According to one report, only 10 of the jurisdictions with no-fault divorce laws (she says there are 51) require both spouses to agree before no-fault divorce may be granted. Freed & Walker, *Family Law in the Fifty States*, 22 FAM. L.Q. 367, 385-86 (1989). *See also infra* app. 1A.

112. *See generally* H. JACOB, *supra* note 7, at 167.

in which divorce is sought no longer reflects modern ideas about marital privacy or marital failure.[113] Few would argue against the modern notion that fault need not be a part of every divorce proceeding, especially when the divorcing couple has no desire to allege and prove fault. However, as the evidence noted above indicates, the notion that fault should or could be eliminated entirely from divorce proceedings or that it could be eliminated by legislative fiat (e.g., abolishing fault grounds for divorce) has proven sadly mistaken.

The fact that both spouses share some of the responsibility for marital failure does not mean that spouses will never earnestly desire or (psychologically) need the opportunity for a formal judicial declaration of comparative marital rectitude. Nor does the fact that most couples can resolve the strong feelings they may have regarding marital failure by negotiations in the shadow of the law of marital fault without demanding trial of fault mean that all can do so (much less that all can do so when the law casting that shadow is removed). Apparently, feelings of anger and blame are still a very real dimension of the breakup of modern marriage. The "shifting" of hostility and perjury since the adoption of no-fault provides abundant evidence that the "nature" of marriage and human intimacy (or at least the psychological nature of men and women) has not changed as much as some reformers believed.[114]

Privacy is another powerful component in the modern concepts of marriage and divorce. Ironically, the adoption of no-fault grounds has led to more, not less, public intrusion into individual and family privacy in regard to divorce.[115] The shield of family privacy protects the ongoing family; when there is family breakup, the state's *parens patriae* interests in protecting vulnerable and dependent persons warrants much greater state intrusion than before.[116] Whereas state intrusion previously focused on marital fault, "[t]he new divorce laws made divorce easier, but they imposed external norms on how divorced couples continue[] to relate to each other and their children."[117] It appears that since the adoption of no-fault divorce grounds

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113. *See generally* Scott, *supra* note 6, at 10-12, 20.

114. *See supra* notes 88-93 and accompanying text.

115. H. JACOB, *supra* note 7, at 7-9.

116. *See generally* Scott, *supra* note 6, at 28-29; J. FISHKIN, JUSTICE, EQUAL OPPORTUNITY AND THE FAMILY 34-39 (1983).

117. H. JACOB, *supra* note 7, at 8.

there is not only more litigation regarding collateral matters (such as custody and finances) at the time of divorce, but it seems that there also is significantly more follow-up litigation. More often, and for longer periods of time, divorced parties are returning to court demanding further judicial scrutiny of the vestiges of a previously-terminated marriage. As a result, not once but many times parties must open their private lives to the scrutiny of public (judicial) officials in formal court proceedings.

Moreover, the type of privacy of which most reformers spoke twenty years ago was not the unbridled freedom of individual choice. Few advocates of no-fault reform asserted that it was beyond the legitimate interests of the state to restrict divorce when one spouse wanted out of the marriage at any time, for any reason, without mutual consent.[118] For example, the authors of *Putting Asunder* explicitly rejected the notion that marriage was a purely private affair, capable of being tossed aside at the will of the spouses.[119] In the United States, as Professor Glendon reports, "ideas of individual liberty did not play a major role in the process of [no-fault divorce] law reform."[120] Indeed, the California Governor's Commission Final Report attacked the ability of an innocent spouse to demand a divorce as a legal remedy when one of the fault grounds existed. The Report declared:

> We believe that it is personally tragic and socially destructive that the Court should be absolutely required, upon proof of a single act of adultery or "extreme cruelty" . . . to end a marriage which may yet contain a spark of life . . . . The marriage relationship . . . should not be sundered by the law unless the Court finds that the legitimate objects of the marriage have been irretrievably lost.[121]

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118. *But see* Goldstein & Gitter, *supra* note 37.

> In order to avoid intrusions upon personal privacy, *but more importantly because the evidence obtained through such intrusions is not relevant to any legitimate interest of the state*, [a proposed divorce law should] not permit judicial inquiry to determine and assure that the marriage has, in fact, "broken down." . . . By not requiring or inviting public exposure of an individual's *personal reasons for wanting or not wanting a divorce* the proposed statute serves to safeguard the privacy of all interested parties.

Id. at 78 (emphasis added).

119. "The fatal defect of the consensual principle is that it subjects marriage absolutely to the joint will of the parties, so making it essentially a private contract." PUTTING ASUNDER, *supra* note 7, at 38.

120. M. GLENDON, *supra* note 6, at 77.

121. *Id.* (quoting CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY, FINAL REPORT

The type of privacy that was asserted was the privacy of couples who had worked out their own differences and were seeking divorce mutually (or without any contest) not to have to publicly charge and prove the details of marital misconduct. Yet that mutual privacy is not what has resulted from the adoption of no-fault divorce laws. A more radical notion of individualistic privacy has supplanted the mutual privacy principle.[122] No-fault divorce laws in most American jurisdictions allow any spouse unilaterally to obtain a decree terminating the marriage, without any real judicial examination into the nature of the relationship or cause of breakdown. Modern no-fault divorce laws embody a more atomistic notion of privacy than mainstream advocates of no-fault divorce asserted twenty years ago.

5. All states but one have climbed aboard the no-fault bandwagon, but there is little real uniformity among no-fault jurisdictions

To date, most of the articles describing the no-fault divorce "revolution" cite the statutes enacted by the states as proof of the great changes that have taken place. By this statutory measure, significant changes have not only occurred, but have occurred quickly. But if the experience with the fault-system of divorce laws taught us anything, it was to look beyond the face of the statutes governing the grounds for divorce to see what the law really is. Substantive provisions that appear to be very liberal on their face may be given a very limited practical scope of operation by other substantive and procedural provisions, or tough-sounding provisions may be given only nominal effect.

Enormous diversity still exists among the states regarding divorce. While nearly all states have adopted some type of modern no-fault provision, that does not mean that divorce is available in the same way or with the same ease in all American jurisdictions. In some states, no-fault divorce grounds have totally supplanted all other grounds for divorce;[123] in other states, they have merely supplemented the fault grounds.[124] In some states, no time of separation is required for no-fault divorce; in other

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(1966)).

122. Lenore Weitzman suggests that the notion that marriage is terminable-at-will of either party now has become generally accepted. L. WEITZMAN, *supra* note 7, at 368-70.

123. *See supra* notes 41-45 and accompanying text.

124. *See supra* notes 46-49 and accompanying text.

states, time-of-separation is the only no-fault ground for divorce.[125] In yet other states, both time-of-separation and specific no-fault allegations must be pleaded to obtain no-fault divorce.[126] In some states, evidence of marital misconduct is forbidden to prove "irretrievable breakdown;"[127] while in others, evidence of marital misconduct may be offered as the evidence of "irretrievable breakdown."[128] Unilateral no-fault divorce is the only type of divorce officially recognized in many states;[129] whereas in other states, unilateral no-fault divorce is forbidden.[130] Thus, significant diversity still exists in the divorce laws of the United States.

Likewise, the UMDA (which has lost some uniformity even in those states where various parts or modifications of it have been adopted) has not been uniformly successful. Only eight states have adopted some part of the UMDA, the most recent adoption coming more than a dozen years ago.[131]

Even the bandwagon argument seems to have rolled to a stop. Professor Freed's "authoritative catalogue" took substantial liberties in classifying statutes as "no-fault." (Professor Jacob described it as "a bold attempt to legislate by scholarly fiat.")[132] For instance, Professor Freed listed as no-fault jurisdictions states providing for divorce upon the ground of separation for lengthy periods (e.g., three-year separation), which are not in any practical sense functional no-fault provisions. Likewise, Professor Freed's "characterization of states like Missouri and South Carolina as possessing no-fault despite the lack of explicit legislative or judicial action aroused no visible objection."[133] Thus, the bandwagon appears to have been smaller than originally asserted.

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125. *See supra* notes 44, 49 and accompanying text.

126. *See supra* note 48 and accompanying text.

127. *See supra* note 13 and accompanying text.

128. *See, e.g.*, Murff v. Murff, 615 S.W.2d 696 (Tex. 1981); Vavtrain v. Vavtrain, 640 S.W.2d 309 (Tex. Ct. App. 1983); *see also* Grosskaupf v. Grosskaupf, 677 P.2d 817 (Wyo. 1984).

129. *See supra* notes 41-45, 111 and accompanying text.

130. *See* Freed & Walker, *supra* note 111.

131. U.M.D.A., Prefatory Note, 9A U.L.A. 147-48.

132. *See* H. JACOB, *supra* note 7, at 81-82. A more careful review of the adoption of no-fault grounds for divorce shows a different picture—a picture of a longer reform process with less "instantaneous" acceptance of no-fault divorce grounds. *See* app. 1A.

133. H. JACOBS, *supra* note 7, at 81. Professor Freed's catalogues of states that have adopted some type of no-fault divorce laws still continue to be valuable, but they still are probably misused more than they are used accurately.

However, most states did eventually climb aboard the bandwagon to some extent, but they travelled down different trails, enacting a strikingly diverse array of no-fault laws.[134] The bandwagon argument became less important as it became harder to find "fault" states that still needed to climb aboard.[135] Moreover, since no-fault grounds for divorce were adopted, even the spread of the "no-fault" concept has waned, notwithstanding the success of no-fault automobile accident insurance and of workers' compensation programs.[136]

6. Summary

From the perspective of principal arguments for and intended purposes of the adoption of no-fault grounds for divorce, it is not clear that the no-fault divorce reforms have succeeded. Any success in reducing hostility appears to have resulted more from shifting or disguising the problem than eliminating it. Similarly, most perjury has been shifted to another part of the divorce proceeding rather than eliminated. The effort to conform the law to the actual practices "overshot the mark," closing one gap between the written law and the law-in-practice while creating a new credibility gap concerning judicial scrutiny of "irretrievably broken" marriages. Modest intentions to protect mutual privacy have been frustrated by post-divorce litigation and by the adoption of more radical individualistic premises of unilateral divorce. In some ways divorce is less daunting than it was two decades ago, but in many ways divorce is not any less difficult, and for some people (especially some children and some struggling parents) the adoption of no-fault divorce probably has exacerbated the trauma of divorce.

B. No-Fault Divorce Appears to Have Wrought Some Serious Unintended or Inadequately Anticipated Consequences

In his comprehensive history of the no-fault divorce reform movement, Professor Jacob observed that no-fault divorce re-

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134. *See supra* notes 40-50 and accompanying text.

135. Over the last 10 years (1981-1991), only four jurisdictions have added no-fault grounds, while 28 jurisdictions adopted no-fault grounds during the previous 10 year period (1971-1981). *See infra* app. 1A.

136. *But see* Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803 (1986) (discussing diminution of family laws that embody traditional moral values).

form "usually eschewed larger social issues. For instance, it avoided discussion of the effect of changing divorce rules on the roles of men and women. It implicitly denied any consequences of change of ongoing marriages . . . ."[137] The advantage of narrowing the focus of the no-fault divorce reform debate was that it reduced the chance of controversy and thereby increased the chance for political success of the no-fault divorce proposals. The disadvantage was that narrowing the debate increased the risk of unanticipated or unintended consequences. At this time, two unintended or inadequately anticipated consequences have emerged as the focus of national concern—the impoverishment of children and divorced custodial mothers and the increase in the rate of divorce.

1. There is some evidence that custodial mothers and their children have suffered more following no-fault divorce than similar mothers and children did before the adoption of no-fault divorce grounds

In most states, no-fault divorce was not a major feminist issue.[138] The potential impact of the adoption of no-fault grounds for divorce upon the ability of women and children to obtain a fair financial settlement was not widely discussed.[139] But soon after California adopted its radical no-fault divorce law, concerns began to be expressed that women were getting less financial support than they had received previously.[140] Lenore Weitzman and her colleagues published their stunning report comparing the economic awards after the adoption of no-fault divorce in California with those that were made previously.[141] Dr. Weitzman found that "[s]omehow, the elimination of

137. H. JACOB, *supra* note 7, at 68-69. *See infra* note 138 and accompanying text.

138. *See* H. JACOB, *supra* note 7, at 60, 72, 85; Kay, *supra* note 71, at 293 ("[T]he achievement of legal equality between women and men was not a central goal of the divorce reform effort in California."). However, in Wisconsin it apparently became a feminist issue. *See* H. JACOB, *supra* note 7, at 99-101; Fineman, *Implementing Equality: Ideology, Contradiction and Social Change. A Study of Rhetoric and Response in the Regulation of the Consequences of Divorce*, 1983 WIS. L. REV. 789, 846-75.

139. The negative impact of no-fault divorce on women and children was not entirely unforeseen, but it was an issue that was widely ignored in the enthusiasm for the reforms. *See* Stone, *supra* note 59, at 390; *cf.* PUTTING ASUNDER, *supra* note 7, at 20.

140. *See* Goddard, *supra* note 10, at 416.

141. *See* L. WEITZMAN, *supra* note 7; Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make A Difference*, 14 FAM. L.Q. 141 (1980); Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981).

grounds, fault, and consent, and the introduction of gender-neutral standards for financial awards [had] unanticipated and unfortunate consequences"[142] and that the adoption of no-fault divorce "worsened women's condition, improved men's condition, and widened the income gap between the sexes."[143] Specifically, she claimed that her California research showed "that, on the average, divorced women and the minor children in their households experience a 73 percent decline in their standard of living in the first year after divorce. Their former husbands, in contrast, experience a 42 percent rise in their standard of living."[144] Professor Weitzman's study stimulated a lot of debate[145] and a boomlet of replication studies in other states in which similar results were reported. In the words of one reviewer:

> These studies indicate in general a decrease in every facet of women's settlements as compared with settlements under fault regimes. Alimony is granted less frequently, in smaller amounts, and for shorter durations. Similarly, child support awards shrank in size and were granted less often. Women also received smaller shares of the family assets and greater shares of the family debt.
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> These studies concluded that the economic outlook for women divorcing under today's no-fault statutes [is] grim indeed. In Michigan, while a divorcing husband could expect his

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142. L. WEITZMAN, *supra* note 7, at 358.

143. *Id.* at 378; *see also id.* at 401 ("For all its aims at fairness, the current no-fault system of divorce is inflicting a high economic toll upon women and children.").

144. *Id.* at xii; *see also id.* at 337-39. *But see* Hoffman & Duncan, *What* Are *the Economic Consequences of Divorce?*, 25 DEMOGRAPHY 641 (1988).

145. Professor Weitzman's studies have been criticized for methodological problems and "nostalgia." Abraham, *The Divorce Revolution Revisited: A Counter-Revolutionary Critique*, 9 N. ILL. U. L. REV. 251, 297 (1989) ("Weitzman's work is characterized by skewed statistical analyses, unfounded working assumptions, one-sided presentations of evidence, and hostility towards husbands and fathers."); *id.* at 273-95 (suggesting that Weitzman misstated some data, used a biased research design, concealed some assumptions and misstated others, refused to let her data be examined, etc.); Duncan & Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 DEMOGRAPHY 485 (1985); Hoffman & Duncan, *supra* note 144; *see also* H. JACOB, *supra* note 7, at 162-64; Kay, *supra* note 71, at 310-19; *see generally* Singer, *Divorce Reform and Gender Justice*, 67 N.C.L. REV. 1103, 1105-13 (1989). My own experience representing clients in divorce cases, and working on Utah's child support guideline drafting committee, leaves me with the impression that there is a very real and very troubling gap between the economic plight of men and women following divorce, but that it is not as great in most cases as some have suggested. But too many other studies have validated the essential finding that there *is* a gap for anyone to dismiss the concern merely because some researcher did not control for all variables or did not design an airtight empirical examination.

> standard of living to improve 17 percent after divorce, his former wife faced a decline of 29 percent. The divergence among California and Vermont couples was even more startling. . . . Men in Vermont saw their per capita income rise 120 percent while that of women fell 33 percent. The Ohio study similarly concluded that the years following divorce are indeed financially quite difficult for women.[146]

Likewise, comparing the divorce laws and post-divorce responsibilities for dependent children and their mothers in twenty countries in North America and Western Europe, Professor Mary Ann Glendon reported that the United States was at the "extreme" end of the responsibility spectrum. Only one other western nation (Sweden) has accepted unilateral no-fault divorce, and Swedish law imposes substantially more responsibility toward former dependents. "More than any other country among those examined . . . the United States has accepted the ideal of a no-fault, no-responsibility divorce."[147]

Thus, the adoption of no-fault divorce was clearly accompanied by, and appears to have caused, some reduction in the financial responsibility imposed upon men for the benefit of their former economically dependent wives and children.[148] Moreover,

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146. McLindon, *supra* note 109, at 352. The author of that review also reported similar results in a study he performed in New Haven, Connecticut: divorce proceedings were quicker, alimony awards were smaller and for shorter duration, men obtained custody more often, child support awards to women were lower, women received a smaller portion of the family assets and a larger portion of family indebtedness, and women received attorney's fees awards less often, and got smaller awards, than before the adoption of no-fault divorce grounds in Connecticut. *Id.* at 353-84; *see also* Welch, *A Decade of No-Fault Divorce Revisited: California, Georgia, and Washington*, 45 J. MARR. & FAM. 411 (1983).

147. M. GLENDON, *supra* note 6, at 105.

148. Whether this "gap" realistically can be closed, or whether it should be closed by means of higher or longer financial awards upon divorce are clearly important questions that merit serious consideration, not knee-jerk reactions. The fairness of increasing the economic responsibilities of persons whose former spouses have unilaterally chosen to liberate themselves from the burdens of their marriage is not immediately apparent when judicial inquiry into questions of spousal responsibility for the marriage failure has become legally irrelevant. Indeed, the adoption of no-fault divorce grounds has created significant problems for the justification of the imposition of any post-dissolution continuing spousal support or sharing obligation. *See generally* Brinig & Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 884-95 (1988); Lichtenstein, *Marital Misconduct and the Allocation of Financial Resources at Divorce*, 54 UMKC L. REV. 1, 7-18 (1985); O'Connell, *Alimony After No-Fault: A Practice In Search of A Theory*, 23 NEW ENG. L. REV. 437, 483-92 (1989); Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 694, 740 (1990). The point of the matter, however, is not what the result of careful consideration might be, but that this profoundly important issue did not receive thorough consideration at the time no-fault

the feminization of poverty as a result of no-fault divorce has also been exacerbated by the role-reversal in divorce filing patterns that occurred after no-fault divorce laws were adopted. For example, one study of divorce filings revealed that before the adoption of no-fault divorce grounds, men filed for divorce in only 29% of the cases, but after no-fault divorce laws were adopted men filed in 68% of the cases .[149] In sum, the plight of financially dependent family members has been exacerbated by no-fault divorce.

2. *No-fault divorce appears to have contributed to an increase in the rate of divorce in the United States*

Does liberalization (or elimination) of the grounds for divorce "cause" an increase in the rate of divorce?[150] It is abundantly clear that many social factors contribute to increases in divorce rates.[151] The question considered here is very specific: has the adoption of no-fault grounds for divorce been one of the causes of increased divorce rates in the United States?

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divorce grounds were adopted.

149. Gunter & Johnson, *Divorce Filing as Role Behavior: Effect of No-Fault on Divorce Filing Patterns*, 40 J. MARR. & FAM. 571 (1978).

150. Undoubtedly an even better question is whether (and, if so, how) the liberalization or elimination of the grounds for divorce causes or helps cause marriages to fail. If the causes of marital breakdown could be eliminated, it is safe to say that divorce would be eliminated. But the "causes" of marital breakdown are multiple and unique in every instance (Tolstoy wrote: "All happy families resemble each other; every unhappy family is unhappy in its own way." L. TOLSTOY, ANNA KARENINA, pt. 1, ch. 1, at 3, in IX THE COMPLETE WORKS OF COUNT TOLSTOY (1968)), and it is practically impossible to conduct any broad social research using marital breakdown as a variable apart from divorce or separation. Thus, to ask a question for which an answer might actually be found, it is necessary to ask whether liberalization of divorce law causes an increase in divorce.

151. *See generally* H. JACOB, *supra* note 7, at 16-17; M. RHEINSTEIN, *supra* note 7, at 262-63, 429; HANDBOOK OF MARRIAGE AND THE FAMILY 19-21 (M. Sussman & S. Steinmetz eds. 1987) (noting intergenerational transfer of marital instability, education, premarital pregnancy, age at marriage, religion and religiosity, race/ethnicity, heterogamy, income, public assistance, children, life-course events, etc.); Frank, Berman & Mazur-Hart, *supra* note 86, at 68-69; Furstenberg, *Premarital Pregnancy and Marital Instability*, in DIVORCE AND SEPARATION, CONTEXT, CAUSES AND CONSEQUENCES 83-98 (G. Levinger & O. Moles eds. 1979); Norton & Glick, *Marital Instability in American: Past, Present & Future*, in DIVORCE AND SEPARATION, CONTEXT, CAUSES AND CONSEQUENCES *supra at 9-10, 16*; Pope & Mueller, *The Intergenerational Transmission of Marital Instability: Comparisons by Race and Sex*, in *id.* at 99, 109; Mott & Moore, *The Causes and Consequences of Marital Breakdown*, in WOMEN, WORK AND FAMILY 113-23 (M. Mott ed. 1978); Raschke, *Divorce*, in HANDBOOK OF MARRIAGE AND THE FAMILY, *supra*, at 597, 600-07; Sepler, *Measuring the Effects of No-Fault Divorce Laws Across Fifty States: Quantifying a Zeitgeist*, 15 FAM. L.Q. 65, 86-88 (1981); Wardle, *Rethinking Marital Age Restriction*, 22 J. FAM. L. 1, 22-30 (1983); *see also* Scott, *supra* note 6, at 39.

The conventional wisdom is that adoption of no-fault grounds for divorce have not caused divorce rates to increase.[152] Professor Jacob noted that "[e]very study of the impact of these [no-fault] laws on divorce rates has concluded that no relationship existed between the introduction of no-fault and the rise in divorce."[153] Professor Marvell's recent, comprehensive study of the relationship between the adoption of no-fault divorce laws and divorce rates cites ten previous studies, most of which seemed to offer "overwhelming evidence" that there was no causal correlation.[154] The main evidence for this conclusion was simple: the divorce rate began to rise in most states *before* no-fault divorce laws were actually enacted in those states.

However, the early studies have been faulted recently for flaws in data used, research design, oversimplicity, and other technical problems.[155] Moreover, even some of the early studies reported a positive correlation between the adoption of no-fault divorce grounds and increases in divorce rates in at least some states.[156] Professor Marvell's rigorous and comprehensive statistical research now has demonstrated a significant causal relationship between adoption of no-fault divorce in individual states and the increase of divorce rates in most states.[157] Of the thirty-five states examined with new no-fault divorce laws effective before 1980, twenty-five experienced higher than average increases in divorce rates when the no-fault laws went into effect, and in eleven states, the increase in the rate of divorce was more

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152. The movement that led to adoption of a radical no-fault divorce law in California began as an effort to find a solution to the high rates of divorce in that state. *See supra* notes 14-15 and accompanying text.

153. H. JACOB, *supra* note 7, at 162; *see id.* at n.30 (collecting sources); Frank, Berman & Mazur-Hart, *supra* note 86, at 68-69; Sepler, *supra* note 151, at 76-84.

154. Marvell, *Divorce Rates and the Fault Requirement*, 23 LAW & SOC. REV. 543, 546 (1989).

155. *Id.* at 547-48.

156. M. RHEINSTEIN, *supra* note 6, at 444-69 (summarizing the doctoral dissertation of Alexander Plateris which "indicate[d] that a positive association exists between the permissiveness of divorce law and the incidence of marriage breakdown"); *id.* at 469; Marvell, *supra* note 154, at 546 (noting three earlier studies that had concluded that the adoption of no-fault divorce laws "had substantially increased the number of divorces"); Sepler, *supra* note 151, at 76-77 (noting that in 10% of the states examined the rate of divorce had increased following the enactment of no-fault divorce grounds).

157. Professor Marvell used a multiple time-series design with a pooled model. Marvell, *supra* note 154, at 549-53. Marvell's article was reviewed by, among others, Herbert Jacob, the author of the book which stated: "[e]very study . . . has concluded that . . . no relationship existed." *See supra* note 153 and accompanying text.

than twice the previous rate of increase.[158] Professor Marvell concluded that "[n]o-fault laws, operationalized as a single variable, had a significant impact on divorce rates, with the major thrust delayed for a year."[159]

Moreover, it is apparent that the significant rise in the divorce rate in the United States did not begin until the no-fault divorce reform movement was well-underway. Thus, until the mid-1960's, the divorce rate had been remarkably stable for twenty years, and before the World War II-era rise in divorce rates, the rates had been stable for many more years. The no-fault divorce reform movement was well underway[160] by the time the divorce rates for the United States began their significant climb in 1967, from 2.5 divorces per 1000 people (1966) to 5.3 (1979 and 1981).[161] As appendices 2, 3, 4 and 4A show, before modern no-fault divorce reforms were accepted, the divorce rates had been slowly rising for a long time; during the years that the legislatures in the American states were adopting no-fault divorce laws, the divorce rates rose abruptly and significantly; and since the no-fault divorce reform movement peaked (leaving virtually every state with some form of no-fault divorce), the divorce rates appear to have stabilized again—at a significantly higher rate of divorce than has ever been recorded, much less maintained, in the history of the United States.[162] The United States now has the highest rate of divorce of any western nation, and some analysts have estimated that as many as one-half of all marriages entered into in these days will end in divorce.[163] In light of these society-wide trends, it begs the ques-

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158. Marvell, *supra* note 154, at 557-58.

159. *Id.* at 563. However, controlling for the type of no-fault laws enacted altered the statistical relationships. *Id.* Moreover, "[t]here is no evidence of reverse causation; that is, divorce rate growth leading to new laws." *Id.*

160. Before the rapid rise in divorce rates began, the California Governor's Commission had made its well-known recommendations, and the New York legislature had already adopted that state's first significant divorce reforms in nearly two centuries. *See supra* notes 16-18, 24-27 and accompanying text.

161. *See infra* notes 224-25 and accompanying table and graph (apps. 4 & 4A).

162. *See generally* Glick, *A Demographer Looks Again at American Families*, 8 J. FAM. ISS. 437, 439 (1988); Glick & Lin, *Record Changes in Divorce and Remarriage*, 48 J. J. MARR. & FAM. 737, 739-45 (1986); Norton & Moorman, *Current Trends in Marriage and Divorce Among American Women*, 49 J. MARR. & FAM. 3, 3-5 (1987).

163. L. WEITZMAN, *supra* note 7, at xvii; Glick, *supra* note 162, at 438; Norton & Glick, *supra* note 151, at 5 ("[American] women currently in their thirties will probably establish record high proportions ever divorced, as nearly one-third of ever-married women 35-39 in 1985 already [had] ended a first marriage in divorce."); Raschke, *supra* note 151, at 598; Schoen, Urton, Woodrow & Baj, *Marriage and Divorce in Twentieth*

tion to argue that because the legislature in a particular state was slower to accept no-fault divorce than legislatures in sister states, the adoption of no-fault divorce laws elsewhere did not contribute to the increase in divorce rates inside that state.[164]

Of course, it is impossible to determine precisely how much no-fault divorce laws have contributed to the increased divorce rates. Many social forces have apparently contributed to this "boom" in divorce. However, the best evidence indicates that in at least some states the adoption of no-fault divorce was a significant factor in increasing divorce rates. Moreover, it seems plausible that no-fault divorce laws in conjunction with other social factors have made divorce an easier and more frequently invoked solution to marital problems than reformers intended.

Thus, it appears that the adoption of no-fault grounds for divorce has both overachieved and underachieved. Most of the good intentions of the reformers have not been realized, whereas some profoundly disturbing consequences were inadequately anticipated. One must wonder whether the evils of the fault-divorce system might not have been remedied by less drastic means.

III. Rethinking the Fundamental Premises of Contemporary No-Fault Divorce Laws

The analysis above inevitably brings us to more basic issues about marriage, divorce, legal policy, and the limits of law. The failings of contemporary no-fault divorce laws illustrate three dimensions of the divorce conundrum: (1) the tension between using divorce laws to promote marriage stability and repair marital ruptures and using them to reduce the distress of marital failure by facilitating divorce, (2) the conflict between fairness upon divorce and fairness in marriage, and (3) the dilemma of private choices that cause public consequences. Modern no-fault divorce laws fail to balance marriage stability goals with divorce facilitation policy, portray a defective model of marriage, and in-

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Century American Cohorts, 22 Demography 101, 108 (1985); *see also* Schoen, *California Divorce Rate by Age at First Marriage and Duration of First Marriage*, 37 J. Marr. & Fam. 548 (1975).

164. Indeed, instead of suggesting the *lack* of influence of state legislation on human behavior outside the state, this data suggests that some state legislation may have significant *extraterritorial* effects on human behavior. (This kind of common sense insight should come as no surprise to anyone—except, perhaps, an expert.)

adequately provide for the public consequences of private choices.

A. The Duality of Divorce Law and The Need for Balance in Divorce Policy

The first dilemma of the divorce conundrum arises from the need to balance two different policy goals: to alleviate the dislocation and suffering caused by marital failure by making the divorce process easier, and to promote marital stability and prevent or repair marital disruption.[165] Divorce laws affect not only people who get divorced; they also affect marriages. Divorce laws affect the nature, expectations and success of marriages as surely as laws governing breach of contract affect the nature, success and performance of contracts.[166] In establishing a divorce law, wise lawmakers must be concerned not only with the effect of the law upon divorcing parties and their children, but also with the impact on ongoing marriages and families in general.

Historically, divorce law evolved as an instrument of social policy to promote marriage stability and prevent marital disruption and showed little concern for the distress caused by marital breakdown or the divorce process itself. Thus, divorce was severely restricted in European, English, and American law, and in the rare exceptional case, the divorce process was very difficult.[167] History also reveals that many abuses occurred when divorce law was principally the tool of the marriage-stability policy.[168]

The no-fault reform movement derived in part from wide-

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165. "[A] good divorce law should seek . . . (i) [t]o buttress, rather than undermine, the stability of marriage, and (ii) [w]hen, regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness, and minimum bitterness, distress, and humiliation." THE LAW COMMISSION, *supra* note 21, para. 15, at 10.

166. Nearly 60 years ago Professor Llewellyn explained that the ideology of marriage shapes divorce law, and that divorce law impacts upon the idea of marriage. Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281, 1281, 1286 (1932); Llewellyn, *supra* note 63, at 272-88. I was introduced to this duality in law during my first weeks of law school, nearly 20 years ago, when my Contracts teacher, Professor Ian MacNeil, convincingly demonstrated that lawyers must plan for nonperformance as well as for performance when drafting contracts. Since then I have learned that lawmakers must do the same; they must promote the success of desirable institutions, relations, and activities, while planning to deal with the failures that inevitably will occur.

167. *See* N. BLAKE, *supra* note 7, at 10-47; M. RHEINSTEIN, *supra* note 7, at 11-27.

168. *See generally* N. BLAKE, *supra* note 7, at 80-172; M. RHEINSTEIN, *supra* note 7, at 51-105; Wadlington, *supra* note 9, at 32-38.

spread dissatisfaction with the harsh consequences that resulted from that imbalance in the law (i.e., from the neglect of the policy to alleviate distress for parties to broken marriages). Recent decades also appear to have brought a general movement away from the strict use of law (at least family law) to promote traditional Judeo-Christian morals,[169] as well as doubts about the effectiveness of strict divorce laws to prevent marital disruption.[170] Thus, the policy of alleviation of the distress of marital failure is considered an extremely important goal in contemporary divorce law and is no longer subordinate to the marriage stability policy.

The no-fault divorce reform movement represented an effort to balance these two policies. But many of the first-generation no-fault divorce laws fail to strike a balance that reflects the social importance of both policies. No-fault divorce laws substantially further divorce-facilitation policy and significantly impair the marriage-stability policy. Moreover, no-fault divorce laws foster a casual commitment to marriage, entice unwary and inexperienced married persons to give up on marriage by fostering the illusion of easy divorce, and fail to distinguish between cries for help to preserve marriages and demands to terminate marriages.[171]

The model of marriage and divorce conveyed by contemporary no-fault divorce laws is neither harmless nor balanced. The imbalance in existing no-fault divorce laws creates a significant policy dilemma. It would be naive not to expect those laws to produce consequences as tragic as those produced when divorce laws were equally unbalanced in the marriage-stability policy direction. The no-fault reforms have merely changed the abuses, not eliminated them.

B. Beyond Equality: The Difference Between Fairness In Divorce and Fairness in Marriage

The duality of divorce policy also requires consideration of two different notions of fairness: fairness for the divorcing parties and their children, and fairness for spouses in ongoing marriages and their children (especially for families where the mar-

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169. *See generally* Schneider, *supra* note 136, at 1807-19.

170. "For strengthening of marriage stability, then, effective tools are available. Laws tending to make divorce difficult should not be considered one of them." M. RHEINSTEIN, *supra* note 7, at 443; *see also id.* at 406-43.

171. *See infra* notes 180-212 and accompanying text.

riage may be in difficulty). Fairness for the divorcing parties essentially consists of divisible equality—i.e., recognizing the equal worth of the contributions of husbands and wives to the marriage and equally dividing their acquisitions. The law assumes that the parties voluntarily have given and received equal worth while the marriage is working,[172] but when the marriage fails the law utilizes its principal tool, coercion, to enforce an accounting of equality. Moreover, when marriage fails, the principal asset of the marriage that remains—and just about the only aspect of family life with which a court can competently deal—is the material wealth acquired by the parties during the marriage.[173] In an egalitarian society, there is no better model for apportioning such assets than to begin with the premise that the spouses valued equally their own and each others' contributions and to aim for equality in the division of the assets and liabilities of the unsuccessful enterprise.[174]

While the rule of equality is essential to fairness in divorce, a "higher law" governs marriage—the "higher law" of love. The essence of love is sharing and giving, of wanting wholeheartedly to be one (not one-half). Fairness in marriage is expressed and measured in terms of love. Self-sacrifice, sharing, continuous giving, and continual forgiving are indispensable to any happy marriage. Marriage requires a long view—eternal is the word that lovers like to use—a view that looks beyond the dull daily duties and sometimes-difficult periods of family life.

Marriage is a matter of the heart, more than of the head. It has more to do with attitudes and feelings than with accounting and economics. Marital satisfaction has less to do with particular marital structures or family arrangements than with how they are worked out, less to do with particular destinations than

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172. Marriage is not considered a contract of adhesion; the law assumes reciprocity and "market equality," by assuming the equality of the status, benefits, contributions, and worth of the contracting parties.

173. The court deals with the children of the divorce as a matter of *parens patriae*—acting to protect the interests of vulnerable, incompetent dependents. Children are not "stuff" of a failed marriage to be divided between the former "investors" or "partners." Deference to parental decisions regarding custody, visitation, and child support results from the child-protective presumption that parents generally act (at least try to act) in the best interests of their children, not from any policy of achieving fairness between the former spouses/parents.

174. Of course, equality does not mean that persons situated differently must receive identical results.

with the way of traveling there. It is a condition, not a tangible possession.

The language of equality is inadequate to describe the essence of marriage. Marriage is better described in language that is poetic and spiritual—the language of love. The language of equality deals with visible, material things, whereas the essence of marriage is invisible.[175] The problem with the language of equality is that it encourages thinking about an intimate, living relationship in terms that do not fairly characterize it until it is dead.

An accounting mentality, so essential to fairness-as-equality, can canker marital relationships that are striving for fairness-as-love.[176] Any marriage built on the premise that each spouse need only give fifty percent of the time, need carry only fifty percent of the burdens, and should expect to receive a full fifty percent of all the benefits may be headed for a successful divorce, not for marital satisfaction. The arithmetic of marriage is not so simple. Persons in such intimate relationships are unable to count with such mathematical precision.

Of course, love is often aimed at equality and more. In our society, gender equality has become a critical sensitivity, shaping the hopes and expectations of many who are married. Modern marriage-fortifying literature refers to co-partnering, mutuality, shared responsibilities, equal allocations of power, open communication, and equal decision-making and task-performance.[177] However, these define goals for giving and ideals for sharing, not accounting rules or contractual requirements. More importantly, in successful marriages they are aspirational, not legal; expectations, not demands; models, not mandates.

The critical premise of fairness-as-equality is enforceability. By definition, fairness-as-love (i.e., sharing and giving) cannot be

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175. "It is only with the heart that one can see rightly; What is essential is invisible to the eye." A. DE SAINT EXUPERY, THE LITTLE PRINCE 87 (K. Wood trans. 1971). There are legalistic and emotional, affective aspects to marital relationships, but as the legalistic aspects come to dominate the parties perception of the relationship, the element of sharing disappears. *See* Schoeman, *Rights of Children, Rights of Parents, and the Moral Basis of the Family*, 91 Ethics 6, 16 (1980) (discussing Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1 (1969)).

176. *See* Schneider, *Rights Discourse and Neonatal Euthanasia*, 76 CALIF. L. REV. 151, 161-64 (1988).

177. *See generally* J. BRADSHAW, BRADSHAW ON: THE FAMILY 47 (1988); A. NAPIER, THE FRAGILE BOND 69-92, 119-23 (1988); S. WHITBOURNE & J. EBMAYER, IDENTITY AND INTIMACY IN MARRIAGE 55-63, 102 (1990).

enforced. Love must be offered voluntarily. It can never be coerced or taken away.

The riddle, then, is how can the law foster fairness-as-love? The truth is, as Samuel Johnson suggested, that there is little the law can do to cause marital success or cure marital dissatisfaction.[178] The law cannot create happy marriages, only married persons can do that.[179] However, the law can teach, warn, exhort, and model. And the law can strive *not to impair* existing marriage relationships. However, the current generation of no-fault divorce laws fails to achieve even these modest goals.

Divorce laws help to define marriage relationships and establish social expectations regarding marriage. Yet the model of marriage conveyed by most current no-fault divorce laws is seriously misleading in three respects: modern no-fault divorce laws cultivate a casual commitment toward marriage, foster the illusion that divorce is easy, and fail to distinguish divorce petitions filed as a cry for help to preserve an ailing marriage from those that are a demand for burial of a dead marriage. By presenting a distorted model of marriage and a misleading image of the ease of divorce, modern no-fault divorce laws convey false messages about marriage and divorce that undermine the success and stability of marriages and exacerbate the pain of divorce.

1. No-fault divorce laws cultivate a casual commitment to marriage

One of the most critical changes wrought by the adoption of no-fault divorce laws is the change in the message of the law about commitment to marriage. Professor Weitzman asserts that "[t]he new divorce laws no longer assume that marriage is a lifelong partnership. Rather, it is now seen as a union that remains

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178. *See supra* note 1 and accompanying text.

179. Thus, the thrust of a legal policy fostering family stability must be protective rather than proactive. Appropriately, the principal legal doctrine fostering family stability (i.e., fairness-as-loving) is the doctrine of family autonomy, which protects the family from the potentially destructive intrusion of the state, except in the cases of family failure, family breakdown, or violation of exceptionally powerful public policy (e.g., to protect the health of children, prohibit extreme violations of basic moral values, etc.). But divorce is the prime example of family breakdown, one of the exceptions to the principle of family autonomy. Should the law attempt to intervene, then, when marital breakdown is alleged, to strengthen the marriage? No-fault divorce laws point in exactly the opposite direction, i.e., away from state involvement. But this article demonstrates that no-fault divorce laws have proven inadequate in many other respects. Perhaps they have failed in abandoning too quickly (at least neglecting) troubled marriages.

tenable only so long as it proves satisfying to both partners."[180] Professor Glendon's comparative study of divorce laws in twenty western industrial nations found that in no other country did the laws convey a message of less commitment to or responsibility for marriage than did the no-fault divorce laws of the United States.[181]

This new legal message is both unrealistic and dangerous. It is unrealistic because people who marry generally intend their marriage to be lifelong.

> As Chesterton pointed out, those who are in love have a natural inclination to bind themselves by promises. Love songs all the world over are full of vows of eternal constancy. The . . . law is not forcing upon the passion of love something which is foreign to that passion's own nature: it is demanding that lovers should take seriously something which their passion of itself impels them to do.[182]

As Karl Llewellyn observed: "Marriage is still, for most, for love. . . . Love does not deeply think in terms of flitting. The ideal of permanence will make itself felt . . . ."[183] Essentially rejecting the message of unilateral no-fault divorce, one national news magazine article recently proclaimed: "The age of disposable marriage is over."[184] By adopting and retaining a model of mar-

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180. L. WEITZMAN, *supra* note 7, at 368; *see also id.* at xii-xvii, 369-70; Brinig & Carbone, *supra* note 148, at 866-67; Redman, *supra* note 6, at 7 (no-fault causes people to "look at marriage the way an eighth grader looks at going steady").

181. M. GLENDON, *supra* note 6, at 78-81, 104-06. Professor Glendon notes that in Europe no-fault divorce grounds supplemented rather than supplanted existing fault grounds and that significant financial obligations to dependent children and spouses accompany divorce; *see also* Sepler, *supra* note 151, at 88.

182. C. S. LEWIS, MERE CHRISTIANITY 97-98 (1952); *see also* Scott, *supra* note 6, at 12, 40-44. As the English Law Commission noted: "The Western world has recognized that it is in the best interests of all concerned—the community, the parties to a marriage and their children—that marriage should be monogamous and that it should last for life." THE LAW COMMISSION, *supra* note 21, para. 13, at 10 (quoting the Morton Commission, Command Paper 9678, para. 35).

183. Llewellyn, *supra* note 63, at 277. Professor Llewellyn emphasized four social values of promoting permanence in marriage.

> First, and most important, to thrust couples after wedding toward building wedlock. Second, to afford protection to earned and vested rights between husband and wife . . . . Third, to reinforce the values of monopoly allotment, and to provide married men and women with a *sense* of security in their partners. Fourth, to increase the chances of procreation within a[n environment] stable enough to place and raise progeny.

Id. at 279-80 (emphasis in original).

184. *Staying Married*, NEWSWEEK, Aug. 24, 1987, at 52; *see also id.* ("Instead of divorce when times get tough, couples are working hard at keeping their unions intact.").

riage that is transitory and unilaterally terminable at will, the no-fault divorce laws widened the gap between real life and the law. The new legal message about marriage also is misleading. The truth is that marriage takes effort, time, and a commitment to work out problems. As a former president of Brigham Young University told students:

> No one would wish a bad marriage on anyone. But where do we think "good marriages" come from? They don't spring full-blown from the head of Zeus any more than does a good education . . . or a good symphony. Why should a marriage require fewer tears and less toil and shabbier commitment than your job or your clothes or your car?
>
> Yet some of you will spend less time on the quality and substance and purpose of your marriage—the highest, holiest, culminating covenant you make in this world—than you will in maintaining your '72 Datsun. And you will break the hearts of many innocent people, including perhaps you own, if that marriage is then dissolved.[185]

The truth is that unceasing commitment and work are required to make marriage succeed. "A good relationship is . . . not some maudlin feeling—*it's a decision.*"[186] "A healthy functional couple commit [sic] to each other through the power of will."[187] The true picture of marriage, which the law should portray, is that it is necessary to "nurture the relationship" in bad times as well as good and to "hang[] tough" when hard times come.[188] Yet

> [a] good many people, and not all of them young, are insufficiently prepared for the shoals of married life. They are surprised by tensions and crises, and they do not know how to meet them. Some people do not realize that tensions and crises are necessary parts of married life, that they are inevitable in even the most harmonious marriage. They do not know that it is the essence of a good marriage that crises arise and that they are overcome through common effort of both parties to understand, to be patient, to endure, to stick together, and thus to grow to ever fuller understanding, to become one not only in flesh but in mind and spirit. Every man and every woman that

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185. Address by President Jeffrey R. Holland at Brigham Young University, *However Long and Hard the Road* (Jan. 18, 1983).

186. J. BRADSHAW, *supra* note 177, at 47 (emphasis in original).

187. *Id.*

188. A. NAPIER, *supra* note 177, at 123.

> has ever been married has some day to discover that the partner is not exactly what he was believed to be, that he has faults that had not been expected . . . . That discovery should not come as a shock.[189]

It is tragic that many people who divorce later respond that they think divorce might have been a mistake and that if they had it to do over again they would try harder to work out their difficulties.[190] Before the adoption of no-fault divorce reforms, the law, by restricting divorce to cases in which serious marital failure could be alleged, conveyed to couples with less-severe marital discord a message like "muttered thunder in the background: you have to work it out!"[191] Now, by fostering a vision of marriage as a likely-to-fail, short-term venture, no-fault divorce laws are shortchanging a generation that needs to be encouraged and supported in making firmer commitments to make marriages work, not offered the false panacea of easy divorce procedures.[192]

2. *No-fault laws and the illusion of easy divorce*

Not long ago, the editor of *Social Work* pinpointed one of the flaws of no-fault divorce laws when she wrote that "the quick and easy cessation of a legal marriage contract fosters an illusion that the dissolution of a relationship is just as easy and

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189. M. RHEINSTEIN, *supra* note 7, at 433.

190. V. PACKARD, OUR ENDANGERED CHILDREN, GROWING UP IN A CHANGING WORLD 192-193 (1983).

191. Llewellyn, *supra* note 63, at 278.

192. Divorce law "can and should ensure that divorce is not so easy that the parties are under no inducement to make a success of their marriage and, in particular, to overcome temporary difficulties." THE LAW COMMISSION, *supra* note 21, para. 16, at 10. As one of the trustees of Brigham Young University emphasized:

> Some think that every marriage must expect to end in unhappiness and divorce, with the hopes and dreams predestined to end in a broken, sad wreck of things.
>
> Some marriages do bend, and some will break, but we must not, because of this, lose faith in marriage nor become afraid of it.
>
> Broken marriages are not typical.
>
> Remember that trouble attracts attention! . . .
>
> . . . .
>
> I do not know of any better time in all of the history of the world for a young couple who are of age and prepared and who are in love to think of marriage. There is no better time because it is *your* time.
>
> . . . .
>
> Do not lose faith in marriage.

B. Packer, *Marriage*, ENSIGN, May 1981, 13, 15 (emphasis in original).

unencumbered."[193] Regardless of the ease of the legal process, divorce is never easy.[194] No-fault divorce laws lay a trap for the unwary by enticing persons struggling with marriage problems to avail themselves of a simple, final, legal "solution" which seldom solves the problems. In fact, divorce causes, exacerbates, or unleashes a host of serious psychological problems, in addition to the economic stresses already noted.[195]

The psychological sequelae of divorce are numerous, profound, and overwhelmingly negative.[196] "[M]arital disruption almost uniformly gives rise to distress, irrespective of the quality of the marriage."[197] Furthermore, "[o]f all the social variables whose relationships with the distribution of psychopathology in the population have been studied, none has been more consistently and powerfully associated with [mental disorders] than marital status."[198] The authors of one extensive literature review reported that the rates of admission to mental institutions for inpatient treatment; outpatient psychological treatment; suicide; alcoholism, high blood pressure, heart disease, and of many other illnesses and disabilities; automobile accidents; homicide victimization; and death from tuberculosis, cirrhosis, malignant neoplasms of the respiratory system, and diabetes were higher for divorced persons than for married persons.[199] Furthermore,

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193. Hopps, *Is No-Fault Without Fault*, 32 Soc. Work 3, 4 (1987).

194. C. S. Lewis explained that divorce is more like having both legs amputated than merely dissolving a business association; divorce is a desperate remedy, not a simple change. C. S. Lewis, *supra* note 182, at 96; *see also* Putting Asunder, *supra* note 7, para. 29, at 21 ("Divorce is a drastic piece of surgery, the unnatural severing of what should be one and indivisible. As such it is bound to cause pain and loss and leave lasting scars.").

195. *See generally* R. Bell, Marriage and Family Interaction 522-26 (6th ed. 1983); L. Weitzman, *supra* note 7, at 343-50; Raschke, *supra* note 151, at 609; *see also supra* notes 90-96 and accompanying text.

196. Fortunately, human beings are resilient and heal with time. Generally the negative psychological sequelae reduce with the passage of time. *See generally* Raschke, *supra* note 151, at 610, 620.

197. Weiss, *The Emotional Impact of Marital Separation*, in Divorce and Separation, Context, Causes and Consequences 201-10 (G. Levinger & O. Moles eds. 1979).

198. Bloom, Asher & White, *Marital Disruption As A Stressor: A Review and Analysis*, 85 Psychological Bull. 867, 869 (1978); *see also* Raschke, *supra* note 151, at 610, 620.

199. *See* J. Lynch, The Broken Heart: The Medical Consequences of Loneliness 49, 69, 209, 244 table B-5 (1977); L. Weitzman, supra note 7, at 343-50; Beuhler & Langenbrunner, *Divorce-Related Stressors: Occurrence, Disruption and Areas of Life Change*, 11 J. Divorce 25 (1987); Bloom, Asher & White, *supra* note 198, at 867-76; *see also* Bloom, White & Asher, *Marital Disruption As A Stressful Life Event*, in Divorce and Separation, Context, Causes and Consequences 184-200 (G. Levinger & O. Moles eds. 1979); Stack, *The Effect of Marital Dissolution on Suicide*, 42 J. Marr. & Fam. 83

antisocial behavior is heavily associated with marital disruption. Arrest and imprisonment rates are significantly higher for divorced persons than for married persons (e.g., the rate of imprisonment of divorced men is fifteen times higher than it is for married men; it is five times higher for divorced women than for married women).[200]

Children whose parents divorce likewise experience enormous psychological and emotional distress. "There is extensive literature testifying to the generally negative consequences of marital disruption for the children of the disrupted family . . . ."[201] Children are hurt by the emotional separation from the noncustodial parent as well as by the physical "abandonment" by that parent. Frequently, divorce is followed by a residential move away from familiar schools, neighborhoods, and friends. Custodial parents (usually mothers) often are forced to increase the hours they spend out of the home in order to financially support the family, leaving diminished time to attend to the emotional needs of children.[202] In addition, divorcing parents, who are suffering themselves, often manifest dysfunctional parenting skills for a time during and following the divorcing period.[203] Education suffers[204] and the incidence of antisocial behavior (including juvenile delinquency) increases for children of divorce.[205]

It takes some time to work through these problems. Since the real process of adjustment to divorce rarely is over in a mat-

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(1985); Wasserman, *A Longitudinal Analysis of the Linkage Between Suicide, Unemployment, and Marital Dissolution*, 46 J. MARR. & FAM. 853 (1984).

200. Bloom, Asher & White, *supra* note 198, at 879; J. LYNCH, *supra* note 199, at 244 table B-5.

201. Bloom, Asher, & White, *supra* note 198, at 877; Keith & Finlay, *The Impact of Parental Divorce on Children's Educational Attainment, Marital Timing, and Likelihood of Divorce*, 50 J. MARR. & FAM. 797 (1988); *see generally Children and Divorce: Developmental and Clinical Issues*, 12 J. DIVORCE 1 (1988); *see also* J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE 35-95, 282 (1980); Bloom, Asher & White, *supra*, at 877-88; Scott, *supra* note 6, at 29-37.

202. J. WALLERSTEIN & J. KELLY, *supra* note 201, at 42; *see generally* sources cited *supra* note 201.

203. J. WALLERSTEIN & J. KELLY, *supra* note 201, at 36; *see generally* sources cited *supra* note 201.

204. J. WALLERSTEIN & J. KELLY, *supra* note 201, at 267-70, 276-77; *see generally* sources cited *supra* note 201.

205. J. WALLERSTEIN & J. KELLY, *supra* note 201, at 233, 252; Desimone-Luis, O'Hahoney & Hunt, *Children of Separation and Divorce: Factors Influencing Adjustment*, 3 J. DIVORCE 37 (1979); Keith & Finlay, *supra* note 201, at 800-02; Scott, *supra* note 6, at 31.

ter of weeks or months, it is strangely unrealistic to structure the legal process to quickly enter a final judgment. While finality in the legal process is important in the psychological adjustment to divorce, that does not mean that hasty finality is helpful or that a more prudently-paced legal process is not more likely to facilitate adjustment. A significant time of separation not only may be the best evidence of genuine irretrievable marital breakdown, but it may provide the best protection for both the marriage-healing and the divorce-adjustment processes.

3. Confusing a cry for help with a demand for divorce

No-fault divorce laws assume that the filing of a petition for divorce is unmistakable evidence that a marriage has been irretrievably broken. Thus, American no-fault divorce laws do not require (some do not even allow) any meaningful inquiry into whether the marriage truly is irretrievably broken. The absence of any implementing standards betrays the emptiness of "irretrievable breakdown" and "irreconcilable differences" as meaningful legal tools.

However, the premise that a petition for a divorce means that a marriage is irretrievably broken is false.[206] "Divorce is not identical with marriage breakdown . . . ."[207] The unhappy spouse who talks to a lawyer about getting a divorce may be pleading for help rather than demanding a divorce. The person may be in a difficult marriage crisis, not knowing what else to do or where else to turn, and in our society, lawyers and courts are seen as having the solutions to virtually all problems. Yet the lawyer—busy, pressured, unable to spend much time looking behind the obvious, and generally untrained to recognize (if not to be insensitive to) the unarticulated feelings of the client—assumes that the client must want a divorce and starts the case on the legal track that will lead inexorably to divorce unless someone else (generally no one) suggests another solution.

I know from personal experience that this can happen. It happened with the very first divorce case I handled. After I had taught family law a couple of years, I decided I needed to get some practical experience to broaden my book learning about family law.[208] So one spring I went to Utah Legal Services and

206. Bodenheimer, *supra* note 54, at 120.
207. M. RHEINSTEIN, *supra* note 7, at 259.
208. I had practiced law for several years before joining the law faculty, but I had

volunteered to represent indigent clients in family law cases. My offer was immediately accepted. In fact, they said that if I was willing to go to work immediately, they would be happy if I would appear at a divorce hearing scheduled for later that week. A paralegal and a staff attorney had interviewed the client (a woman living in one of the outlying communities) and had drafted and filed the necessary divorce pleadings. The defendant had filed no answer opposing the divorce petition, and the matter was duly put on the court's calendar for the divorce hearing. They assured me that it was a routine case, that it would be a good place to start, and that it would provide welcome relief to their overworked staff. So I agreed to take the case. I asked the paralegal to contact the client and ask her to meet me at the Legal Services offices, near the courthouse, about an hour before the scheduled hearing.

A few days later I met the client for the first time, an hour before we were to appear before the judge to have the divorce decree signed. Like any young attorney handling a new kind of case for the first time, I had prepared (overprepared) a number of questions to review with the client before we went in for a simple, routine divorce hearing. Although I assumed that the staff attorney or paralegal had asked all of the basic questions in the initial interview, one of the "standard" questions I had on my list to ask this client was whether she had been receiving any counselling from a marriage, psychological, or spiritual counselor since deciding to seek a divorce. I assumed that the same question had been asked, at least once, by the Legal Services staff.

However, when I asked her if she had ever talked to a counselor, she blanched and jerked as if she had been startled, and she stammered that she had not talked things over with anyone. It was obvious that she had not expected her "divorce lawyer" to ask her such a question and that she had never been asked that question. I had read enough about the psychological trauma of divorce that I wanted to make sure that she was not isolated in coping with those stresses and that the decision to end her marriage of nine or ten years had not been made without sensitively considering alternatives to divorce. I briefly encouraged her to see a counselor, marriage or religious, at least for the sake of getting support in coping with the strains of divorce, if not to consider alternatives. She said that she knew a counselor she

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never handled a divorce case.

could see, and that she did not need me to give her a referral. Then I proceeded with the interview.

It so happened that we did not get into court that day; the judge's calendar got backed up and the court clerk called Legal Services and rescheduled the hearing for a week or two later. So I made another appointment to meet my client and we parted company. A few days later I was told that the hearing had been cancelled again—this time at our client's request. The client had called the Legal Services office and reported that she and her husband were trying to work out their problems without divorce, and she had asked Legal Services to cancel the hearing and stop the divorce proceeding.

That experience made a profound impression on me. I was astounded that the divorce process could have proceeded so far without anyone suggesting that the client talk to a counselor. I was surprised to discover the enormous inertia of the divorce system; once proceedings are set in motion, they tend to continue in motion. And I was amazed to think that the small suggestion to see a counselor might have made a big difference in the lives of two human beings.

All marriages "encounter a number of predictable crises."[209] Conflict is an unavoidable part of marriage. "The capacity for conflict is the mark of intimacy and a mark of a healthy family."[210] One renowned marriage therapist has written: "Couples who come into therapy saying 'We never fight' usually have very serious problems."[211] Some people do not know how to deal with crisis and conflict in intimate relationships. Given time or help, they may learn how to cope.[212] Parties who prematurely initiate divorce proceedings are deprived of this help by no-fault divorce processes that lead unilaterally or automatically to early divorce. No-fault divorce laws deny the courts (and the parties) the opportunity to determine whether the marriage is irretrievably broken. They neglect the value of fostering coping strategies for marriages that are most in need of those strategies.

While it is difficult to discern how all people interpret the

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209. A. NAPIER, *supra* note 177, at 233.

210. J. BRADSHAW, *supra* note 177, at 52.

211. A. NAPIER, *supra* note 177, at 125.

212. *See* Boss, *Family Stress*, in HANDBOOK OF MARRIAGE AND THE FAMILY, *supra* note 151, at 701-16 (coping theories and strategies); Chion-Kenney, *Saying No to Divorce*, Wash. Post, Oct. 5, 1990, at D5, col. 1 (family therapists teaching clients how to make marriages work instead of abandoning good marriages because of solvable problems).

messages of the law or how those messages effect human conduct, it seems that the model of divorce presented by current no-fault divorce laws is seriously defective. This defective model may have its most profound impact on marriages in crisis. The misleading messages communicated by contemporary no-fault divorce law violate the principle that divorce law should not impair the stability of marriages. Also, they clearly evidence the imbalance of current divorce law in favor of easy divorce, at the expense of marital stability. The current generation of no-fault divorce laws tries to reduce the distress of divorce by making divorce easy to obtain. However, these laws were adopted without adequate consideration of how they would effect marriage relationships; and ongoing marriages, especially marriages in trouble, have suffered the adverse consequences.

C. *No-Fault Divorce and the Public Consequences of Private Choices*

The third dilemma of divorce law results from the tension between the public and private (or privacy) interests in divorce. Presently this is most obvious in the distinction between unilateral no-fault divorce and no-fault divorce upon mutual agreement (or uncontested divorce). Unilateral no-fault divorce views marriage solely as a matter of atomistic, individual privacy, whereas the focus of divorce upon mutual consent is the privacy of both of the spouses. Unilateral no-fault divorce rejects the legitimacy of state restriction on the private choice of any individual to walk out of a marriage, whereas no-fault divorce upon mutual consent asserts that the state's legitimate regulatory interests have not ended unless both spouses have agreed to the termination of the relationship. In the post-yuppie world, the extremely individualistic privacy of unilateral no-fault divorce seems uncomfortably narcissistic. It appears that notions of self and marriage have continued to change in the two decades since California embraced the model of purely individual privacy and adopted the modern world's first unilateral no-fault divorce law. Unilateral no-fault divorce (like its *de facto* predecessor, abandonment) strains the notion of privacy to an extreme, without recognizing the interests of nonconsenting spouses or the public interest in protecting these spouses.[213]

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213. *See* Llewellyn, *supra* note 63, at 278-81; *see also* Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. REV. 1.

A second dimension of the public-private dilemma is suggested by the difference between state interests in protecting children from harm and protecting adults from their own harmful decisions. As appendix 5 shows, more than one million children are involved in divorces every year in the United States (and at least that many have been involved in divorces every year for at least fifteen years). The state's great interest in protecting children, even from their own parents, is well-established. Since it is indisputable that stable families provide the best environment for children to grow, it would seem that the best thing that can be done for children is to help their parents stabilize their marriages. "That parents have a 'right to divorce' without regard to the possible detriment to their children . . . on reflection . . . is puzzling."[214]

> [T]here is substantial evidence of pervasive psychological and economic detriment to children when parents decide to divorce. . . . Further, except in cases of extreme interparental conflict, little evidence supports the reassuring assumption that divorce is better for children if either parent is unhappy with the marriage. What does not seem debatable is that children in general are harmed by divorce and are better off if their parents realize their goal of marital stability than if they fail to do so.[215]

Thus, it has been suggested that stricter rules should apply to divorces involving children.[216] Logically, it could be argued that if the welfare of children were given priority, parents would not be allowed to divorce until the children were of legal age. But the life of the law, as Holmes said, is experience, not logic,[217] and it is not necessary to take this principle to a "logical" but unreasonable extreme. However, many potential benefits would result if divorces involving minor children were excluded from no-fault divorce processes or were subject to more protective no-fault divorce procedures.

Finally, there is a difference between an isolated incident and an epidemic. The law, and society, can accommodate some

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214. Scott, *supra* note 6, at 27; *see also* THE LAW COMMISSION, *supra* note 21, para. 110, at 50. Ironically, the English Law Commission erroneously concluded that it was impossible to determine whether divorce was harmful to children. *Id.* para. 47, at 24.

215. Scott, *supra* note 6, at 37 (footnote omitted); *see also* V. PACKARD, *supra* note 190, at 191 (divorce is the single largest cause of childhood depression).

216. Scott, *supra* note 6, at 87-91; *see also* V. PACKARD, *supra* note 190, at 247-48.

217. O. HOLMES, JR., THE COMMON LAW 1 (1881).

exceptions and instability, but when the exception becomes the rule, that is a different matter. Thus, Justice Richard Neeley of the West Virginia Supreme Court has written:

> In a sense, divorce is like smoking. For years, we had a policy of benign neglect toward smoking despite widespread reports of its harmfulness. It was, after all, the smoker's life. Finally, we realized that the smoker not only jeopardizes his own health, but he jacks up group health insurance rates, increases government medicare and medicaid costs, and uses up scarce hospital beds when he is treated from smoking-related diseases. Our new approach to smoking is to weigh the individual's right to make a private decision against that decision's harm to society. The result is that we discourage smoking without forbidding it.
>
> I do not suggest that we require lawyers to post signs saying: "*Warning*: Divorce is Hazardous to your Health . . . . I do suggest, however, that we have made a major mistake by not paying greater attention to how our new divorce-on-demand system is affecting an entire generation of children brought up in the poverty of single parent homes.[218]

Besides the children, part of an entire generation of adults has had their lives radically altered as a result of the fact that quickie no-fault divorce laws have made it possible for them or their spouses to abandon their marital and parental responsibilities without adequate compensating adjustments.

IV. Conclusion: Toward Further Reforms

The no-fault divorce reform movement effected a significant change in American law and life, but not entirely for the better. Many of the problems that prompted the adoption of no-fault grounds for divorce, such as hostile litigation, deceit in legal processes, the existence of a "gap" between law and practice, and loss of privacy, still remain—disguised and perhaps imbedded more firmly in the legal and social fabric than they were twenty years ago. And at least two problems that were not addressed by no-fault divorce reform—economic hardship for divorced mothers and their custodial children and the rate and incidence of divorce—appear to have been exacerbated by the adoption of no-fault divorce.

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218. Speech by Justice R. Neeley at the 1984 Utah Judicial Conference, *The Economics of Emotion, Trading Children for Money in Divorce Court* 1-2 (1984).

Contemporary no-fault divorce laws are based on several slippery premises. At the heart of the modern divorce conundrum are the powerful tensions (1) between the policy of alleviating the stress of the divorce process when marriage fails and the policy of preventing or repairing marriage failure, (2) between fairness-as-equality (the essence of a just divorce) and fairness-as-love (the essence of marriage), and (3) between the private and public interests in divorce. It appears that contemporary no-fault divorce laws neglect the balance of competing interests by tilting heavily toward facilitating divorce, denying some couples in conflict the model of marriage and the time needed to foster the coping skills necessary for marriage. Quickie no-fault laws foster the illusion of easy divorce and convey a false vision of casual commitment to marriage. No-fault divorce policy appears to treat all petitions for divorce as irrefutable proof of marital breakdown, whereas in some cases a divorce pleading is really a cry for help. By insisting that divorce is a matter of individual choice, contemporary no-fault divorce laws impair bilateral or mutual privacy and neglect the public consequences of private choices, especially the detriment to children. Mandatory, unilateral, and quickie no-fault divorce laws poorly balance the competing private interests and poorly accommodate the compelling public interests in divorce.

Four facets of existing no-fault divorce laws have particularly detrimental consequences for many individuals and for society in general. Unilateral no-fault divorce, quickie no-fault divorce processes, mandatory no-fault divorce grounds, and the absence of separate substantive and procedural protections when divorce disrupts a family in which there are minor children have all produced unnecessary unfairness and hardship. There are compelling reasons to consider four kinds of reform to contemporary no-fault divorce laws; modern divorce laws should (1) protect the privacy of couples (not just of isolated individuals), (2) discourage hasty, premature termination of marriages that are not irretrievably broken, (3) provide injured spouses with some moderate legal mechanism to express their feelings of deprivation and obtain recognition of their comparative marital rectitude, and (4) require parents to postpone (or provide mandatory, protective legal procedures for) major legal family adjustments that may be severely detrimental to the psychological and economic well-being of their children. The specific details of each of these four kinds of law reforms certainly merit

further attention, but the need for such generic reforms should be clear.

Thus, the time has come to consider reforming the first generation of no-fault divorce laws. It would be unrealistic and irresponsible to ignore the fundamental fallacies and specific failures of the current generation of no-fault divorce laws. This does not mean we should "turn the clock back" and reenact 1950s-era divorce laws.[219] But we should be unafraid to ask hard questions about the 1970s-era no-fault divorce laws we have inherited. It is time to adopt a new generation of divorce law reforms.

APPENDIX 1
PROFESSOR FREED'S CATALOGUE OF GROUNDS FOR DIVORCE IN THE UNITED STATES, 1972 - 1989 *a[220]

Year	States With Fault Grounds Only *a	States With Fault And No-Fault Added *a, b	States With Fault And Separation Added *a	States With Modern No-Fault Only *a, b	States With Mutual Consent Requirements *a
1972	21	7	16	7	—
1974	5	18	15	13	—
1977	3	23	10	15	—
1981	2	24	9	16	6
1986	0	24	13	14	9
1989	0	26	11	13	10

*a This includes the District of Columbia as a "state."
*b "Irretrievable breakdown," "irreconcilable differences" and "incompatibility" are the modern "no-fault" grounds for divorce. *See supra* note 40.

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219. Courts are still ill-equipped to judge souls.

220. All of the data was taken from articles written or co-authored by Professor Doris Jonas Freed. *See* Freed, *Grounds for Divorce in the American Jurisdictions*, 6 FAM. L.Q. 179 (1972); Freed, *Grounds for Divorce in the American Jurisdictions*, 8 FAM. L.Q. 297 (1974); Freed & Foster, *Divorce in the Fifty States: An Outline*, 11 FAM. L.Q. 297 (1977); Freed & Foster, *Divorce in the Fifty States: An Overview*, 14 FAM. L.Q. 229

APPENDIX 1A[221]
THE SPREAD OF STATUTORY NO-FAULT DIVORCE REFORMS

Year	Number of States* With No-Fault Divorce Provisions
1969	8
1971	18
1973	33
1975	38
1977	43
1979	45
1981	46
1983	46
1985	48
1987	50

*Includes the District of Columbia as one of the "States".

(1981); Freed & Walker, *Family Law in the Fifty States: An Overview*, 19 FAM. L.Q. 331 (1986); Freed & Walker, *Family Law in the Fifty States: An Overview*, 22 FAM. L.Q. 367 (1989).

221. *See generally* Marvell, *supra* note 154, at 553 (for 41 states, omitting Arkansas) (the legislative histories in the current statutes cited above of the remaining states and the District of Columbia were also reviewed).

APPENDIX 2
DIVORCE INCIDENCE AND RATES IN THE UNITED STATES, 1920 - 1985[222]

Year	Number of Divorces	Divorce Rate Per 1000 Population	Divorce Rate Per 1000 Married Women
1920	171,000	1.6	8.0
1925	175,000	1.5	7.2
1930	196,000	1.6	7.5
1935	218,000	1.7	7.8
1940	264,000	2.0	8.8
1945	485,000	3.5	14.4
(1946)	(610,000)	(4.3)	(17.9)
1950	385,000	2.6	10.3
1955	377,000	2.3	9.3
1960	393,000	2.2	9.2
1965	479,000	2.5	10.6
1970	708,000	3.5	14.9
1975	1,036,000	4.8	20.3
1980	1,189,000	5.2	22.6
1985	1,190,000	5.0	21.7

222. Sources: U.S. Dept. of Commerce, Historical Statistics of the United States, Colonial Times to 1979 (Part 1) at Tables B 1-4, B 216-220 (19); U.S. Dept. of Commerce, Statistical Abstract of the United States 1989, at 61, Table no. 83; *id.* at 85, Table no. 127. (Figures for 1946 are included because the rate and number of rate of divorces granted that year, the first year following World War II, were the historic high, to that time. By 1975, however, that high water mark had been surpassed.)

APPENDIX 3
PERCENTAGE AND RATIO OF POPULATION OF THE UNITED STATES MARRIED AND DIVORCED 1950 - 1987[223]

Year	Percentage of Population Married	Percentage of Population Divorced	Divorced Persons Per 1,000 Married Persons
1950	67.0	1.9	29
1955	68.4	2.0	31
1960	67.3	2.3	35
1965	73.2	2.9	41
1970	71.7	3.2	47
1975	69.6	4.6	69
1980	65.5	6.2	100
1985	63.0	7.6	128
1987	62.9	7.8	130

223. Source: U.S. Dept. of Commerce, Statistical Abstract of the United States 1989, at 42, Table no. 50, *id.* at 43, Table no. 53; U.S. Dept. of Commerce, Statistical Abstract of the United States 1979, at 81, Table no. 117; *id.* at 40, Table no. 47; U.S. Dept. of Commerce, Statistical Abstract of the United States 1960, at 38, Table no. 36.

APPENDIX 4
INCIDENCE AND RATE OF DIVORCE IN THE UNITED STATES, 1965-1987[224]

Year	Rate of Divorce Per 1000 Population	No. of Divorces
1965	2.5	479,000
1966	2.5	499,000
1967	2.7	523,000
1968	2.9	584,000
1969	3.2	639,000
1970	3.5	708,000
1971	3.7	773,000
1972	4.0	845,000
1973	4.3	915,000
1974	4.6	977,000
1975	4.8	1,036,000
1976	5.0	1,083,000
1977	5.0	1,091,000
1978	5.1	1,130,000
1979	5.3	1,181,000
1980	5.2	1,189,000
1981	5.3	1,213,000
1982	5.0	1,170,000
1983	4.9	1,158,000
1984	5.0	1,169,000
1985	5.0	1,190,000
1986	4.8	1,159,000
1987	4.8	1,157,000

224. U.S. Department of Commerce, Statistical Abstract of the United States, 1989, at 61, Table no. 83, and U.S. Department of Commerce, Statistical Abstract of the United States, 1979, at 60, Table no. 80.

APPENDIX 5

Estimated Number, Average, and Rate of Children Involved in Divorces and Annulments[226]

Year	All divorces and annulments	Estimated number of children involved	Average number of children per decree	Rate per 1,000 children
1985	1,190,000	1,091,000	0.92	17.3
1980	1,189,000	1,174,000	0.98	17.3
1975	1,036,000	1,123,000	1.08	16.7
1970	708,000	870,000	1.22	12.5
1965	479,000	630,000	1.32	8.9
1960	393,000	463,000	1.18	7.2
1955	377,000	347,000	0.92	6.3
1950	385,000	299,000	0.78	6.3

225. Source: Norton & Moorman, *supra* note 162, at 5 fig. 1.

226. Sources: U.S. Department of Health and Human Services, II Vital Statistics of the United States 1985 (Marriage and Divorce) at 2-11.