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The institution of marriage is the creation of morality. ... The association of man and woman in wedlock has from time immemorial been of such importance in every society that its regulation has always been a matter of morals. ... [W]hat obligations the spouses should undertake towards each other are not questions which any society has ever left to individuals to settle for themselves. They must be settled according to the ideas of right and wrong which prevail in that society.

—Lord Patrick Devlin[2]

There must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.

—H.L.A. Hart[3]

INTRODUCTION

THE morality of marriage presents terrific controversy. What is the state's role in marriage? Can marriage be morally defined? At every critical legal turn in a marriage, such issues present themselves. They resonate in today's raging debates over same-sex marriage and who shall be afforded the right to marry.[4] They define the legal parameters of rights enjoyed during marriage such as the right to contract, own property, or seek redress for a crime or tort committed by one's spouse.[5] Questions regarding the legal

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2 PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 61 (1965).

3 H.L.A. HART, LAW, LIBERTY AND MORALITY 14–15 (1963) (quoting the 1954 Wolfenden Report to the English Parliament). For further discussion of the Wolfenden report, see *infra* note 132 and accompanying text.

4 For further discussion of same-sex marriage, see *infra* note 173 and accompanying text.

5 For further discussion of rights within marriage, see *infra* notes 144–46 and

enforcement of morality are also asked at the end of marriage. They have shaped the transformation of divorce law from a fault to a no–fault system.[6] And, while often overlooked, such moral issues are just as pivotal when a marriage ends in death.

When a married individual dies without a will or certain property has not or cannot be devised, a surviving spouse's marital conduct becomes relevant in determining how the decedent's estate will be distributed. The states' use of fault in probate runs the full gamut—from denying all inheritance rights unless the surviving spouse is "totally free of fault"[7] to awarding the decedent's estate regardless of fault simply because one "blunders into matrimony."[8] Between these extremes, the states' treatment of fault varies as to what is defined as fault, who defines fault, and how probate benefits are restricted. Notwithstanding the differences between the states, the use of fault by any particular state may be justified as a matter of state privilege. However, the exercise of state prerogative cannot be completely arbitrary. In order for the use of fault in probate to withstand challenge, it must be consistent with a state's application of fault in other contexts.

In at least two other areas, spousal behavior impacts monetary awards which are determined by the state. When an employed spouse has died and the employer can be held accountable, a surviving spouse may claim benefits through workers' compensation laws. Such death benefits, however, may be restricted by considerations of spousal behavior. Property distribution and alimony awards at divorce can also be affected by conduct determinations. Yet a comparison of each state's probate, workers' compensation, and divorce law reveals little consistency in the evaluation of spousal behavior.

To a certain extent, inconsistencies in the use of spousal misconduct in the various legal contexts can be understood by distinguishing between the types of harm which may be inflicted and the rationale behind considering the misconduct. For example, a spouse may engage in a physical act of harm. Not surprisingly, murdering one's spouse typically precludes inheritance rights.[9] Economic misconduct, such as the intentional depletion of marital assets, similarly results in a disproportionate division of assets in order to compensate the "victimized" spouse at divorce.[10] However,

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accompanying text.

6 For further discussion of the development of no-fault divorce and the tradition of fault, see *infra* notes 101–04, 110–20 and accompanying text.

7 *In re* Succession of LaBorde, 540 So. 2d 966, 968 (La. Ct. App. 1988) (emphasis removed); *see also* LA. CIV. CODE ANN. art. 2433 (2005) (forfeiture of marital fourth); LA. CIV. CODE ANN. art. 2437 (2005) (forfeiture of family allowance).

8 Whitehurst v. Whitehurst, 145 A. 204, 207 (Md. 1929).

9 For a discussion of the slayer statutes, see *infra* notes 16–24 and accompanying text.

10 For a discussion of the distinction between economic misconduct and other fault considerations in the divorce context, see *infra* note 102 and accompanying text.

more "emotional harms" such as bigamy, adultery, abandonment, desertion, or nonsupport may also be a basis for forfeiture of inheritance rights. In these instances, the legal justification for recognizing the harm needs to thoughtfully be considered. Forfeiture for emotional harm cannot always be equated with fault. In certain instances, spousal behavior is considered as an equitable matter. One example of equity may be precluding a bigamist spouse from inheriting.[11] Similarly, the use of conduct considerations throughout workers' compensation death benefits law may be more a matter of equity than a matter of fault.[12] Yet even after isolating solely the instances in probate and dissolution in which the use of emotional harm serves a punitive function, it remains difficult to justify.

Within each state, there is little consistency in the application of emotional fault in probate and dissolution.[13] Yet when the states apply fault considerations consistently, the legal enforcement of a code of private morality still raises serious policy questions. Should the state be engaged in regulating private marital behavior? What objective does enforcement of a marital code hope to achieve? Are certain behaviors being enforced because they represent moral truths or for more utilitarian reasons? Is legal enforcement an effective mechanism for promoting morality? And, perhaps most fundamentally, does society share a common morality about marriage?

The first three sections of this article present a detailed and comprehensive analysis of the fifty states and the District of Columbia's use of fault in the probate context. Part I surveys what behavior constitutes fault and each state's variations on such definition. Part II reviews whether defining fault in probate is a legislative or judicial function. After the "what" and "who" aspects of fault are detailed, Part III considers the consequences of fault through a review of the particular probate benefits which may be forfeited. Having provided this background, Parts IV and V compare considerations of spousal misconduct in probate law to its use in workers' compensation and dissolution law. Within each area of law reviewed, the consideration of misconduct as a matter of fault or equity is contemplated. Finally, Part VI raises the fault with using fault in probate. Drawing upon the diminishing use of fault in dissolution, I first minimally argue for the consistent treatment of fault in probate. I then advance more theoretical justifications for the entire elimination of emotional fault in probate. To do so, I rely upon the classic debate of English Lord Patrick Devlin and American philosopher H.L.A. Hart on the legal enforcement of morality. I charge that probate statutes which attempt to regulate marital behavior

11 For a discussion of the preclusion of bigamists in probate, see *infra* notes 26–33 and accompanying text.

12 For a discussion of the use of spousal misconduct in workers' compensation law, see *infra* Part IV.

13 For a comparison of the use of spousal misconduct in probate and dissolution law, see *infra* notes 106–07 and accompanying text.

serve no legitimate state purpose. Without a "common understanding"[14] of marriage, the state cannot attempt to regulate marriage by enforcing a code of moral behavior. This conclusion is drawn in proper deference to the right of marital privacy. Recognizing every individual's right to define his marriage during life and at death, I propose in Part VII the complete elimination of emotional fault in probate.

I. WHAT IS FAULT?

A. Physical Fault: Murder

The definition of fault in probate covers a range of behaviors. Murdering one's spouse is the most egregious behavior which results in estate preclusion. Following the maxim that no man should profit from his wrongs,[15] virtually all the states rely upon some version of a "slayer statute"[16] or

14 Lutwak v. United States, 344 U.S. 604, 611 (1953) (referring to congressional conceptions of marriage in the enactment of the War Brides Act).

15 Riggs v. Palmer, 22 N.E. 188, 190 (N.Y. 1889) (first use of judicial equitable power to deny the right to take property by will or intestacy in the case of a grandson who murdered his grandfather). As later stated by Judge Cardozo in support of the *Riggs* decision:

> There was the principle of the binding force of a will disposing of the estate of a testator in conformity with law.... There was the principle that civil courts may not add to the pains and penalties of crimes.... But over against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man should profit from his own inequity or take advantage of his own wrong.

BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 41 (1921).

16 Forty-eight states and the District of Columbia have such statutes, although there is terrific variation between them. For the state statutes, see ALA. CODE § 43-8-253 (2005); ALASKA STAT. § 13.12.803 (2004); ARIZ. REV. STAT. ANN. § 14-2803 (2005); ARK. CODE ANN. § 28-11-204 (West 2005); CAL. PROB. CODE §§ 250-258 (West 2005); COLO. REV. STAT. ANN. § 15-11-803 (West 2005); CONN. GEN. STAT. ANN. § 45a-447 (West 2005); DEL CODE ANN. tit. 12, § 2322 (2005); D.C. CODE § 19-320 (2005); FLA. STAT. ANN. § 732.802 (West 2005); GA. CODE ANN. § 53-1-5 (West 2005); HAW. REV. STAT. ANN. § 560:2-803 (LexisNexis 2004); IDAHO CODE ANN. § 15-2-803 (2005); 755 ILL. COMP. STAT. ANN. 5/2-6 (West 2005); IND. CODE ANN. § 29-1-2-12.1 (West 2005); IOWA CODE ANN. § 633.535 (West 2005); KAN. STAT. ANN. § 59-513 (2004); KY. REV. STAT. ANN. § 381.280 (West 2004); LA. CIV. CODE ANN. art. 946 (2005); ME. REV. STAT. ANN. tit. 18-A, § 2-803 (2005); MD. CODE ANN., EST. & TRUSTS § 1-209 (West 2005); MICH. COMP. LAWS ANN. § 700.2803 (West 2005); MINN. STAT. ANN. § 524.2-803 (West 2005); MISS. CODE ANN. § 91-1-25 (West 2005); MO. ANN. STAT. § 461.054 (West 2005); MONT. CODE ANN. § 72-2-813 (2003); NEB. REV. STAT. § 30-2354 (2004); NEV. REV. STAT. ANN. § 41B (West 2005); N.J. STAT. ANN. §§ 3B:7-5 to 7-7 (West 2005); N.M. STAT. ANN. § 45-2-803 (West 2005); N.Y. EST. POWERS & TRUSTS LAW § 4-1.6 (McKinney 2005); N.C. GEN. STAT. ANN. §§ 31A-3 to -12 (West 2005); N.D. CENT. CODE § 30.1-10-03 (2003); OHIO REV. CODE ANN. § 2105.19 (West 2005); OKLA. STAT. ANN. tit. 84, § 231 (West 2005); OR. REV. STAT. ANN. §§ 112.455 to .555 (West 2003); 20 PA. CONS. STAT. ANN. §§ 8801-8815 (West 2005); R.I. GEN. LAWS §§ 33-1.1-1 to 33-1.1-16 (2004); S.C. CODE

judicial equity[17] to withhold inheritance rights from an individual who kills an ancestor or benefactor. Yet despite the extreme reprehensibility of murder, there is great variation in the states' treatment of killers. The inheritance preclusion may extend only to particular relations such as a spouse, or it may apply to any person regardless of whether he is a relative or simply a benefactor.[18] The statutes and common law may be written to eliminate any combination of intestate privileges; gifts pursuant to a will; and nonprobate transfers, such as life insurance and property held in joint tenancy or tenancy by the entirety.[19] They may apply only to acts of voluntary manslaughter or to both voluntary and involuntary manslaughter.[20] The necessity of a conviction is yet another distinction.[21] When the slayer is disinherited because of his action, there may also be variation as to whether a descendant of the killer may claim "through or under" the slayer.[22] Attempting to rely strictly upon state statutes or case precedent to address the myriad complicating details can result in severe injustice.[23]

ANN. § 62-2-803 (2004); S.D. CODIFIED LAWS § 29A-2-803 (2005); TENN. CODE ANN. § 31-1-106 (West 2005); TEX. PROB. CODE ANN. § 41(d) (Vernon 2005); UTAH CODE ANN. § 75-2-803 (West 2005); VT. STAT. ANN. tit. 14, § 551(6) (2005); VA. CODE ANN. §§ 55-401 to 415 (West 2005); WASH. REV. CODE ANN. § 11.84.010 to 11.84.900 (West 2005); W. VA. CODE ANN. § 42-4-2 (West 2005); WIS. STAT. ANN. §§ 852.01(2m), 854.14 (West 2005); WYO. STAT. ANN. § 2-14-101 (2005).

17 Two states rely solely on judicial equity to prevent killers from benefitting from their victims' estates. These states are Massachusetts, *see* Slocum v. Metro. Life Ins. Co., 139 N.E. 816, 816 (Mass. 1923), and New Hampshire, *see* Kelley v. State, 196 A.2d 68, 69-70 (N.H. 1963).

States also rely upon judicial equity to compensate for shortcomings in their slayer statutes. For a comprehensive discussion of each state's case law, see Michael G. Walsh, Annotation, *Homicide as Precluding Taking Under Will or by Intestacy*, 25 A.L.R. 4th 787 (2004).

18 *Compare* ARK. CODE ANN. § 28-11-204 (West 2005) (forfeiture for murder of spouse), *with* ALASKA STAT. § 13.12.803 (2004) (forfeiture for murder of any individual).

19 *Compare* ALASKA STAT. § 13.12.803 (2004) (revoking probate and nonprobate rights of any individual), *with* N.Y. EST. POWERS & TRUSTS LAW § 4-1.6 (McKinney 2005) (disqualifying joint tenant convicted of murder in the first or second degree of another joint tenant from distribution of any monies held together in a joint bank account).

20 Alternatively, some states have drawn the distinction between murder and manslaughter. For discussion of the voluntary versus involuntary manslaughter and the murder versus manslaughter distinction, see *In re* Estate of Mahoney, 220 A.2d 475 (Vt. 1966) (limiting disinheritance to voluntary manslaughter); *see also* Walsh, *supra* note 17, § 6.

21 For discussion of the conviction requirement, see Walsh, *supra* note 17, §§ 5, 7.

22 For a recent review of this question by the states, see Cook v. Grierson, 845 A.2d 1231 (Md. 2004) (in the absence of an express statutory provision, relying on judicial equity to disinherit the grandchildren of a decedent who was killed by their father who had been convicted of second-degree murder).

23 For further discussion of the numerous variations in slayer statutes and common law, see generally JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 126–31 (7th ed. 2005); Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489 (1986); Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803 (1993); Walsh, *supra* note 17.

For example, in Kansas the statutory conviction requirement resulted in an award of a wife's estate to the estate of her murderer/husband because he committed suicide immediately after killing her and consequently could not be convicted of murder.[24]

B. Emotional Fault

1. Bigamy.—Apart from the physical and brutal act of murder, "emotional harms" to the decedent may also result in the forfeiture of inheritance rights. Bigamy, adultery, abandonment, desertion, and nonsupport are the most common behaviors considered.[25] Amongst such behaviors, bigamy is the most commonly agreed upon act which results in the loss of benefits.[26] However, unlike the other emotional harms, the preclusion for bigamy may be a matter of equity rather than a matter of fault.

In probate proceedings, bigamy tends to arise in two types of cases. In one instance, the decedent and the survivor are not legally married because one of them (or both) without being divorced or widowed from an earlier spouse has nevertheless remarried. If this situation arises, the surviving party is typically denied any inheritance rights because the marriage was void *ab initio*, thereby preventing the survivor from being the legal spouse.[27] A court may, however, disregard the lack of valid marriage and choose to treat

24 *See* United Trust Co. v. Pyke, 427 P.2d 67 (Kan. 1967), *overruled in part by* Harper v. Prudential Ins. Co., 662 P.2d 1264 (Kan. 1983). Since that time, Kansas has amended its slayer statute so that cases of murder-suicide are treated as instances of simultaneous death. *See* KAN. STAT. ANN. § 59-513 (2004). To prevent such inequitable results, other states explicitly encourage their slayer statutes to be broadly construed. *See, e.g.*, VA. CODE ANN. § 55-414 (West 2005); WASH. REV. CODE ANN. § 11.84.900 (West 2004). For further discussion of the challenges posed by subscribing either to a philosophy of legislative deference or judicial equity, see *infra* notes 60–63 and accompanying text.

25 For a discussion of the use of abandonment or desertion in probate, see *infra* notes 35, 49–53 and accompanying text. For a discussion of adultery, see *infra* notes 36, 41–43 and accompanying text. For a discussion of nonsupport, see *infra* notes 37, 47–48 and accompanying text.

26 At least 40 states address bigamy, either by adopting a version of the Uniform Probate Code section which disinherits bigamists, relying upon other statutory language, or by following case law. Such states are Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Tennessee, Utah, Vermont, Virginia, and Wisconsin. For each state's particular statutory provision or case precedent, see *infra* notes 29–32 and accompanying text.

27 While pursuant to a state's family or domestic relations law the decedent and the surviving party's marriage in this case is void *ab initio*, some states have chosen to explicitly confirm the denial of inheritance benefits within their probate statutes. *See, e.g.*, N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a)(2) (McKinney 2005) (disqualifying an individual as a surviving spouse when the "marriage was void as ... bigamous.").

the survivor as a spouse as a matter of equity if, for example, the surviving spouse had no knowledge of the decedent's bigamy.[28]

In the other case, the decedent and the survivor initially had a valid marriage, but the surviving party has remarried prior to the decedent's death without a valid divorce. In this instance, because the decedent and the surviving party's marriage remains legally valid, the surviving party is arguably entitled to benefits as she remains the decedent's legal spouse. However, the vast majority of states prevent the surviving party from enjoying spousal inheritance rights. At least eighteen states have adopted versions of the Uniform Probate Code (UPC), which precludes individuals who remarry after an invalid divorce is obtained by the decedent from inheriting.[29] An additional fourteen states disinherit bigamists either by reliance on statutes that are explicitly directed at bigamists or have been interpreted to encompass bigamy.[30] In another eight states, the courts deny inheritance

28 *Compare* Titus v. Titus, 101 P.2d 872 (Kan. 1940) (first wife denied inheritance due to failure to obtain a divorce; decedent's second wife who married in good faith takes as a matter of equity), *with* Childress v. Smith, 200 N.E. 179 (Ill. 1936) (bigamy of decedent prevents treatment of second spouse who later remarries as a surviving spouse).

29 Nine states have adopted the current version of the Uniform Probate Code (UPC), which reads in relevant part: "a surviving spouse does not include ... an individual who, following an invalid decree or judgment of divorce or annulment obtained by the decedent, participates in a marriage ceremony with a third individual." UNIF. PROBATE CODE § 2-802(b)(2) (revised 1993); *see* ALASKA STAT. § 13.12.802 (2004); ARIZ. REV. STAT. ANN. § 14-2802 (2004); COLO. REV. STAT. §15-11-802 (2005); HAW. REV. STAT. ANN. § 560:2-802 (2004); MD. CODE ANN., EST. & TRUSTS § 1-202(c) (West 2004); MONT. CODE ANN. § 72-2-812 (2004); N.M. STAT. ANN. §45-2-802 (West 2005); N.D. CENT. CODE § 30.1-10-02 (2005); UTAH CODE ANN. § 75-2-802 (West 2005); WIS. STAT. § 851.30 (West 2005).

Six states have adopted an earlier version of the Uniform Probate Code which omits the phrase "an invalid" in the code section, but clarifies in the subsequent comment that the divorce or annulment secured by the decedent was invalid. UNIF. PROBATE CODE § 2-802 (amended 1975). *See* ALA. CODE § 43-8-252 (2005); CAL. PROB. CODE § 78(c) (West 2005); IDAHO CODE ANN. § 15-2-802(b) (2005); ME. REV. STAT. ANN. tit. 18-A, § 2-802 (2005); NEB. REV. STAT. ANN. § 30-2353 (LexisNexis 2005); S.C. CODE ANN. § 62-2-802 (2004).

Two states have adopted a more modified version of the Uniform Probate Code language. *See* MICH. COMP. LAWS ANN. § 700.2801(2) (West 2005) (including amongst the preclusion provisions that the remarriage may follow an "invalid decree or judgment of divorce" or that the survivor "at the time of the decedent's death, is living in a bigamous relationship with another individual"); TENN. CODE ANN. § 31-1-102(b)(2) (West 2005) (noting that the survivor's remarriage can follow either a "valid or invalid" divorce decree).

30 Two states use language explicitly referring to individuals who knowingly commit bigamy. *See* MD. CODE ANN., EST. & TRUSTS § 1-202(d) (West 2004) (bigamy with conviction); N.C. GEN. STAT. ANN. § 31A-1(a)(5) (West 2004) (surviving spouse "knowingly contracts a bigamous marriage"). Maryland also disqualifies individuals who remarry after an invalid divorce is obtained by the decedent. *See supra* note 29.

Inheritance statutes prohibiting abandonment and adultery have also been relied upon to preclude survivors who have committed bigamy. *See, e.g.*, Warner v. Warner, 658 S.W.2d 81, 83 (Mo. Ct. App. 1983) (relying upon MO. REV. STAT. § 474.140, which addresses abandonment and adultery as the basis for disinheriting a bigamist).

For states which may rely upon abandonment, adultery or general fault statutes to dis-

rights to bigamists by relying upon their equitable powers.[31] Perhaps not surprisingly, the states which do not exclude bigamists when they have maintained a legal marriage to the decedent are "no-fault" probate states that do not provide any statutory basis for fault disinheritance.[32]

Preclusion for bigamy may seem to be a means of condemning fault. However, disinheritance for bigamy may simply be an equitable decision. The UPC preclusion well illustrates this distinction between fault and equity. Pursuant to the UPC, a survivor who has remarried is denied inheritance rights even if his remarriage was in good faith reliance upon an invalid divorce obtained by the decedent.[33] Knowledge of wrongdoing is irrelevant. What is relevant is that the surviving "spouse" has considered

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inherit bigamists, *see* CONN. GEN. STAT. ANN. §§ 45a-436, 45a-320 (West 2004) (abandonment terminating elective share and family allowance); IND. CODE ANN. §29-1-2-14; 29-1-2-15 (West 2004) (adultery and abandonment); KY. REV. STAT. ANN. § 392.090 (West 2004) (adultery); LA. CIV. CODE ANN. art. 2433, 2437 (2004) (denying survivor's marital fourth and family allowance if separation of the parties occurred without decedent's fault); MO. ANN. STAT. § 474.140 (West 2005) (abandonment and adultery); N.H. REV. STAT. ANN. § 560:19 (2004) (survivor guilty of conduct which is cause for divorce); N.J. STAT. ANN. §3B:8-1 (West 2004) (loss of elective share if "living separate and apart" or having "ceased to cohabit as man and wife"); N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a)(2) (McKinney 2005) (abandonment); OHIO REV. CODE ANN. § 2103.05 (West 2005) (adultery as a bar to dower); OR. REV. STAT. ANN. § 114.135 (West 2003) (survivor "living apart" from decedent with court discretion to determine circumstances of separation); 20 PA. CONS. STAT. ANN. § 2106 (West 2005) (willful neglect, nonsupport or willful and malicious desertion); VT. STAT. ANN. tit. 14, § 1492 (2004) (loss of wrongful death benefits for abandonment by either spouse or nonsupport by husband); VA. CODE ANN. § 64.1-16.3 (West 2005) (desertion or abandonment).

31 *See In re* Estate of Golden, 1997 Del. Ch. LEXIS 155 (1997) (no inheritance rights when surviving spouse fraudulently represented self as divorced from decedent and remarried); *In re* Estate of Montanez, 687 So. 2d 943 (Fla. Dist. Ct. App. 1997) (no inheritance rights when surviving spouse fraudulently represented self as divorced from decedent and remarried); Hamrick v. Bonner, 354 S.E.2d 687 (Ga. Ct. App. 1987) (annulment of second marriage not valid as motivated by desire to inherit from first marriage); Stevens v. Stevens, 136 N.E. 785 (Ill. 1922) (surviving spouse denied inheritance as marriage not recognized when divorce from earlier spouse obtained within two years before remarriage); Childress v. Smith, 200 N.E. 179 (Ill. 1936) (bigamy of decedent and remarriage of second spouse prevents her treatment as surviving spouse); Titus v. Titus, 101 P.2d 872 (Kan. 1940) (first wife who remarries without obtaining divorce denied inheritance; decedent's second wife married in good faith takes as a matter of equity); Parmelee v. Hutchins, 131 N.E. 443 (Mass. 1921) (wife's reliance on invalid divorce through remarriage estopped her from claiming widow's allowance); Rowell v. Rowell, 170 So. 2d 267 (Miss. 1964) (bigamous marriage of survivor after marriage to decedent estops inheritance from decedent's estate); *In re* Estate of Allen, 738 P.2d 142 (Okla. 1987) (surviving party estopped from asserting a legal marriage to first spouse when divorce not pursued and survivor's cohabitation with another could be construed as marriage).

32 Ten states and the District of Columbia have chosen not to preclude bigamists or other brands of misbehaving survivors by statute or case law. These "no-fault" probate jurisdictions are Arkansas, D.C., Iowa, Minnesota, Nevada, Rhode Island, South Dakota, Texas, Washington, West Virginia, and Wyoming. For further discussion of the division between the states in the use of emotional fault, see *infra* notes 34–40 and accompanying text.

33 For the states subscribing to the UPC, see *supra* note 29.

herself to be and held herself out as the spouse of another. As a matter of equity, rather than a matter of fault, such an individual is prevented from claiming inheritance privileges from the decedent.

2. Abandonment, Adultery, Nonsupport, and Grounds for Divorce. — Disinheritance for other emotional harms may be more aptly characterized as fault-based preclusion. In total, twenty-three states have some consideration of emotional fault other than bigamy at probate.[34] The most commonly recognized are abandonment or desertion,[35] adultery,[36] and nonsupport.[37] Other

34 The states which rely on emotional harms other than bigamy are Connecticut, Florida, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, Vermont, and Virginia. For each specific state's recognition of fault in either its statutes or case law, see *infra* notes 35–40 and accompanying text.

35 At least fifteen states specifically consider abandonment or desertion, either as a matter of law or equity. *See* CONN. GEN. STAT. ANN. § 45a-436(g) (West 2005) (forfeiture of election and intestacy rights); CONN. GEN. STAT. ANN. § 45a-320 (West 2005) (forfeiture of family allowance); HAW. REV. STAT. § 533-9 (2004) (loss of wife's dower right, although dower limited by § 533-1 repeal to accrual prior to 1977); IND. CODE. ANN. § 29-1-2-15 (West 2005) (forfeiture by abandoning spouse); MASS. GEN. LAWS ANN. ch. 191, § 15, ch. 209 § 36 (West 2005) (forfeiture of abandoning spouse's right to waive provisions of the decedent's will); MICH. COMP. LAWS ANN. § 700.2801(2)(e) (West 2005) (the term "surviving spouse" does not include those who were "willfully absent from" or "deserted" the decedent); MO. ANN. STAT. § 474.140 (West 2005) (abandoning spouse barred from all inheritance rights, allowances, and exemptions); N.H. REV. STAT. ANN. § 560:18 (2004) (husbands who have "willingly abandoned...and absented" their wives are not entitled to a portion of her intestate estate); N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a) (McKinney 2005) (abandoning spouse not a surviving spouse); N.C. GEN. STAT. ANN. § 31A-1 (West 2005) (abandoning spouses lose all rights to intestate succession, allowances and elective shares); 20 PA. CONS. STAT. ANN. § 2106(a) (West 2005); VT. STAT. ANN. tit. 14, §1492 (2004) (wrongful death); VA. CODE ANN. § 64.1-16.3 (West 2005) (abandoning spouse barred from "all interest in the estate" of the decedent); Kreisel v. Ingham, 113 So. 2d 205 (Fla. Dist. Ct. App. 1959) (contemplating abandonment as basis for forfeiture); Tillman v. Williams, 403 So. 2d 880 (Miss. 1981) (desertion estops a surviving spouse from inheriting); Swift v. Reasonover, 77 S.W.2d 809 (Tenn. 1935) (forfeiture of homestead); *see also* Miller v. Miller, 158 N.E.2d 674 (Mass. 1959) (precluding elective share). For a general discussion of the courts' legislative deference versus equitable reliance, see *infra* Part II.

36 In at least five states, the survivor's adultery can jeopardize probate rights. *See* IND. CODE ANN. § 29-1-2-14 (West 2005); KY. REV. STAT. ANN. § 392.090 (West 2004); MO. ANN. STAT. § 474.140 (West 2005); N.C. GEN. STAT. ANN. § 31A-1(2) (West 2005); OHIO REV. CODE ANN. § 4123.59 (West 2005).

37 In at least five states, survivors may forfeit probate rights upon establishment of nonsupport of the decedent. *See* MICH. COMP. LAWS ANN. § 700.2801 (West 2005); N.H. REV. STAT. ANN. § 560:18 (2004); N.Y. EST. POWERS & TRUSTS LAW § 5-1.2(a) (McKinney 2005); 20 PA. CONS. STAT. ANN. § 2106(a) (West 2005) (explicitly including both forfeiture for willful neglect and nonsupport); VT. STAT. ANN. tit. 14, § 1492 (2004) (wrongful death). However, because abandonment may be based upon either actual or constructive abandonment, states denying inheritance rights due to abandonment may also recognize nonsupport as a basis for preclusion. For further discussion of the abandonment/nonsupport overlap, see *infra* note 50 and accompanying text.

states rely upon more general fault language within their probate statutes. These states may directly cross reference their family or domestic relations statutes by mandating forfeiture for an offense which is recognized by the state as grounds for divorce or separation.[38] Finally, there are some less common reasons for estate preclusion. However, these are also rooted in traditional concepts of fault. For example, while adultery or desertion would not prevent survivor benefits in Maryland, a conviction for bigamy is sufficiently egregious to create a statutory bar.[39] In a highly publicized Illinois case, a surviving husband's rights to his wife's estate were denied because the court suspected that the husband had encouraged his male lover to kill his wife even though his lover had been acquitted of such crime.[40]

38 In at least three states, a survivor risks forfeiting probate rights if it is determined that the decedent could have established grounds for divorce against the survivor. *See* LA. CIV. CODE ANN. art. 2433 (2004) (forfeiture of marital fourth); *id.* art. 2437 (forfeiture of family allowance); N.H. REV. STAT. ANN. § 560:19 (2004) (forfeiture of all inheritance rights except as provided for by decedent's will); N.J. STAT. ANN. § 3B:8-1 (West 2005) (loss of elective share); *see also In re* Succession of LaBorde, 540 So. 2d 966 (La. App. 1988).

Even without a legal separation, several states allow forfeiture upon showing that the survivor bears some fault in the parties' separation. In Oregon, the courts are given discretion to reduce the surviving spouse's elective share by any amount deemed appropriate when the parties are living apart at the time of the decedent's death and the court takes into consideration other circumstances, including the reason for the parties' separation. *See* OR. REV. STAT. ANN. § 114.135 (West 2003). Similarly, in Louisiana, when the parties are separated, the survivor is only entitled to the marital fourth and a periodic allowance "on proof that the separation occurred without his fault." LA. CIV. CODE ANN. art. 2433 (2004) (forfeiting marital fourth); *see also* LA. CIV. CODE ANN. art. 2437 (2004) (forfeiting elective share).

In New Jersey, the probate statute's cross reference to the divorce statutes is not limited to establishing the survivor's fault. If a cause of action for divorce can be established by the survivor against the decedent, the survivor also tragically loses her elective share. Moreover, since the decedent's death prevents a divorce action from being pursued by the survivor after the decedent dies, divorce benefits are also not available, thus creating a legal "black hole" for the survivor. Carr v. Carr, 576 A.2d 872, 874 (N.J. 1990) (surviving wife not entitled to elective share as decedent had willfully deserted her prior to death; as wife also not entitled after decedent's death to pursue divorce action which had been filed before decedent's death, court remands action for consideration of the imposition of a constructive trust); *see also* N.J. REV. STAT. § 3B:8-1 (West 2005).

39 MD. CODE ANN., EST. & TRUSTS § 1-202(c) (West 2004); Schmeizl v. Schmeizl, 46 A.2d 619, 619 (Md. 1946) (awarding adulterous spouse inheritance rights as statutory preclusion only for bigamy convictions). Georgia has also denied benefits when a survivor remarried and his motives appeared questionable. *See* Hamrick v. Bonner, 354 S.E.2d 687 (Ga. Ct. App. 1987) (denying benefits to a survivor who, after having a subsequent marriage annulled, continued to cohabit with his second wife, thus raising suspicion that the annulment was financially motivated).

40 *See* United Press International, *Olds Barred from Late Wife's Money*, Dec. 15, 1995; Darryl Van Duch, *He Wished for Death of Wife, Court Told*, NAT'L L.J., Jan. 1, 1996, at A5; Darryl Van Duch, *Suspicions Prove Costly*, NAT'L L.J., Jan. 8, 1996, at A6. The court's preclusion may plausibly be a broad interpretation of Illinois' slayer statute. *See* 755 ILL. COMP. STAT. ANN. 5/2-6 (West 2005) ("A person who intentionally and unjustifiably causes the death of another shall not receive any property, benefit, or other interest by reason of the death.").

C. Interpreting Emotional Fault

1. Construction Challenges.—Variations in the types of emotional fault recognized by the states are compounded by numerous interpretive differences. Amongst the states which deny inheritance rights to adulterers, there is some basic agreement. In order to prove adultery, there is general reliance upon a preponderance standard and, given the nature of the misconduct, a willingness to rely entirely upon circumstantial evidence.[41] Each state's statute also includes language which requires the survivor to be "living in adultery."[42] Yet despite such literal and evidentiary similarities, states do not consistently require physical residence with the paramour.[43]

Disinheritance by reliance on divorce or separation grounds also results in interpretive differences.[44] Such statutes may be seen as a simple shorthand measure used to create consistency between divorce and probate fault grounds. However, because a state's grounds for divorce can include both traditional fault grounds and more contemporary no-fault standards, questions arise as to whether a spouse forfeits his inheritance share when the no-fault dissolution standard of "irreconcilable differences" is established.[45] Disinheritance may also be statutorily mandated when parties are physically separated but the marriage remains legally intact.[46]

41 *See, e.g.*, Oliver v. Estate of Oliver, 554 N.E.2d 8, 11 (Ind. Ct. App. 1990); *In re* Estate of Trogdon, 409 S.E.2d 897, 900 (N.C. 1991).

42 *See* IND. CODE ANN. § 29-1-2-14 (West 2005) ("If either a husband or wife shall have left the other and shall be living at the time of his or her death in adultery..."); KY. REV. STAT. ANN. § 392.090(2) (West 2004) ("If either spouse voluntarily leaves the other and lives in adultery..."); MO. ANN. STAT. § 474.140 (West 2005) ("If any married person voluntarily leaves his or her spouse and goes away and continues with an adulterer... or dwells with another in a state of adultery..."); N.C. GEN. STAT. ANN. § 31A-1(2) (West 2005) ("A spouse who voluntarily separates from the other spouse and lives in adultery..."); OHIO REV. CODE ANN. § 2103.05 (West 2005) ("A husband or wife who leaves the other and dwells in adultery...").

43 *See* Ferguson v. Ferguson, 156 S.W. 413, 414 (Ky. 1913) (adultery alone, without physically leaving the spouse, is sufficient); *In re* Estate of Montgomery, 528 S.E.2d 618, 621 (N.C. 2000) ("living in adultery" means more than a single act of "committing adultery," but less than "residing" in adultery).

44 For the states' use of divorce grounds in probate, see *supra* note 38 and accompanying text.

45 *See, e.g.*, *In re* Hitchcock, 391 A.2d 882, 883 (N.H. 1978) (interpreting New Hampshire's forfeiture statute, which disinherits a surviving spouse when "such survivor was or had been guilty of conduct which constitutes cause for divorce," as only applicable when a fault based ground for divorce can be established despite the "irreconcilable differences" statutory basis for divorce).

46 In New Jersey a surviving spouse only maintains his elective share:

> provided that at the time of death the decedent and the surviving spouse had not been living separate and apart in different habitations or had not ceased to cohabit as man and wife, either as the result of judgment of divorce from bed and board or under circumstances which would have given rise to a cause of action for divorce or nullity of marriage to a dece-

2. Application Differences.—In addition to statutory construction differences, there may be little consensus in applying the fault standards. Disagreement may exist as to what factually constitutes nonsupport or "willful neglect."[47] If a survivor refuses the help of others and provides his spouse with sub-par living conditions, is he guilty of willful neglect even if he is "an irascible, irritable, choleric old man" with mental infirmities?[48]

Likewise, it is difficult to agree as to what behavior constitutes abandonment.[49] States which recognize abandonment as a basis for forfeiture list some common criteria: 1) an act of departure, 2) the intention not to return, and 3) no cause for or consent to the departure.[50] Forfeiture is believed justified in such cases as "[a spouse] can not repudiate, while her husband lives, all the obligations of the marital relations, and take all the benefits which remain after he dies."[51] However, what is necessary to meet the abandonment standard? Compelling facts are often deemed insuffi-

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dent prior to his death under the laws of this State.

N.J. STAT. ANN. § 3B:8–1 (West 2005).

Relying upon this statutory provision, a surviving spouse who was separated from her husband because of his desertion could not receive probate benefits from his estate. Because her husband died before the divorce she had filed was finalized, she was also statutorily ineligible to receive an equitable division of marital property at divorce. *See* Carr v. Carr, 576 A.2d 872, 877(N.J. 1990). Given the devastating statutory consequences, the New Jersey Supreme Court remanded the case, instructing the lower court to rely upon the equitable notion of a constructive trust in order to award property to the widow. *See id.* at 880. For further discussion of *Carr* and the problems raised by more open-ended fault statutes in probate, see *infra* note 167 and accompanying text.

47 For the states precluding spousal inheritance for nonsupport of the decedent, see *supra* note 37. For recognition of the overlap between nonsupport and "constructive" abandonment, see *infra* note 50.

48 *In re* Estate of Fonos, 698 A.2d 74, 78-80 (Pa. Super. Ct. 1997) (finding insufficient evidence to establish willful neglect or refusal to support).

49 For the states which preclude spousal inheritance for abandonment of the decedent, see *supra* note 35.

50 *See, e.g.*, Estate of Calcutt v. Calcutt, 576 N.E.2d 1288, 1294 (Ind. Ct. App. 1991); Fellabaum v. Alvarez, 67 A.2d 788, 790 (Pa. Super. Ct. 1949); *In re* Jellech, 854 S.W.2d 828, 830 (Mo. Ct. App. 1993); *In re* Estate of Lapenna, 226 N.Y.S.2d 497, 499–500 (N.Y. App. Div. 1962); *In re* Estate of Lorenzo, 602 P.2d 521, 528 (Haw. 1979). Abandonment and nonsupport claims may overlap to the extent states recognize both actual and constructive abandonment. *See, e.g.*, Meares v. Jernigan, 530 S.E.2d 883, 885–86 (N.C. Ct. App. 2000) (considering a claim of constructive abandonment consisting of both affirmative acts of cruelty and willful failure to provide support).

51 Heil v. Shriner's Hosp. for Crippled Children, 365 S.W.2d 736, 742 (Mo. Ct. App. 1963) (quoting Wilson v. Craig, 75 S.W. 419, 432 (Mo. 1903)).

cient.[52] Matters are further complicated if the decedent is argued to have acted less than virtuously or condoned the survivor's behavior.[53]

II. Who Decides: A Matter of Law or Equity?

Apart from definitional differences, states also vary in understanding fault as a matter within legislative or judicial control. For harms other than murder or bigamy, eighteen states disinherit a surviving spouse by statute.[54] Absent any legislative direction, an additional five states rely upon their equitable powers to estop a surviving spouse from claiming inheritance rights when there has been misconduct.[55] The courts have also taken liberties in

52 *See, e.g.*, *In re* Estate of Chambers, 257 N.Y.S.2d 685, 688 (N.Y. Sup. Ct. 1965) (despite ten year separation, abandonment standard not met, as no showing that departure was unjustified and without decedent's consent); *Estate of Fonos*, 698 A.2d at 80 (insufficient evidence to meet forfeiture standard despite surviving husband being "an irascible, irritable, choleric old man" with mental infirmities who provided sub-par living conditions); *Meares*, 530 S.E.2d at 885–86 (no evidence of intent to constructively abandon or willfully desert where both decedent and husband were very old and feeble, despite decedent's severely deteriorating condition during final days living with husband and being found covered with food and feces and "very nearly comatose"); *In re* Estate of Riefberg, 446 N.E.2d 424, 425–26 (N.Y. 1983) (insufficient showing of abandonment despite couple living apart and surviving wife's request that locks be changed and husband be excluded).

53 *See, e.g.*, *In re* Crater's Estate, 93 A.2d 475, 477–78 (Pa. 1953) (surviving wife's adultery after husband leaves her constitutes desertion as she is now in "open disregard of her marital obligations" and insufficient evidence that his departure was without cause); *In re* Estate of Mancuso, 722 N.Y.S.2d 651, 651 (N.Y. App. Div. 2001) (despite three year separation, failure to prove forfeiture of elective share under theory of abandonment or nonsupport where decedent asked surviving spouse to leave residence and insufficient proof survivor was able to support decedent); *In re* Mooney's Will, 86 N.Y.S.2d 485, 486–87 (N.Y. Sur. Ct. 1948) (abandonment defeated by subsequent condonation through separation agreement).

Such problems significantly contributed to the elimination of fault in divorce. For further discussion of the analogy between fault-based probate and dissolution standards, see *infra* Part V.

54 The states which disinherit by statute are Connecticut, Hawaii, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Missouri, New Hampshire, New Jersey, New York, North Carolina, Ohio, Oregon, Pennsylvania, Vermont, and Virginia. For such states' statutory disinheritance provisions, see *supra* notes 35–38.

This article does not consider murder or bigamy at this point. As murder is the most extreme physical harm, it raises little controversy regarding the decision to preclude spousal privileges. Likewise, bigamy is excluded from this discussion of fault, since as previously stated, it raises a more equitable rationale than the other emotional fault behaviors. For a discussion of the slayer statutes, see *supra* notes 15–24 and accompanying text. For a discussion of bigamy, see *supra* notes 25–33 and accompanying text.

55 *See* Kreisel v. Ingham, 113 So. 2d 205, 207-210 (Fla. Dist. Ct. App. 1959) (contemplating abandonment as basis for forfeiture); Hamrick v. Bonner, 354 S.E.2d 689 (Ga. Ct. App. 1987) (precluding surviving spouse from inheriting when the annulment of his second marriage believed to be financially motivated); Tillman v. Williams, 403 So. 2d 880, 881 (Miss. 1981) (recognizing absent statutory direction that "clear abandonment or desertion" may estop a

defining what constitutes fault. While adultery or even a subsequent bigamous marriage might not "ipso facto" preclude a surviving spouse, a court may deny inheritance rights when the survivor's misconduct is of a "flagrant and inexcusable character."[56] "Philandering,"[57] abandoning a "blind and helpless" spouse,[58] and conspiring to kill one's spouse[59] are amongst the behaviors that probate courts have found sufficiently egregious.

Such equitable decisions are significant as descent and distribution is commonly recognized to be a legislative matter. Without deference to the legislature, courts risk usurping the legislature's role in setting public policy, "making next of kin avengers of marital wrongs."[60] Legislative control over probate matters is so absolute that the Supreme Court has found that statutory limitations on a decedent's "right"[61] to distribute his property upon death may only amount to an unconstitutional taking when there has been a "complete abolition" of both descent *and* devise without *any* government purpose being served.[62]

Strict statutory construction has led to seemingly harsh results such as allowing a surviving spouse to claim an elective share of her husband's es-

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surviving spouse from claiming his elective share); Vaughan v. Vaughan, 16 So. 2d 23 (Miss. 1943) (consideration of fault in award of family allowance); Swift v. Reasonover, 77 S.W.2d 809, 809–10 (1935) (forfeiture of homestead); Duch, *Suspicions Prove Costly*, *supra* note 40 (prohibiting an Illinois husband believed to have encouraged his wife's killing from inheriting).

56 Nedd v. Starry, 143 So. 2d 522, 524 (Fla. Dist. Ct. App. 1962) (denying a "philanderer" an intestate share in his deceased spouse's estate when the couple had only cohabitated for one year after a formal marriage and the husband engaged in two subsequent ceremonial marriages in two different states and commonly engaged in sexual relations with other women).

57 *Id.* at 524.

58 *Swift*, 77 S.W.2d at 809 (denying homestead rights but awarding dower to a surviving spouse who abandoned her "blind and helpless" husband fourteen months after they were married).

59 *See* Duch, *Suspicions Prove Costly*, *supra* note 40.

60 Schmeizl v. Schmeizl, 46 A.2d 619, 621 (Md. 1946) (awarding surviving spouse inheritance rights to decedent's estate despite survivor's adultery). Regardless of whether probate is recognized as a legislative or judicial matter, this article ultimately questions the propriety of either branch's reliance upon emotional fault in probate. For the arguments against the use of fault in probate, see *infra* Part VI.

61 While this article refers to the decedent's and surviving spouse's respective "rights" to pass and inherit property throughout this article, the legal distinction between "rights" and "privileges" places matters of descent and distribution clearly on the side of "privilege." "The right to receive property by devise or descent is not a natural right but a privilege granted by the state.... A State may deny the privilege altogether or may impose whatever restrictions or conditions upon the grant it deems appropriate." Hall v. Vallandingham, 540 A.2d 1162, 1164 (Md. Ct. Spec. App. 1988) (relying on Mager v. Grima, 49 U.S. (8 How.) 490 (1850)). However, as it is also acknowledged that the "rights" versus "privilege" distinction has largely eroded, this article uses the terms rights and privilege. For discussion of the rights/privilege distinction, see William W. Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

62 Hodel v. Irving, 481 U.S. 704, 717 (1987).

tate based on the statutes in place at the time of her spouse's death even though the decedent's will (which had left virtually his entire estate to his son) was executed at a time when the law still denied elective shares for abandonment and the decedent had been so abandoned.[63] "The Legislature giveth, and the Legislature taketh away."[64]

63 After abandoning her husband, the couple remained legally married for approximately nine more years. The will was executed shortly after the wife abandoned her husband when dower rights were forfeited by abandonment. Approximately nine months before the decedent's death, when the husband was "legally blind and in poor health," the legislature abolished dower and replaced it with the right of election which had no consideration of fault. *See In re* Petition of Shiflett, 490 S.E.2d 902, 904–06 (W. Va. 1997).

For other instances where absent explicit statutory provision, abandonment, or other misconduct has not barred inheritance, see Mabry v. Mabry, 535 S.W.2d 824, 826 (Ark. 1976) ("[N]either spouse, individually or in collusion with the other, may effectively nullify, suspend or interrupt the binding force of their marriage contract by mere abandonment, and such abandonment does not end the marital status."); Pogue v. Pogue, 434 So. 2d 262, 264 (Ala. 1983) ("The great weight of authority is against any finding of an 'implied exception' to the descent and distribution statutes.... In the absence of statutory provisions to the contrary, the fact a surviving spouse abandoned the deceased spouse does not bar the surviving spouse's right to inherit under descent and distribution." (internal citation omitted)); *Schmeizl*, 46 A.2d at 620 ("It has long been established at common law that, in the absence of statutory provision to the contrary, a widow will not be barred from her right of inheritance in her husband's estate, even though she has deserted him and lived in adultery."); United Trust Co. v. Pyke, 427 P.2d 67, 74 (Kan. 1967) (allowing a wife's estate to be awarded to her husband's estate after the husband killed his wife and then committed suicide because the existing forfeiture statute required a conviction), *overruled on other grounds by* Harper v. Prudential Ins. Co., 662 P.2d 1264 (Kan. 1983); *In re* Torres' Estate, 120 P.2d 816, 817–18 (Nev. 1942) (husband who abandoned his wife remained entitled to his intestate share of her separate property because legislature failed to incorporate any consideration of fault in the award of separate property, although abandonment, by statute, resulted in forfeiture of community property rights); Wooten v. Carmichael, 267 S.W. 344, 345 (Tex. Civ. App. 1924) (husband's total abandonment of wife, leaving her destitute did not limit his intestate share as statute "unequivocally" fails to consider fault).

These cases are used as examples of the terrific deference the legislature is generally shown in probate law. However, to the extent such cases do not consider emotional harm as a matter of equity when the legislature has made no such provision, the cases also support the proposition that such harms should not be considered in probate either by the legislative or judicial branch. For the arguments in favor of the elimination of emotional harm in probate, see *infra* Part VI.

64 *Hall*, 540 A.2d at 1165.

III. How Fault is Applied: The Forfeiture of Inheritance

A. The Benefits Forfeited

When fault is taken into account in estate distribution, the monetary benefits subject to loss may also vary.[65] The potential rights at stake are those that cannot or have not been restricted by the decedent's will.[66] A survivor's intestate rights, which arise when the decedent has no will or has not devised all or part of his property pursuant to a valid will,[67] as well as a survivor's alternative right to take any type of elective, dower or "forced" share against any will the decedent has properly executed,[68] are perhaps the two most significant rights. However, a survivor's homestead claim to the family residence, her right to a "family" or "widow's" allowance during the course of probate proceedings, and her right to take possession of exempt property of a personal nature are amongst other important benefits.[69]

Eleven states legislate that all monetary benefits are lost when fault is found.[70] In six states, only the right of election or dower interest is specifi-

65 A spouse may also lose nonfinancial privileges, such as being named administrator of the estate, because of misconduct. *See, e.g.*, N.C. Gen. Stat. Ann. § 31A-1(b)(5) (West 2005).

66 This includes both probate and nonprobate rights. For purposes of illustration, this discussion is limited to the loss of more critical financial rights. For an overview of all of the potential probate and nonprobate rights of a surviving spouse which do not depend upon a decedent's will, see Dukeminier et al., *supra* note 23, at 30–31 (distinction between probate and nonprobate), 59-73 (spousal intestate rights), 126–32 (bars to spousal intestate rights), 321–44 (discussion of nonprobate transfers), 417–65 (restrictions on the decedent's power to dispose through probate).

67 A spouse's intestate share varies by state and is often dependent upon whether the widow and/or the decedent have children who may benefit directly from their own intestate rights or benefit indirectly from those of the survivor. For further discussion of the variations in intestate statutes, see *id.* at 59–73, 126–32.

68 The elective share typically ranges from allowing the widow to take one third to one half of the decedent's estate, despite the existence of a valid will in which the decedent may attempt to completely preclude his widow from taking any portion of his estate. With the exception of Georgia, all the separate property states and the District of Columbia provide for an elective share. Because of efforts to prevent a survivor's election by placing one's estate in nonprobate assets, many states have also moved toward including a decedent's nonprobate assets amongst those subject to election. For a discussion of the wealth of diverse issues and complications associated with the elective share, see *id.* at 425–55. The traditional dower interest of a life estate has generally been replaced by the notion of elective share. Several states, however, still rely upon the term dower and preclude such rights because of fault. *See, e.g.*, Haw. Rev. Stat. § 533-9 (2004) (desertion as a bar to dower); Ohio Rev. Code Ann. § 2103.05 (West 2005) (adultery as a bar to dower). For a comparison of the traditional dower interest and elective share, see Leslie J. Harris & Lee E. Teitelbaum, Family Law 111–12 (2d ed. 2000).

69 For a discussion of such rights, see Dukeminier et al., *supra* note 23, at 421–22.

70 It should be remembered that the states not only vary in the size of such benefits but

cally eliminated,[71] although such elimination is accompanied by the loss of family allowance in two of these six states.[72] By statute, one state uses fault only to eliminate wrongful death benefits.[73] In other states, courts rely upon their equitable powers to eliminate certain rights. One state court has eliminated intestate rights,[74] while another has limited the use of fault in probate to forfeiting homestead claims.[75] Another state court has simply denied the family allowance.[76]

B. Explaining the Distinctions

These differences may not reflect arbitrary choices by the states but rather disagreement as to the purpose of the relevant benefits and what effect, if any, a survivor's misconduct should have upon these benefits. Perhaps the greatest number of states have singled out the elective share for forfeiture when the survivor has engaged in misconduct because the elective share supports the decedent's effort to preclude or restrict his spouse's testamentary share.[77] The forfeiture of homestead rights may also seem justified.

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also as to which benefits are even available. The states eliminating all benefits are Connecticut, Indiana, Kentucky, Maryland, Michigan, Missouri, North Carolina, New Hampshire, New York, Pennsylvania, and Virginia. For the states' particular authority, see *supra* notes 35-38.

71 These states are Louisiana, Massachusetts, Mississippi, New Jersey, Ohio, and Oregon. For such states' relevant authority, see *supra* notes 35–38 and accompanying text.

72 These states are Louisiana and Mississippi. For such states' relevant authority, see *supra* notes 35, 38 and accompanying text.

73 *See* VT. STAT. ANN. tit. 14, § 1492 (2004). Other states determine the apportionment of wrongful death benefits in a variety of ways. They include the utilization of the intestate scheme, *see, e.g.*, N.C. GEN. STAT. ANN. § 28A-18-2(a) (West 2005); S.C. CODE ANN. § 15-51-40 (2004); VA. CODE ANN. § 8.01-53 (West 2005), determination of actual loss suffered by interested individuals, *see, e.g.*, WYO. STAT. ANN. § 1-38-102 (2005); Parrish v. Jones, 722 P.2d 878 (Wash. Ct. App. 1986), and consideration of other equitable factors, *see, e.g.*, W. VA. CODE ANN. § 55-7-6 (West 2005) (allowing consideration by jury of actual loss and other equitable factors). Such methods potentially allow for the indirect consideration of fault to the extent the fact finder is entitled to factor fault into a determination of actual loss or an equity analysis.

74 *See* Nedd v. Starry, 143 So. 2d 522, 524 (Fla. Dist. Ct. App. 1962) (denying a "philanderer" an intestate share).

75 *See* Swift v. Reasonover, 77 S.W.2d 809, 809 (1935) ("[W]life's wrongful abandonment of the husband is an abandonment of the homestead..."). In other jurisdictions, the loss of homestead may occur without any consideration of whether the marital abandonment was wrong. For example, in Wisconsin, a spouse yielded her homestead interest when she left the property intending to seek divorce and thereby could not demonstrate the "certain and abiding intention to return." Schapiro v. Security Savings & Loan Ass'n, 441 N.W.2d 241, 244 (Wis. Ct. App. 1989).

76 *See* Hamrick v. Bonner, 354 S.E.2d 687, 687 (1987) (precluding surviving spouse from inheriting when the annulment of his second marriage was believed to be financially motivated).

77 As previously stated, seventeen states eliminate the elective share when fault is found. Eleven states eliminate all probate rights, and an additional six eliminate only the elective

As its name suggests, homestead rights exist "mainly to protect the family in the possession of a home as a fixed abode."[78] Consequently, homestead claims may arguably be lost upon abandonment of the marriage because such abandonment possibly obviates the need for a "family" home.[79] Alternatively, a state may view the rights in a hierarchical fashion thereby disallowing rights perceived as less significant while steadfastly protecting other more critical provisions. For example, in Mississippi, while abandonment or desertion eliminates a survivor's family allowance[80] and may in some instances result in the loss of elective share,[81] greater misconduct such as entry into a bigamous marriage is necessary before intestate rights may be forfeited.[82]

Despite the many internal inconsistencies within probate law between the states as to what specific acts constitute fault, who defines it, and how benefits are restricted, such variations may seem defensible. The endless distinctions and uses of fault by the states may be an administrative headache assumed as a matter of state prerogative. Each state that endorses any use of fault may also justify its policy as an effort to prevent monies from falling into unclean hands.[83] However, these arguments are weakened when some practical and theoretical observations are made about the use of fault in probate. At first blush, it seems reasonable to assume that a state

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share upon a finding of fault. *See supra* notes 70-71 and accompanying text (noting states' use of fault to forfeit the elective share).

While honoring the decedent's effort to preclude his spouse may at first glance justify the forfeiture of an elective share, such justification is not consistent with the traditional understanding that an elective share is meant to parallel at death the notion of equitable distribution used to divide property at divorce. For further discussion of the need to adhere to the traditional purpose of the elective share, see *infra* notes 155–56 and accompanying text.

78 *Swift*, 77 S.W.2d at 810; *see also* Overstreet v. Sircy, 1985 Tenn. App. LEXIS 3137, *10–*11 (Tenn. Ct. App. 1985) (relying on *Swift*).

79 *Swift*, 77 S.W.2d at 810 (protecting a survivor's right to dower but denying her homestead claim on account of her misconduct and "wrongful" abandonment of her husband). By comparison, other states may deny homestead privileges if a spouse abandons the marriage without any consideration of the wrongfulness of such behavior. *See, e.g.*, *Schapiro*, 441 N.W.2d at 244.

80 *See* Byars v. Gholson, 112 So. 578, 578–79 (Miss. 1927) (no allowance awarded to surviving wife who was living apart from husband without his fault and not supported by him); *cf.* Vaughan v. Vaughan, 16 So. 2d 23 (Miss. 1943) (family allowance preserved because decedent, not survivor, at fault for survivor leaving decedent and decedent remarried without divorcing survivor).

81 "[T]he statute has to be strictly construed unless there is a clear desertion and abandonment that sets up the estoppel." Tillman v. Williams, 403 So. 2d 880, 881 (Miss. 1981) (reversing a denial of elective share).

82 Rowell v. Rowell, 170 So. 2d 267, 272 (Miss. 1964) (denying estoppel of spouse's intestate rights despite survivor's adultery in the absence of a commission of bigamy or a statute precluding inheritance due to adultery).

83 For further discussion of the unclean hands justification, see *supra* note 15 and accompanying text (discussing such consideration in the context of murdering one's benefactor).

would consider spousal misconduct in cases involving workers' compensation death benefits and dissolution of marriage to the extent it makes similar conduct considerations in probate. Without such consistency, it may appear difficult for a state to argue that it truly believes such behavior is reprehensible. However, before charging that such weaknesses exist within any state's law, one must consider whether the inconsistencies between the various areas of law can be explained by distinguishing between the use of conduct as a matter of equity or fault.[84] Yet even when a state is consistent in its use of conduct as a punitive measure, more theoretical concerns need to be addressed. The legal enforcement of a moral code must be warranted.[85]

IV. Workers' Compensation and Spousal Misconduct

A. The Use of Misconduct

Spousal behavior is still considered by a significant number of states in distributing workers' compensation death benefits to a surviving spouse when the working spouse has died and his employer is accountable.[86] In twenty-one states, a surviving spouse's misconduct prior to the decedent's death bars the survivor from claiming workers' compensation death benefits.[87] Similarly, in the District of Columbia and ten other states, a misbehaving surviving spouse's claim is presumptively denied, although evidence of dependence on the decedent preceding his death overcomes the wrongdo-

84 A similar distinction is drawn between state considerations of bigamy and other emotional harms (such as adultery, abandonment, desertion or nonsupport) in the probate context. *See supra* notes 24–40 and accompanying text.

85 For the discussion of the ineffective enforcement of morality through probate, see *infra* notes 153–60 and accompanying text.

86 For comprehensive treatment of spousal death benefits, see 5 Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law 98-1 to 98-26 (2005).

87 In nine states, fault simply creates a bar to survivor benefits. *See* Fla. Stat. Ann. § 440.02(18) (West 2005); 820 Ill. Comp. Stat. Ann. 305/7 (West 2005); Kan. Stat. Ann. § 44-508(c)(2) (2005); Md. Code Ann., Lab. & Empl. § 9-680 (West 2005); N.Y. Workers' Comp. Law § 16(1-a) (McKinney 2005); Or. Rev. Stat. Ann. § 656.005 (West 2003); 77 Pa. Cons. Stat. Ann. § 562 (West 2005); Tex. Lab. Code § 408.182 (Vernon 2005); W. Va. Code Ann. § 23-4-13 (West 2005); *see also* Midway Landfill, Inc. v. Indus. Comm'n, 304 N.E.2d 607 (Ill. 2003) (recognizing misconduct as a possible bar to benefits).

In twelve states, fault rebuts a presumption of dependency. *See* Ala. Code § 25-5-61 (2005); Ariz. Rev. Stat. Ann. § 23-1064 (2005); Colo. Rev. Stat. Ann. § 8-41-501 (West 2005); Ga. Code Ann. § 34-9-13 (West 2005); Iowa Code Ann. § 85.42 (West 2005); Ky. Rev. Stat. Ann. § 342.075 (West 2005); Mass. Gen. Laws Ann. ch. 152, § 32 (West 2004); Mich. Comp. Laws Ann. § 418.331 (West 2005); Minn. Stat. Ann. § 176.111 (West 2005); Ohio Rev. Code Ann. § 4123.59 (West 2005); Tenn. Code Ann. § 50-6-210 (West 2005); Va. Code Ann. § 65.2-515 (West 2005).

ing.[88] Of the remaining nineteen states which do not consider misconduct, fifteen still require a showing of dependence upon the decedent.[89] Only four states adhere to a standard in which the survivor bears no burden other than demonstrating a legal marriage.[90]

Like probate law, the primary conduct considered in workers' compensation death benefit cases is abandonment.[91] Each of the thirty-two states that consider misconduct in workers' compensation relies upon some notion of abandonment.[92] Two states also consider whether the surviving spouse is cohabitating in a "meretricious relationship," while two others also consider more general misconduct in the allocation of workers' compensation death benefits.[93] Yet, despite the facially comparable misconduct terms in

88 *See* ALASKA STAT. § 23.30.395(33) (2004); DEL. CODE ANN. tit. 19, § 2330(d) (2005); D.C. CODE § 32-1501 (2005); IDAHO CODE ANN. § 72-410 (2005); ME. REV. STAT. ANN. tit. 39-A, § 102 (2005); MISS. CODE ANN. § 71-3-3 (West 2005); N.C. GEN. STAT. ANN. § 97-2 (West 2005); OKLA. STAT. ANN. tit. 85, § 3.1 (West 2005); R.I. GEN. LAWS § 28-33-13 (2004); S.C. CODE ANN. § 42-1-175 (2004); S.D. CODIFIED LAWS § 62-4-21 (2005).

89 *See* ARK. CODE ANN. § 11-9-102 (West 2005); CAL LAB. CODE § 3501 (West 2005); CONN. GEN. STAT. ANN. § 31-275 (West 2005); HAW. REV. STAT. § 386-1 (2004); IND. CODE ANN. § 22-3-3-19 (West 2005); LA. REV. STAT. ANN. 23:1255 (2004); MONT. CODE ANN. § 39-71-116 (2003); NEB. REV. STAT. § 48-124 (2004); N.H. REV. STAT. ANN. § 281-A:2 (2004); N.J. STAT. ANN. § 34:15-13 (West 2005); N.M. STAT. ANN. § 52-1-17 (West 2005); N.D. CENT. CODE § 65-01-02 (2003); UTAH CODE ANN. § 34A-2-403 (West 2005); WASH. REV. CODE ANN. § 51.08.020 (West 2005); WIS. STAT. ANN. § 102.51 (West 2005); *see also* Woman's Home Companion Reading Club v. Indus. Comm'n, 285 N.W. 745, 746 (Wis. 1939) (defining statutory requirement of "living with spouse" to preclude only legal or actual estrangement).

90 *See* NEV. REV. STAT. ANN. § 616C.505(13) (West 2004); VT. STAT. ANN. tit. 21, § 634 (2004); WYO. STAT. ANN. § 27-14-102(a)(xvii) (2005); Snowbarger v. MFA Cent. Coop., 317 S.W.2d 390 (Mo. 1958).

91 In the thirty-two states which consider spousal fault in workers' compensation cases, misconduct is characterized solely through one or more of these terms. These states are Alabama, Alaska, Arizona, Colorado, Delaware, D.C., Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Virginia, and West Virginia. For reference to each state's particular workers' compensation statute, see *supra* notes 87–90 and accompanying text.

By comparison, abandonment is specifically used by fifteen states in probate. For use of abandonment in probate codes and case law, see *supra* notes 35, 49–52 and accompanying text.

To the extent states rely upon more general fault language in probate, such states also contemplate abandonment. For use of abandonment and general fault by the states and the relevant authority of each state in probate, see *supra* notes 34–40 and accompanying text.

92 Included within this standard of abandonment are states which rely upon such statutory language as whether the surviving spouse "voluntarily abandoned," "willfully deserted," was "voluntarily living apart," or was "living apart without justifiable cause." For reference to each state's particular workers' compensation statute, see *supra* notes 87–90 and accompanying text.

93 The four states which rely upon fault considerations in addition to abandonment are Georgia, Pennsylvania, Illinois, and West Virginia. Georgia and Pennsylvania find the presumption of dependency rebutted by cohabitation in a "meretricious relationship." *See* GA.

probate and workers' compensation, the standard is not consistently used within each state.

B. The Inconsistency of Probate and Workers' Compensation

Of the thirty-two states relying upon spousal misconduct to make awards in workers' compensation death benefits cases, seventeen do not consistently consider misconduct as a basis for disinheriting surviving spouses.[94] Conversely, of the twenty-three states that rely upon fault in probate proceedings, eight do not consider conduct in determining a surviving spouse's right to workers' compensation death benefits.[95]

As a general matter, rights of probate and workers' compensation are created by statute and fully controlled by the legislature.[96] The misalign-

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CODE ANN. § 34-9-13 (West 2004); 77 PA. CONS. STAT. ANN. § 562 (West 2004). While Illinois makes no statutory reference to fault, its case law recognizes more general "misconduct" as a possible bar. *See* Midway Landfill, Inc. v. Indus. Comm'n, 304 N.E.2d 607 (Ill. 1973). In West Virginia, in addition to a surviving spouse being denied benefits for her abandonment of the decedent, she can also be denied benefits if she was abandoned for "a reason that would have entitled the deceased employee to an annulment or divorce...." W. VA. CODE ANN. § 23-4-13 (West 2003).

94 The seventeen which consider fault in workers' compensation death claims but not in probate proceedings are Alabama, Alaska, Arizona, Colorado, Delaware, D.C., Idaho, Iowa, Kansas, Maine, Minnesota, Oklahoma, Rhode Island, South Carolina, South Dakota, Texas, and West Virginia. For the relevant probate authority, see *supra* notes 34–38 and accompanying text. For the relevant workers' compensation authority, see *supra* notes 87–90 and accompanying text. *See also* Appendix.

Because forfeiture for bigamy in probate is ultimately based on an equitable rationale, the treatment of bigamy is not included in the comparison of probate and workers' compensation use of fault. *See supra* notes 25–33 and accompanying text.

This article does not discuss the loss of inheritance for murder within the comparison to workers' compensation, because there is no parallel in workers' compensation. By definition, it is the employer, not the spouse, who is responsible for the decedent's death in workers' compensation cases involving death benefits.

95 The eight states which consider fault at probate but rely upon a no-fault standard to award workers' compensation death benefits are Connecticut, Hawaii, Indiana, Louisiana, Missouri, New Hampshire, New Jersey, and Vermont. However, in six of these states, the survivor must still evidence dependence on the decedent to receive workers' compensation benefits. Of the eight, only Missouri and Vermont award workers' compensation death benefits without any consideration of fault or dependence.

The fifteen states which consider fault in both workers' compensation and probate proceedings are Florida, Georgia, Illinois, Kentucky, Maryland, Massachusetts, Michigan, Mississippi, New York, North Carolina, Ohio, Oregon, Pennsylvania, Tennessee, and Virginia. For the relevant probate authority, see *supra* notes 34–40 and accompanying text. For the relevant workers' compensation authority, see *supra* notes 87–90 and accompanying text. *See also* Appendix.

96 For recognition of the legislative control over inheritance, see *supra* Part II. For recognition of the legislative control over workers' compensation, see A.O. Smith Corp. v. Indus. Comm'n., 485 N.E.2d 335, 337–38 (Ill. 1985); City of McKeesport v. Workers' Comp. Appeal Bd., 746 A.2d 87, 89 (Pa. 2000).

ment between workers' compensation and probate may thus be simply seen as the product of haphazard legislative thinking. However, the differences may be better understood by recognizing that workers' compensation death benefits and probate privileges serve different functions. With varying legal purposes, the use of misconduct in each context can understandably also vary.

C. Fault versus Equity and the Case for Inconsistency

Inheritance by will or intestacy is a right belonging to the decedent to which the beneficiaries have no vested claim.[97] The legislative interest in protecting the decedent at probate explains the use of fault therein. It is a posthumous legislative second guessing game—would a decedent truly want to leave his estate to a surviving spouse who engaged in adultery or abandoned him? When the legislature or the court acts upon the widow's fault in probate, it believes it is acting on behalf of the decedent and precludes the surviving spouse from benefitting from the individual he has betrayed.[98]

By contrast, workers' compensation death benefits are considered to belong to the survivor and are not merely a privilege derived from the decedent's rights.[99] Unlike probate, the foremost legislative interest in awarding workers' compensation death benefits is the well being of the surviving spouse. The division of workers' compensation death benefits changes the critical question to one of dependence—did the surviving spouse financially depend upon the decedent? As a result of this focus, the almost exclusive use of an abandonment standard to restrict workers' compensation death benefits of surviving spouses is not an effort to redress fault.[100] It is rather a means of determining dependency. Consequently, despite the use in workers' compensation of misconduct terms similar to those used in probate, statutes that preclude the surviving spouse's death benefits in workers' compensation are not driven by a fault agenda.

97 *See* Hodel v. Irving, 481 U.S. 704, 711–12 (1987) (recognizing the standing of decedent's potential heirs and devisees as third parties protecting the decedent's right of inheritance rather than resulting from a claimed violation of their own rights and interests).

98 For discussion of the use of fault in probate, see *supra* Part I.

99 *See, e.g.*, Mizell v. Raybestos-Manhattan, Inc., 315 S.E.2d 123, 124 (S.C. 1984); Rouse v. WCC, 342 S.E.2d 229, 231 (W. Va. 1986). For recognition of this principle by the courts of various states, see LARSON & LARSON, *supra* note 86, § 98.01 (recognizing the general purpose of workers' compensation death benefits).

100 As previously discussed, of the thirty-two states which deny workers' compensation benefits for misconduct, twenty-eight rely exclusively upon abandonment, desertion, or "voluntarily living apart." The other four states allow other considerations in addition to abandonment. *See supra* notes 87–90 and accompanying text.

V. Dissolution of Marriage and Spousal Misconduct

A. The Use of Misconduct

Spousal misconduct may also appear in three critical provisions of a state's dissolution statutes. Pursuant to a 2004 survey by the *Family Law Quarterly*, while each of the fifty states and the District of Columbia now include some no-fault ground within their grounds for dissolution of marriage, thirty-two states also maintain some traditional fault grounds such as desertion or adultery.[101] Marital misconduct of the emotional nature may also be a negative factor in alimony and property determinations.[102] The American Law Institute (A.L.I.) reports that thirty states consider emotional fault in alimony determinations.[103] A.L.I. also reports that eighteen states continue

101 In *Family Law Quarterly*'s annual chart reviewing the states' "Grounds for Divorce and Residency Requirements," the thirty-two states categorized as "No Fault Added to Traditional" fault grounds are Alabama, Arizona, Arkansas, Connecticut, Delaware, Georgia, Idaho, Illinois, Louisiana, Maine, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming. In addition to the "No Fault Added to Traditional" fault ground, the chart also categorizes by "No Fault Sole Ground," "Incompatibility," "Living Separate and Apart," and "Judicial Separation." *Charts*, 37 Fam. L.Q. 577, 580 (2004).

102 Economic misconduct can also be considered at divorce. Economic misconduct encompasses such behavior as the wasteful dissipation of assets and reckless incurrence of debts. It is therefore distinct from emotional misconduct such as adultery or abandonment, as such behaviors may have little or no direct economic consequences. Not surprisingly, there is greater agreement between the jurisdictions regarding the relevance of economic misconduct. Unlike emotional fault, consideration of economic misconduct in dissolution may be a direct effort to compensate for financial damage. Therefore, economic misconduct is not considered in the comparison of the use of fault in different legal contexts. For further discussion of the distinction between economic and emotional misconduct and the legitimacy of economic considerations, see *Charts*, *supra* note 101, at 577, 580 (noting in Charts 1 and 4 each state's use of marital fault and economic misconduct in alimony and property determinations); Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 Ariz. St. L.J. 773, 776–77 (1996) (noting that all states consider economic misconduct but vary in use of noneconomic misconduct); Harris & Teitelbaum, *supra* note 68, at 509; Harry D. Krause et al., Family Law: Cases, Comments, and Questions 810–12 (5th ed. 2003) (discussing the legitimacy of economic misconduct and noneconomic misconduct considerations at divorce); Barbara Bennett Woodhouse & Katharine T. Bartlett, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 Geo. L.J. 2525, 2528–29 (1994) (distinguishing between and comparing the different types of fault).

103 According to the American Law Institute's *Principles of the Law of Family Dissolution*, the thirty states which consider emotional fault in alimony determinations are Alabama, Arkansas, Connecticut, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, West Virginia, and Wyoming. American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations 44 nn. 66–68 (2002) [*hereinafter* A.L.I.]. This study of fault is based upon a 1996 survey prepared

to consider emotional fault in marital property distributions.[104] Yet, in comparing each state's use of emotional fault in determining the parties' economics at divorce with the use of fault in distributing a decedent's estate at probate, there is no consistent pattern.[105]

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by A.L.I.'s Chief Reporter, Ira Mark Ellman. *Id.* at 44 n. 66. In 1996, Professor Ellman published a detailed review of every state's treatment of fault in alimony and property determinations. Professor Ellman divided the states into five categories: "Complete No-Fault, Property and Alimony," "No-Fault Property, Limited Fault Alimony," "Almost Complete No-Fault, Property and Alimony," "No-Fault Property, Full Fault Alimony," and "Full-Fault, Property and Alimony." Ellman, *supra* note 102, at 780–81. His comprehensive analysis includes appendices which reference each state's relevant statutes and case law. The District of Columbia is not surveyed. A.L.I.'s *Principles of the Law of Family Dissolution* essentially reproduces Ellman's 1996 article. *See* A.L.I., *supra* note 103, at 45–46; Ellman, *supra* note 102, at 778–82, 810–30.

Family Law Quarterly annually publishes similar charts on the use of fault in alimony determinations. A chart entitled "Alimony/Spousal Support Factors," divides the states for alimony into the two categories of "Marital Fault Not Considered" and "Marital Fault Relevant." According to *Family Law Quarterly*, twenty-seven states consider fault in alimony determinations. *Charts*, *supra* note 101, at 577.

On the treatment of fault in alimony determinations, *Family Law Quarterly* editors and Professor Ellman differ in minor respects on their characterization of only five states—Arkansas, Florida, Kansas, Ohio, and Vermont. *Family Law Quarterly* classifies Arkansas as "Marital Fault Not Considered," while Ellman includes it amongst the states that are "Almost Complete No-Fault" and indicates that Arkansas case law has allowed the use of fault only in egregious cases. *Family Law Quarterly* classifies Florida as "Marital Fault Relevant," while Ellman includes it amongst the "Complete No-Fault" states. Ellman recognizes fault as listed amongst Florida's statutory factors but reports that case law limits the statute to fault carrying financial consequences. *Family Law Quarterly* classifies Kansas as "Marital Fault Not Considered." Ellman characterizes it as "Almost Complete No-Fault Property and Alimony" but states that case law dicta only indicates consideration for extreme cases. *Family Law Quarterly* classifies Ohio as "Marital Fault Not Considered." Ellman includes it amongst "No-Fault Property, Limited Fault Alimony," indicating the statute allows for consideration of "all relevant factors." *Family Law Quarterly* classifies Vermont as "Marital Fault Not Considered." Ellman includes Vermont in the group of "Full-Fault, Property and Alimony" but indicates that despite the absence of statutory instruction, court discretion might allow for consideration of fault in alimony determinations. *See Charts*, *supra* note 101, at 577; Ellman, *supra* note 102, at 778–82, 810–30.

104 These eighteen states are Alabama, Arkansas, Connecticut, Georgia, Kansas, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New York, North Dakota, Rhode Island, South Carolina, Texas, Vermont, and Wyoming. The District of Columbia was not included in this review. A.L.I., *supra* note 103, at 44 nn. 66-68; *see also* Ellman, *supra* note 102, at 781–82, 810–30. A.L.I. notes that no state allows for fault considerations in property, while following a no–fault policy for alimony. Conversely, seven states do allow for fault considerations in alimony, while not engaging in such considerations in property distributions. A.L.I., *supra* note 103, at 43–49; Ellman, *supra* note 102, at 782. *See also* Appendix. Perhaps because of such overlap, *Family Law Quarterly*, which annually reviews the use of fault in alimony determinations, carries no similar analysis for property distribution at divorce. *Charts*, *supra* note 101.

105 Because the focus is on the use of fault in allocating assets at divorce and at death, the use of fault as a ground for divorce is not included in this comparison of fault's role in dissolution and probate.

B. The Inconsistency of Probate and Dissolution

A state is as likely to subscribe to a fault standard in one proceeding and a no-fault standard in the other as it is to consistently pursue a fault or no-fault standard in both proceedings. Only one-half of the states consistently follow a fault or no-fault standard in both probate and dissolution. Of the twenty-three states that consider emotional fault in probate, only ten consistently consider fault in alimony and property determinations at divorce.[106] Of the twenty-seven remaining states which do not consider fault in probate, fifteen consistently do not consider fault in either alimony or property determinations at divorce.[107]

C. Fault versus No-Fault and the Case for Consistency

Unlike workers' compensation law, the use of fault in divorce proceedings is an important consideration when evaluating the use of fault in probate.[108] Probate and dissolution proceedings both make distributions of assets earned during the course of the marriage. Moreover, the rationale for relying upon fault in probate is analogous to its traditional justification in

106 The ten which consider fault in probate and in both alimony and property determinations are Connecticut, Georgia, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, New York, and Vermont.

Of the remaining thirteen states which consider fault in probate but do not consistently consider fault in both alimony and property determinations at divorce, five rely upon fault in probate but do not consider fault in either alimony or property determinations at divorce. These states are Florida, Hawaii, Illinois, Indiana, and Oregon. The remaining eight states rely upon fault in probate and recognize fault in alimony determinations but not in property determinations. These states are Kentucky, Louisiana, New Jersey, North Carolina, Ohio, Pennsylvania, Tennessee, and Virginia. In many of these states, fault may also be a ground for divorce. For each state's relevant authority, see *supra* notes 34–40 and accompanying text (regarding probate), 103–04 and accompanying text (regarding alimony and property determinations at divorce). *See also* Appendix.

107 The fifteen consistently "no-fault" states which do not consider fault in probate or in alimony or property determinations at divorce are Alaska, Arizona, California, Colorado, Delaware, Iowa, Maine, Minnesota, Montana, Nebraska, Nevada, New Mexico, Oklahoma, Washington, and Wisconsin. Of the remaining twelve states which do not consider fault in probate, eight consider fault in both alimony and property determinations at divorce. These states are Alabama, Arkansas, Kansas, North Dakota, Rhode Island, South Carolina, Texas, and Wyoming. The final four states which do not consider fault in probate continue to consider fault in alimony but not in property determinations at divorce are Idaho, South Dakota, Utah, and West Virginia. Many of these states also continue to consider fault as a ground for divorce. For each state's relevant authority, see *supra* notes 34–40 and accompanying text (regarding probate), 103–04 and accompany text (regarding alimony and property determinations at divorce). *See also* Appendix.

108 For the equity/fault distinction between workers' compensation and probate law in their respective uses of misconduct, see *supra* notes 97–100 and accompanying text.

divorce.[109] In each context, the elimination or restriction of a misbehaving spouse's monetary rights is intended to be punitive.[110]

Given the common motive, a state should consistently follow either a fault or no-fault standard in both proceedings. Certainly, a state could achieve consistency between its probate and divorce law by arbitrarily adopting either a fault or no-fault standard. Fortunately, the determination to pursue either a fault or no-fault standard can be more sensible. In the divorce context, there has been a dramatic elimination of fault as a ground for divorce as well as a factor in alimony and property over the last thirty-five years.[111] This "trend" toward no-fault in dissolution has not been without controversy.[112] However, despite such resistance in the divorce context, probate standards should also move toward the elimination of fault. The arguments in favor of disregarding fault at divorce are analogous and often more powerful when raised in the probate context.

D. The Development Of No-Fault Divorce

The elimination of fault in the divorce context began with the recognition of its ineffectiveness as a ground for divorce. Limited to fault grounds such

109 *See, e.g., In re* Jac Estate, 49 A.2d 360, 363 (Pa. 1946) (recognizing the standard of fault for desertion necessary to terminate inheritance rights analogous to fault standard in divorce).

110 At divorce, fault's use has traditionally been recognized as a punitive and compensatory measure. However, after the distinction between economic and emotional misconduct is made, the compensatory justification for emotional fault may simply serve as a guise to punish otherwise unactionable, nontortious conduct. If a court is unable to determine which party "'caused'" the divorce, the fault determination ultimately turns on "the parties' relative moral failings, not the relationship between independent and dependent variables." A.L.I., *supra* note 103, at 51. For more direct recognition and support of fault's moral function in dissolution, see generally Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869 (1994) (supporting ongoing use of fault in order to enforce the marital contract); Adriaen M. Morse, Jr., Comment, *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605 (1996) (supporting some ongoing use of fault in divorce proceedings); Carl E. Schneider, *Moral Discourse and the Tranformation of American Family Law*, 83 MICH. L. REV. 1803 (1985) (describing the trend of moral values diminution in family law); Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197 (1991) (arguing against morally neutral alimony standards); Peter Nash Swisher, *The A.L.I. Principles: A Farewell to Fault—But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse?*, 8 DUKE J. GENDER L. & POL'Y 213, 220 (arguing for the use of fault as "moral issues still do matter in a family law context"); Woodhouse & Bartlett, *supra* note 102 (recognizing the value of fault in divorce law).

For the use of fault as a punitive measure in probate, see *supra* Part I.

111 In 1970, California was the first state to adopt a no-fault ground for divorce. For discussion of the history of no-fault's adoption by the states, see LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 440–42 (2002).

112 For discussion of the controversy regarding the use of fault in dissolution, see *infra* notes 128–31 and accompanying text.

as adultery, abandonment, or extreme cruelty, parties wanting to terminate their marriage often needed to engage in collusion or perjury to satisfy the court that their relationship had become untenable because one party had engaged in such misconduct.[113] This interest in avoiding system abuse coincided with a growing recognition that the terms of marriage were not to be dictated by the state. Rather than viewing marriage as a public institution, it became recognized as a private right.[114]

If, as the Supreme Court emphasized, marriage was "not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup," then every individual was guaranteed the right to enter as well as exit marriage "free from unwarranted governmental intrusion."[115] The recognition of marriage as a unique relation, each one defined (however imperfectly) by the two wed individuals, significantly contributed to the development of no-fault divorce standards.[116] Individual privacy not only discouraged the courts from inquiring into the delicate and sordid details of failed relationships but also made such titillating facts irrelevant. Without a "common understanding"[117] of marriage, how could there be a common understanding of fault? Use of fault in any aspect of divorce came under suspicion. As the fault grounds of divorce became replaced or supplemented by the no-fault divorce ground of "irreconcilable differences," the use of marital misconduct in dividing property and determining alimony also diminished.[118] Today, the majority of states now adhere to no-fault divorce standards.[119] Such standards are also uniformly promoted by the Uniform Marriage and

113 Such defenses as recrimination, connivance and condonation which existed in a fault-based divorce system also prevented divorce or encouraged system abuse. For a general discussion of the demise of fault-based divorce, see FRIEDMAN, *supra* note 111, at 434–42; MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 63–111 (1987); HARRIS & TEITELBAUM, *supra* note 68, at 319–42.

114 *See, e.g.*, Zablocki v. Redhail, 434 U.S. 374, 384 (1978) (recognizing the decision to marry as among the personal decisions protected by the constitutional right of privacy).

115 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (addressing the constitutional right of privacy within the "marital relationship").

116 As A.L.I. recognizes, "the imposition of external standards on an intimate relationship may risk inappropriate, and possibly even unconstitutional, intrusion on marital privacy." A.L.I., *supra* note 103, at 60 (relying upon Massey v. Massey, 807 S.W.2d 391, 400 (Tex. App. 1991) (rejecting the use of external standards in tort claim for intentional infliction of emotional distress)).

117 Lutwak v. United States, 344 U.S. 604, 611 (1953) (discussing Congress' "common understanding" of marriage).

118 *See supra* notes 101–104 and accompanying text (noting A.L.I.'s and *Family Law Quarterly*'s surveys on the use of fault by the states as a grounds for divorce and in alimony and property determinations). *See also* Appendix.

119 For a review of the adoption of no-fault, see *supra* notes 101–04 and accompanying text. *See also* Appendix.

Divorce Act (UMDA) and the American Law Institute's Principles of the Law of Family Dissolution.[120]

VI. The Fault with Fault

A. *Applying The Lessons Of Fault Divorce To Probate*

Arguments against the use of fault in probate follow from the justifications for no-fault divorce. Even assuming that a surviving spouse's adultery or desertion can be conclusively established, extensive inquiry into the couple's marriage challenges both the survivor's *and* the decedent's privacy.[121] The decedent's failure to have terminated the relationship or have affirmatively limited the inheritance of the misbehaving spouse also suggests his tolerance of a behavior which, while perhaps not complying with a "traditional" understanding of marriage, should be respected in order to recognize *his* right to set the terms of *his* relationship.[122] Additionally, even at divorce in a fault-based divorce state, the injured spouse personally decides whether to introduce his injury into evidence and can thereby control the invasion into his privacy. In probate, the court or estate administrator necessarily introduce the matter posthumously without any assurance the decedent would have assented to the exposure of his intimate marital details. Unlike divorce proceedings, in probate proceedings the injured party (i.e., the decedent) cannot testify as to the harm inflicted by his spouse's behavior. What may be egregious harm in one relationship may be accepted or at least forgiven behavior in another.[123] Absolute standards that only take into

120 In the UMDA sections for property distribution and spousal maintenance, there is explicit language which mandates that determinations be made "without regard to marital misconduct." Unif. Marriage and Divorce Act §§ 307 (property distribution), 308 (spousal maintenance) (amended 1973). The UMDA also supports only no-fault grounds for dissolution or legal separation. *See* at § 302.

A.L.I. supports a no-fault principle in both alimony and property distributions in order to improve "consistency and predictability" while maintaining the "core tenet" that dissolution law should only compensate for financial losses. A.L.I., *supra* note 103, at 43. The American Law Institute's no-fault stance is consistent with the view it took as early as 1955 with its publication of a draft Model Penal Code, which supported decriminalizing all private sexual relations between consenting adults. For a discussion of these developments in the Model Penal Code, see Hart, *supra* note 3, at 15.

121 For a discussion of the difficulty in defining emotional fault in probate proceedings, see *supra* notes 41–53 and accompanying text.

122 This of course assumes that the decedent was aware of the infidelity or misconduct. If the decedent was unaware, the argument in favor of no-fault may be more difficult to make, but it is still necessary in order to maintain a consistent standard and prevent delving into the private details of marriage.

123 As acknowledged by one court in critiquing the use of fault in divorce, the "bounds of decency" may vary. Massey v. Massey, 807 S.W.2d 391, 400 (Tex. App. 1991). The American

account the surviving spouse's misconduct may also be unfair, as they fail to examine any possible misconduct by the decedent that may have precipitated the surviving spouse's behavior.[124]

Like divorce, the use of fault in probate can be arbitrary.[125] Inheritance rights may be summarily denied to a *legally* "at fault" surviving spouse who may not have inflicted any injury *in fact* upon the decedent.[126] As was well-stated in one probate matter, "[h]uman relations between spouses are so complex and influenced by so many circumstances, separations occur in so many instances with fault and without fault, with consent and without consent."[127]

B. Applying the Lessons of No-Fault Divorce to Probate

As in the divorce context, the concerns regarding no-fault need to be considered in advocating such a standard at probate. Initially, the elimination of fault in divorce was charged as contributing to the feminization of poverty. Husbands were reported to disproportionately benefit from the no-fault release from payment due to their misdeeds.[128] This charge was

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Law Institute's recommendation that fault be removed from divorce determinations of alimony and property was also made in recognition of the difficulty in measuring the harm caused by fault-defined conduct. A.L.I., *supra* note 103, at 50.

124 For a comparison of absolute versus relative evaluations of fault in probate law, see *supra* note 53 and accompanying text.

In the divorce setting, the recognition that fault may be shared has also contributed to academic and judicial efforts to eliminate its consideration. *See, e.g.*, A.L.I., *supra* note 103, at 51; *see also* Chalmers v. Chalmers, 320 A.2d 478, 482 (N.J. 1974) (dismissing the use of fault in alimony determinations as "merely a manifestation of a sick marriage").

125 As warned by the American Law Institute regarding the ongoing use of fault in divorce, "[m]uch mischief can result from allowing courts to assign liability to nontortious conduct by application of unarticulated—and effectively unreviewable—standards of blameworthiness." A.L.I., *supra* note 103, at 51.

126 In choosing not to consider abandonment by the surviving spouse as a matter of equity, at least one court has recognized the difficulty in determining whether any harm was truly inflicted. In so doing, it distinguished the clear damage done by the physical harm of murder which could bar inheritance.

> [T]he case of murder is far different from the case before us. [The surviving spouse's] conduct, reprehensible though it may have been, was not hidden from her husband. He could have debarred her from inheriting any part of his estate, if he had so desired. For many years he had ground for an absolute divorce, but he did not see fit to procure a divorce for reasons unknown to us. Whatever his reasons may have been, the inference to be drawn from his conduct is that he did not want to sever the relation of husband and wife. However that may be, the fact remains that he did not sever the relation.

Schmeizl v. Schmeizl, 46 A.2d 619, 622 (Md. 1946).

127 *In re* Estate of Maiden, 31 N.E.2d 889, 890 (N.Y. 1940).

128 Lenore Weitzman's work was critical to the feminist claim that no-fault divorce

largely statistically discounted and dismissed by less paternalistic brands of feminism.[129] Recent increases in the number and pay of working women have further mitigated the force of such arguments.[130] Consequently, such feminist criticisms of fault in divorce should have little bearing upon the adoption of a no-fault probate standard. Yet a second concern—that no-fault divorce contributes to the disintegration of moral values—raises more basic and deeper questions.[131] As in the development of no-fault divorce, questions regarding the legal enforcement of morality must be addressed in the promotion of no-fault probate.

C. The Legal Enforcement of Morality in Probate: Hart-Devlin Redux

In the classic debate between the English Lord Patrick Devlin and the American philosopher H.L.A. Hart on the law's relevance to matters of "private morality," Lord Devlin presented a traditional utilitarian justification for the legal regulation of such private matters as the sexual practices of consenting adults.[132] Like his liberal counterparts, Lord Devlin believed

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was prejudicial to women. Her 1981 article's critique of no-fault was later repeated in her 1985 book. *See generally* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985); Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981). For a review and critique of Weitzman's work and others raising similar gender-based attacks against no-fault, see IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 368–72, 438–40 (3d ed. 1998). For further feminist support of fault in divorce, see June R. Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463, 1464–67 (1990).

129 ELLMAN, *supra* note 128, at 371–72, 438–40. For more liberal strands of feminism, see Anne C. Dailey, *Feminism's Return to Liberalism*, 102 YALE L.J. 1265, 1266-1267 (1993) (reviewing FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katharine T. Bartlett & Rosanne Kennedy eds., 1991)) (arguing that social equality can be best achieved for women by a return to liberalism); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) (embracing woman's sexuality and critiquing radical and cultural feminism's characterization of female sexuality as either a means of oppression or reproduction).

130 *See* Louis Uchitelle, *Gaining Ground on the Wage Front*, N.Y. TIMES, Dec. 31, 2004, at C1.

131 For the moralist support of fault in divorce, see Brinig & Crafton, *supra* note 110; Morse, *supra* note 110; Schneider, *Moral Discourse and the Transformation of American Family Law*, *supra* note 110; Schneider, *Rethinking Alimony*, *supra* note 110; Swisher, *supra* note 110.

132 The impetus for Devlin and Hart's debate was the report of the "Wolfenden Committee" which was appointed in 1954 in England to study matters of morality and the criminal law. In 1957, the committee recommended to the English legislature that homosexual practices between two consenting adults be decriminalized and prostitution remain criminal only to the extent it involved public solicitation. As the committee believed, "[t]here must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business." HART, *supra* note 3, at 14–15 (quoting the Wolfenden Committee's Report). For Lord Devlin's acknowledgment of the influence of the Wolfenden Report on his writings on criminal law, see DEVLIN, *supra* note 2, at v–x.

that a shared "public morality" restricted every citizen's freedom to the extent the state prohibited the physical injury of one citizen by another in criminalizing such acts as murder and burglary.[133] Yet Lord Devlin also supported enforcing a common "private morality" in order to prevent more intangible injuries to society.[134] While doubting that many moral truths on private matters existed, Lord Devlin posited that every society shared a certain "community of ideas" which reflected, amongst other things, its morality regarding acceptable personal behavior and relations.[135] Taking no position on the integrity of such common attitudes, these private morals needed to be publicly enforced in order to maintain social cohesion.[136] Without the observance of a common morality, a society was likely to "disintegrate from within."[137] However, emphasizing the maintenance of social cohesion over the promotion of any particular morality, Devlin acknowl-

133 Devlin agreed with such liberals as John Stuart Mill and H.L.A. Hart on the enforcement of laws intended to prevent the physical harm of others. However, Devlin believed that the law should be further used to protect social morals. For Devlin's discussion of the liberal position and criticism of Mill and Hart, see DEVLIN, supra note 2, at 102–23.

John Stuart Mill's *On Liberty* represents the most traditional liberal position that government's interference with individual liberty should be limited to preventing one man from physically harming another. JOHN STUART MILL, ON LIBERTY 141–42 (Pelican Books 1974) (1859):

> As soon as any part of a person's conduct affect prejudicially the interests of others, society has jurisdiction over it.... But there is no room for entertaining any such questions when a person's conduct affects the interests of no person besides himself.... In all such cases, there should be perfect freedom, legal and social, to do the action and stand the consequences.

See also DEVLIN, *supra* note 2, at 103. Hart presents a more modified liberal position, allowing the law to prevent an individual from physically harming others as well as himself. HART, *supra* note 3, at 33–34.

134 DEVLIN, *supra* note 2, at 17–18; *see also* ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY 68–69 (1993) (interpreting Devlin's support for criminalizing matters of private morality as based upon a desire to prevent more intangible injury to society).

135 DEVLIN, *supra* note 2, at 9.

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> If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price.

Id. at 10.

137 *Id.* at 13.

edged, "[w]hat is important is not the quality of the creed but the strength of the belief in it."[138]

Even accepting the general validity of Devlin's disintegration thesis, one may still question whether probate law should distribute based upon moral determinations of a surviving spouse's worthiness. To warrant restricting one's freedom, there must be a sufficient degree of "intolerance, indignation, and disgust" toward a particular behavior.[139] Such a "strength of belief" regarding what constitutes impermissible spousal misconduct does not exist.[140] Only twenty-three states deny inheritance benefits due to misconduct,[141] and even among such states, only ten consistently consider fault as a basis for limiting property and monetary determinations at divorce.[142] The lack of consistency on questions of fault between probate and dissolution law indicates there is little "strength of belief" as to whether such misbehavior should be the basis for denying benefits. Indeed, if there is any relevant common belief recognized in our law, it is that marriage is an increasingly independent, individual right over which the state has diminishing control. We recognize this individual freedom through such changes as the adoption of no-fault divorce laws,[143] the legitimacy of premarital contracts,[144] the married woman's unilateral control over abortion decisions,[145] and the end of interspousal tort immunity.[146] Without a strong social consensus as to the significance of fault, states cannot rely upon a utilitarian argument of social cohesion to support their legal efforts to enforce morality.

138 *Id.* at 114.

139 *Id.* at 17.

140 *Id.* at 114.

141 *See supra* notes 34–40 and accompanying text; *see also* Appendix.

142 *See supra* note 106 and accompanying text; *see also* Appendix.

143 *See supra* notes 113–20 and accompanying text (discussing the development of no-fault divorce laws).

144 On the use of premarital contracts, see generally Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145 (1998) (discussing the evolution of premarital contracts); James Herbie Difonzo, *Customized Marriage*, 75 IND. L.J. 875, 950 (2000) (discussing the use of premarital contracts as a means to "undo the excesses" of no-fault divorce); Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65 (1998) (considering the selective enforcement of only monetary provisions of premarital contracts).

145 *See* Planned Parenthood of Central Mo. v. Danforth, 428 U.S. 52, 67–72 (1976) (striking down state legislation requiring a married woman to gain her husband's consent before proceeding with an abortion); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 887–98 (1992) (striking down state legislation requiring a married woman to inform her husband of plans to have an abortion).

146 *See* HARRIS & TEITELBAUM, *supra* note 68, at 139–47 (reviewing the demise of interspousal tort immunity). Exceptions for interspousal crimes such as rape have also been largely eliminated. *Id.* at 116–23.

Alternatively, one could argue that the states that consistently consider fault in probate and dissolution demonstrate the requisite level of "indignation, intolerance, and disgust"[147] to warrant its ongoing use. One could also posit that we do share a strong belief against engaging in certain types of spousal misconduct, but it is simply not reflected in our existing law.[148] However, in accepting either of these arguments, other questions must be answered in order to justify the legal enforcement of morality. Such questions were raised by H.L.A. Hart in response to Lord Devlin's promotion of the legal enforcement of morality. As Hart observes, no society has self-destructed because of differences in private morals.[149] Such an empirical observation might be made in comparing states which rely upon fault in probate and dissolution with states that do not consider fault. As Hart might query, are states which do not legislate morals on the brink of destruction while states which do enforce morality are secure? One might counter that Devlin's disintegration fear is to be interpreted less literally, emphasizing the more intangible loss of social cohesion which results when society members "drift apart" because their common morality has disappeared.[150] However, following Hart, reliance on the social cohesion justification to support the legal enforcement of morals in probate inevitably leads to a more basic question. Does probate law *effectively* promote any commonly held morality?[151] Ultimately, this is the most fundamental question. Regardless of whether a morality is supported because of its instrumental or its intrinsic value, the effectiveness of legal enforcement must be evaluated.[152]

D. The Effectiveness of Moral Enforcement

1. Deterrence.—The effectiveness of punishment is measured in large degree by considering the deterrent and retributive values.[153] As a matter of deterrence, punishing the offender is deemed to prevent his continued engagement in the unwanted behavior as well as coerce the desired behav-

147 DEVLIN, *supra* note 2, at 17.

148 Devlin acknowledges that prior to considering whether or not morality may be legally enforced, it must be determined that a morality is socially shared. *See id.* at 7–8.

149 *See* HART, *supra* note 3, at 50–52.

150 *See* GEORGE, *supra* note 134, at 63 (citing DEVLIN, *supra* note 2, at 10).

151 *Cf.* HART, *supra* note 3, at 57–58 (discussing coercion as rationale for the enforcement of morality in criminal prohibitions).

152 *See id.* at 54.

153 *See id.* at 55–60. Hart also acknowledges denunciation as a reason for punishment which is related to retribution. *Id.* at 60–69. While rehabilitation may also be a basis for punishment, it has little application to probate as there is no need to correct the surviving spouse's offensive ways when the decedent is not at threat of further injury after his death.

ior from others who want to avoid punishment.[154] In the probate context, correcting the offender's conduct is a moot issue—with the passing of the decedent spouse, the widow can no longer engage in spousal misconduct as there is no spouse to harm. Alternatively, one might hope that probate fault laws discourage other potentially wayward spouses from committing the wrong. A spouse who expects to be the principal beneficiary of her spouse's will may be influenced by the knowledge that the spouse she harms may affirmatively disinherit her. Yet it seems unlikely that a state's intestacy statutes would provide any further disincentive. As a default measure relied upon only when a will is nonexistent or inapplicable, intestacy statutes seem too remote to influence behavior.

Statutes that deny an elective share due to misconduct arguably survive such a challenge to the deterrent value of spousal misconduct intestacy statutes. Eliminating one's right to an elective share may be seen as complementing the injured spouse's effort to exclude the at fault/misbehaving spouse from his will. However, the traditional common law purpose of the elective share is to recognize the "economic partnership theory of marriage" and thereby imitate in probate the "equitable distribution" system used to divide property at divorce.[155] Moreover, nine out of seventeen states that deny an elective share for fault do not rely upon fault in distributing property upon divorce.[156] Consequently, in these states it seems particularly inconsistent to justify the prohibition of an elective share for fault because of a belief in its deterrent value while not relying upon fault to diminish one's share when property is divided upon divorce.

2. *Retribution.*—If there is little deterrent value, fault-based probate statutes may alternatively be justified as a means of retribution. In short, the denial of inheritance is the "pain" inflicted upon the guilty spouse as "the appropriate or 'fitting' return for moral evil done."[157] The exacting of such injury upon the surviving spouse presupposes that the decedent spouse

154 *See id.* at 55–69.

155 UNIF. PROBATE CODE art. II pt. 2 gen. cmt. (amended 1993). Because the community property state recognizes joint ownership of property during marriage, the elective share is not necessary as the surviving spouse in a community property state simply remains the sole owner. For further discussion of the parallels between equitable distribution and the elective share, see HARRIS & TEITELBAUM, *supra* note 68, at 106–15.

156 The nine states which eliminate the right of election for fault but do not rely upon fault in property distribution are Indiana, Kentucky, Louisiana, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, and Virginia. The eight states which consistently rely upon fault to deny election and disproportionately divide marital assets are Connecticut, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, and New York. For further discussion of fault's effect on election, see *supra* notes 70–71 and accompanying text. For further discussion of the states' use of fault in property distribution, see *supra* note 104 and accompanying text; *see also* Appendix.

157 HART, *supra* note 3, at 59.

was indeed injured by the legally condemned behavior. However, in the no-fault divorce context, states already ignore any "injury" inflicted by spousal misconduct. Consequently, if a state does not recognize fault in divorce, how can it assume that a decedent spouse was so injured that it must act in a retributive manner, denying benefits to a surviving spouse?[158] In states that do continue to recognize fault in both dissolution and probate proceedings, it also remains difficult to recognize fault in probate.[159] As recognized earlier in the comparison of fault's use in probate and divorce, without testimony from the decedent as to the harm inflicted and an evidentiary opportunity to evaluate the possible relative fault of both parties, a retribution figure can not fairly be calculated. There is also no assurance that the decedent spouse would want the marital misconduct publicly litigated or that he even felt injured by such behavior.[160]

By denying benefits to surviving spouses who have engaged in certain proscribed conduct, a state unilaterally pronounces a single, inflexible definition of marriage and fault. To prevent inheritance benefits from being denied, married couples are required to conform to this standard regardless of how misguided or ill conceived it may be. There is little, if any, retributive or deterrent value. More importantly, it is unclear that there is a shared definition of acceptable marital behavior that society wants legally enforced.

E. The Privacy of Marriage at Death

Marriage is encompassed by the right of privacy.[161] The elimination of spousal misconduct considerations in probate furthers the recognition of marriage as an individual right. However, ending the use of emotional harm does not excuse misconduct. Instead, it recognizes that the law cannot teach morality by demanding conformity.[162] Without fault in probate, spouses who personally believe there has been a moral transgression must

158 Currently, thirteen states do not consistently consider fault in both alimony and property determinations in divorce, while allowing such considerations in probate. *See supra* notes 106–07 and accompanying text. For additional arguments that states not contemplating fault in dissolution proceedings should not consider it in probate, see *supra* notes 108–12 and accompanying text (recognizing the need for consistency), 153–56 and accompanying text (questioning the deterrent value of fault in probate); *see also* Appendix.

159 For a discussion of the states' use of fault in probate and divorce, see *supra* notes 101–12 and accompanying text.

160 For a comparison of fault's use in probate and divorce and the exacerbation of concerns regarding party fairness and evidentiary problems in the probate context, see *supra* notes 121–27 and accompanying text.

161 *See* Zablocki v. Redhail, 434 U.S. 374, 384 (1978).

162 "Much morality is certainly taught and sustained without [legal punishment], and where morality is taught with it, there is the standing danger that fear of punishment may remain the sole motive for conformity." HART, *supra* note 3, at 58.

secure a divorce or separation. In so doing, an individual clearly signals his intentions regarding property rights. By initiating a divorce or separation action, property is of course subject to equitable distribution.[163] Yet by clearly severing the relationship, spousal intestacy rights, like all other marital benefits and obligations, are terminated.[164]

VII. Replacing Fault in Probate: The Legal Measure Necessary

A. Divorce or Legal Separation

While it may seem unduly harsh to impose the duty of securing divorce or legal separation upon an aggrieved party, it must be remembered that spousal intestacy rights and other inheritance privileges in twenty-seven states and the District of Columbia already rely solely upon this simple determination, which is supported by the UPC.[165] Requiring a legal termination of marriage or separation is the only nonintrusive measure that

163 For an overview of the equitable distribution of property at divorce, see Ellman et al., *supra* note 128, at 277–89, 293–97; Harris & Teitelbaum, *supra* note 68, at 447–60; Krause, *supra* note 102, at 751–53.

164 In most states, divorce also eliminates a spouse's rights pursuant to a will, making it unnecessary to draft a subsequent will which does not include the former spouse. For discussion of the effect of divorce upon a will, see Dukeminier et al., *supra* note 23, at 269-70.

165 For a discussion of the use of fault in probate by twenty-three states, see *supra* notes 34-40 and accompanying text. *See also* Appendix.

Pursuant to the Uniform Probate Code, an individual is not considered a "surviving spouse" when there is a divorce or annulment, but makes clear that "[a] decree of separation that does not terminate the status of husband and wife" is not a divorce. Unif. Probate Code § 2-802 (amended 1993). The Comment accompanying the section further details that the expectation of a "definitive legal act" which will bar the surviving spouse in the case of a legal separation necessitates "a complete property settlement." Unif. Probate Code § 2-802 cmt. (amended 1993). At least eighteen states have adopted a version of the UPC requiring a legal separation explicitly terminating the status of husband and wife or, at a minimum, property rights in order to terminate inheritance rights. *See* Ala. Code § 43-8-252 (2005); Alaska Stat. § 13.12.802 (2004); Ariz. Rev. Stat. Ann. § 14-2802 (2005); Cal. Prob. Code § 78(d) (West 2005); Colo. Rev. Stat. Ann. § 15-11-802 (West 2005); Haw. Rev. Stat. § 560:2-802 (2004); Idaho Code Ann. § 15-2-802 (2005); Me. Rev. Stat. Ann. tit. 18-A, § 2-802 (2005); Mich. Comp. Laws Ann. § 700.2801 (West 2005); Mont. Code Ann. § 72-2-812 (2003); Neb. Rev. Stat. § 30-2353 (2004); N.M. Stat. Ann. § 45-2-802 (West 2005); N.D. Cent. Code § 30.1-10-02 (2003); S.C. Code Ann. § 62-2-802 (2004); S.D. Codified Laws § 29A-2-802 (2005); Tenn. Code Ann. § 31-1-102 (West 2005); Utah Code Ann. § 75-2-802 (West 2005); Wis. Stat. Ann. § 851.30 (West 2005).

Pursuant to case law, at least three jurisdictions follow a principle similar to the UPC. *See* Shaw v. Saxman, 46 App. D.C. 526, 531 (D.C. Cir. 1917) (separation agreement does not terminate marital property rights of surviving spouse unless it does so expressly); *In re* Estate of Carlisle, 653 N.W.2d 368, 369–70 (Iowa 2002) (finding separate maintenance decree does not result in loss of rights to widow allowance); Coleman v. Coleman, 269 S.W.2d 730, 738 (Ky.

recognizes that marital privacy is to be protected both during life and at death. No exceptions should be made for the harmed individual who obtains a legal separation that does not terminate property rights, initiates a divorce action but dies before the divorce is finalized, or merely has sufficient grounds for legal separation or divorce.[166] States that have adopted such lesser standards have created "black holes" that can make a surviving spouse ineligible for probate rights because sufficient grounds for divorce exist and, tragically, also ineligible for a property award pursuant to the divorce proceedings because the divorce was not decreed at the time of the decedent's death.[167] Yet even if such "black holes" can be repaired by better statutory drafting or reliance on judicial equity, lesser standards invite ongoing considerations of marital conduct and fault. Probate courts may be tempted to abuse their discretionary power.[168] Requiring a final judgment also ensures that the true intention is to terminate the relationship and thereby sever all spousal rights. This prevents the possibility of terminating spousal rights when the parties may have reconciled, had the decedent

1954) (acknowledging that, in the case of a divorce from "bed and board," inheritance rights are maintained).

166 In at least five jurisdictions, however, a divorce or legal separation explicitly terminating the status of husband and wife or property rights is not necessary. A legal separation, physical separation or sufficient grounds for divorce or legal separation may be sufficient to terminate spousal inheritance rights. *See* LA. CIV. CODE ANN. art. 2433 (2004) (forfeiture of marital fourth for engaging in any fault); LA. CIV. CODE. ANN. art. 2437 (2004) (forfeiture of family allowance for engaging in any fault); *In re* LaBorde, 540 So. 2d at 969–70 (La. Ct. App. 1988) (finding any fault of the surviving spouse which would have entitled the decedent to a divorce or separation sufficient to deny the statutory rights to a marital provision and periodic allowance); N.H. REV. STAT. ANN. § 560:19 (2004) (denying spousal inheritance rights when the surviving spouse "was or had been guilty of conduct which constitutes cause for divorce); N.J. STAT. ANN. § 3B:8-1 (West 2005) (denying elective share to a surviving spouse if at the time of the decedent's death the parties are "living separate and apart" or "ceased to cohabit as man and wife," either as a "result of a judgement of divorce from bed and board" or under circumstances providing cause of action for divorce or nullity of marriage); N.C. GEN. STAT. ANN. § 31A-1 (West 2005) (loss of spousal probate rights in the event of "divorce from bed and board"); OR. REV. STAT. ANN. § 114.135 (West 2003) (providing court discretion to deny or reduce a surviving spouse's elective share if the parties are "living apart at the time of the death of the decedent, whether or not there is a judgment for legal separation."); *see also In re* Hitchcock, 391 A.2d 882, 883 (N.H. 1978) (limiting statutory disinheritance to fault based grounds of divorce).

167 In *Carr v. Carr*, this tragedy was further compounded as the probate statute prohibited inheritance of the surviving spouse as long as grounds for divorce were established by either party. In that case, it was the decedent who had been the at-fault party. *See* Carr v. Carr, 576 A.2d 872, 874, 877 n.2 (N.J. 1990) (citing STEPHEN HAWKING, A BRIEF HISTORY OF TIME 81 (1988) for the court's "black hole" metaphor). For earlier discussions of *Carr*, including the court's ultimate conclusion to impose a constructive trust on the decedent's estate, see *supra* note 46 and accompanying text.

168 In the divorce setting, judicial abuse of this "inherently limitless" power significantly contributed to the promotion of no-fault divorce standards. *See* A.L.I., *supra* note 103, at 50.

lived.[169] It also ensures all substantive and procedural due process requirements are met by providing the divorce court, not the probate court, the opportunity to hear from both parties and make a legal determination as to whether the grounds for divorce have been established.[170]

B. Disinheritance by Will

As an alternative to securing a divorce or an appropriate legal separation, a married individual can certainly limit a spouse's inheritance by explicit exclusion or omission from one's will. Assuming the nonexistence of fault-based disinheritance statutes, a testamentary measure will not terminate the elective share of a spouse who has engaged in acts of emotional misconduct.[171] Yet the will can serve as a valid, albeit more limited, means of ensuring certain rights and privileges are eliminated when a spouse feels aggrieved but does not want to go to the length of securing a divorce or separation. Again, the expectation that the aggrieved spouse take the necessary legal action may initially seem inappropriate. However, placing the burden on the victim is necessary in order to maintain a consistent no-fault standard.

C. Rejecting the Behavior Test

Rather than eliminating fault determinations, others invite greater judicial involvement. Rejecting sole reliance upon one's legal relationships, Professor Frances Foster considers various theories which would allow estates to be distributed upon case-by-case determinations regarding the quality and validity of the decedent's relationship with both relatives and nonrelatives.[172] It may be tempting to support such a proposition in order to recog-

169 The frequency of reconciliation may explain why divorce actions may be dismissed by the courts if after a set period of time no action has been taken by the parties. *See, e.g.*, IND. CODE ANN. § 31-15-2-15(c) (West 2005) (dismissing dissolution action if no action taken within 90 days from the date of continuance).

170 Even in the no-fault divorce context, a judicial determination that the grounds of divorce have been established may only be made in accordance with due process. *See, e.g.*, Manion v. Manion, 363 A.2d 921 (N.J. Super. Ct. Ch. Div. 1976) (denying a motion for default judgement in a divorce action without an evidentiary hearing at which testimony could be heard).

171 For further discussion of the elective share and the implications of fault, see *supra* notes 77 and accompanying text (for a general definition of elective share), 55–56 and accompanying text (recognizing the elective share as a mechanism to acknowledge the joint property rights of spouses regardless of emotional misconduct).

172 After briefly raising and rejecting either altogether "abolishing inheritance" or "purging" any consideration of family, Professor Foster more seriously evaluates three other alternative approaches to distributing a decedent's estate. Such approaches "append[] non-family categories" to family categories based upon evaluations of actual dependence or support, rely upon the "decedent['s] intent" to recognize the "natural objects of the decedent's bounty,"

nize same-sex relationships that still cannot be legally created through marriage.[173] However, the denigration of the marital right of privacy to achieve such recognition takes the law in the wrong direction. The demand must be for more privacy not less. Instead of proposing a standard that would result in less privacy rights for opposite-sex couples, more rights must be advocated for same-sex couples.

D. Maintaining the Physical Harm Preclusion

Certainly, elimination of the traditional emotional fault standard does not require abolishing the slayer statutes.[174] One can easily differentiate between a murderer and one who commits the more emotional harms of adultery, abandonment, and desertion. The elimination of fault in probate arguably also still allows for disinheritance in certain cases of extreme physical violence, even if death does not result.[175] Nor does the preclusion for bigamy need to be discarded, as such preclusion is grounded in equity rather than fault.[176] However, by eliminating forfeiture for the more emotional harms, a

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and recognize the "actual relationship" between the decedent and other individuals by relying upon various factors such as financial, legal, and emotional ties. Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 251-271 (2001); *see also* Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 124-26 (1998) (recognizing the advantages of China's "behavior-based model of inheritance").

173 Same-sex marriage is now a matter of overwhelming controversy, with the right to legal recognition of such relationships being raised before legislatures and courts throughout the country. As this Article goes to press, Massachusetts is the only state which, by judicial order, recognizes same-sex marriage. *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003), *appeal dismissed,* Doyle v. Goodridge, 827 N.E.2d 1255 (Mass. 2005). More recently, the city of New York's ban on same-sex marriages has been judicially struck down, but reinstated. *See* Hernandez v. Robles, 7 Misc. 3d 459 (N.Y. Sup. Ct. 2005), *rev'd*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005).

In other states, constitutional amendments have been relied upon to prevent same-sex marriages. While it is difficult to remain abreast of all the ongoing national developments, for a discussion of legislative and judicial efforts at the time of this article, see Monica Davey, *Sharp Reactions to Missouri's Decisive Vote Against Gay Marriage*, N.Y. TIMES, Aug. 5, 2004, at A16; Sarah Kershaw, *Constitutional Bans on Same-Sex Marriage Gain Widespread Support in 10 States*, N.Y. TIMES, Nov. 3, 2004, at P6.

174 For discussion of the slayer statutes, see *supra* notes 15–24 and accompanying text.

175 In Illinois, for example, a conviction for elder abuse results in the loss of all rights of descent and inheritance. 755 ILL. COMP. STAT. ANN. 5/2-6.2(b) (West 2005). There have also been proposals to more broadly require forfeiture in certain cases of domestic violence. *See, e.g.*, Robin L. Preble, *Family Violence and Family Property: A Proposal for Reform*, 13 LAW & INEQ. 401 (1995); Thomas H. Shepherd, *It's the 21st Century ... Time for Probate Codes to Address Family Violence: A Proposal that Deals with the Realities of the Problem*, 20 ST. LOUIS U. PUB. L. REV. 449 (2001).

176 For a discussion of the treatment of bigamy in probate, see *supra* notes 25–33 and accompanying text.

consistency with our "common understanding" of marriage is maintained. Marriage is a privacy right. Without decisive legal action dissolving that right, the state cannot intrude. Admittedly, some cases will arise where perpetrators seem to be unduly rewarded. Yet such costs are outweighed by the damage to marital privacy if fault remains in probate.

CONCLUSION

Marriage may be the "creation of morality,"[177] but the morality of marriage defies legal definition. It is precisely this lack of definition which makes every effort to regulate marital behavior controversial. Yet in whatever arena the debate about marriage plays out, privacy ultimately prevails. The transformation of divorce law into a no-fault system exemplifies the acknowledgment of marriage as a right uniquely belonging to every individual. By adopting no-fault standards, probate law may easily follow the direction of no-fault divorce law and recognize that the individual right of marriage is best protected when left alone.

177 DEVLIN, *supra* note 2, at 61.

APPENDIX
SPOUSAL MISCONDUCT

	Probate[178]	*Workers' Comp: Death Benefits*[179]	*Divorce: Grounds*[180]	*Divorce: Alimony*[181]	*Divorce: Property*[182]
Alabama		x	x	x	x
Alaska		x		x	
Arizona		x	x		
Arkansas			x		x
California					
Colorado		x			
Connecticut	x		x	x	x
Delaware		x	x		
Dist. of Columbia		x		*n/a*	*n/a*
Florida	x	x			
Georgia	x	x	x	x	x
Hawaii	x				
Idaho		x	x	x	
Illinois	x	x	x		
Indiana	x				
Iowa		x			
Kansas		x		x	x
Kentucky	x	x		x	
Louisiana	x		x	x	
Maine		x	x		

	Probate	*Workers' Comp: Death Benefits*	*Divorce: Grounds*	*Divorce: Alimony*	*Divorce: Property*
Maryland	x	x	x	x	x
Massachusetts	x	x	x	x	x
Michigan	x	x		x	x
Minnesota		x			
Mississippi	x	x	x	x	x
Missouri	x		x	x	x
Montana					
Nebraska					
Nevada					
New Hampshire	x		x	x	x
New Jersey	x		x	x	
New Mexico			x		
New York	x	x	x	x	x
North Carolina	x	x	x	x	
North Dakota			x	x	x
Ohio	x	x	x	x	
Oklahoma		x			
Oregon	x	x			
Pennsylvania	x	x	x	x	
Rhode Island		x	x	x	x
South Carolina		x	x	x	x
South Dakota		x	x	x	
Tennessee	x	x	x	x	

	Probate	*Workers' Comp: Death Benefits*	*Divorce: Grounds*	*Divorce: Alimony*	*Divorce: Property*
Texas		x	x	x	x
Utah			x	x	
Vermont	x		x	x	x
Virginia	x	x	x	x	
Washington					
West Virginia		x	x	x	
Wisconsin					
Wyoming			x	x	x

178 For a detailed discussion of each state's use of emotional fault in probate, see *supra* notes 34–40 and accompanying text.

179 For a detailed discussion of each state's use of misconduct in workers' compensation, see *supra* notes 86–90 and accompanying text.

180 *Family Law Quarterly* is relied upon for its survey of each state's use of fault as a grounds for divorce. *See supra* note 101 and accompanying text.

181 The American Law Institute is relied upon for its survey of each state's use of fault in alimony determinations. D.C. was not included. *See supra* note 103 and accompanying text.

182 The American Law Institute is relied upon for its survey of each state's use of fault in property determinations at divorce. D.C. was not included. *See supra* note 104 and accompanying text.