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The Ferment in Divorce Legislation

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I. INTRODUCTION

Marriage as we know it in America is undergoing rigorous re-examination and even hostile attack in the last third of the twentieth century in part because of the doubt expressed in some quarters that this venerable institution meets the psychological and sociological needs of the mass of men and women.[1]

And since, as one wag has put it, marriage is the "cause" of divorce,[2] one can expect great ferment in the area of divorce law as well. Such is in fact the case. The legislatures, the prime source of divorce law, after a period of neglect sometimes going back to the revolutionary period,[3] are beginning to explore and occasionally enact legislation which is moving the law from quasi-tort (fault) theory[4] toward a concept embracing the dissolution of a partnership when the partners are temperamentally incapable of making a success of the enterprise.[5]

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[1] Going beyond theoretical academic discussion of the need for radical reform of the marriage institution, two Maryland legislators introduced a bill in the 1972 legislative session which would have substituted for the standard life-time marriage contract a fixed term contract with mutual options to extend the contract at the end of the fixed term. *See* J. BERNARD, THE FUTURE OF MARRIAGE 96 (1972) [hereinafter cited as BERNARD]; Note, *Untying the Knot: The Course and Problems of Divorce Reform*, 57 CORNELL L. REV. 649, 661-63 (1972).

[2] This anonymous wag's exact words are: "Hurrah! I have just found the solution. Yes, I have delved to the very source and now I can tell you that 'marriage' is the principal cause of divorce." Tilton, *Lawyer's Strategy in Matrimonial Law*, That this poet may be more accurate in his appraisal of the cause of divorce, *see* BERNARD, *supra* note 1, which suggests that marriage as an institution is a positive cause of unhappiness in a majority of women who indulge in it.

[3] In 1787 New York recognized absolute divorce (divorce *a vinculo*) on the sole ground of adultery. It was not until 1966 that the legislature increased the number of grounds for which an absolute divorce could be obtained in New York. M. PAULSEN, M. PARKER, W. WADLINGTON, & J. GOEBEL, DOMESTIC RELATIONS, CASES AND MATERIALS 415 (1970) [hereinafter cited as PAULSEN]; N.Y. DOM. REL. LAW § 170 (McKinney Supp. 1966).

[4] *See* H. CLARK, JR., DOMESTIC RELATIONS 284 (1968) [hereinafter cited as CLARK].

[5] Dissolution of marriage in California under the new Family Law Act is a business-like transaction. *See* CAL. CIV. CODE §§ 4000-5138 (West 1971). As one divorcee complained, the proceedings seemed "too impersonal and coldblooded." N.Y. Times, Mar. 7, 1971, at 62, cols. 1-6. On the other hand, the judges handling

But even though change appears to be the order of the day, there is presently no real national consensus as to the form that change should take. Many legislative approaches have been suggested in an effort to modify or eliminate the fault principle. These will be explored at length in this article, and their strengths and weaknesses will be emphasized. In addition, the effects of the new legislation on the parties, the individual judges and lawyers involved, and the bar will be discussed. In the course of this discussion of the ferment in divorce law the authors have not hesitated to state their own preferences and their reasons therefor.

For the discussion of new legislative approaches to divorce to be meaningful to the reader unfamiliar with divorce law, an historical and contemporary matrix is provided.

A. A SHORT OUTLINE OF DIVORCE IN AMERICA[6]

Both English and American divorce law have been profoundly affected by the view of the Roman Catholic church that the marital rites are a sacrament and indissoluble except upon death of one of the parties.[7] This sacramental theory of marriage provided the Church with a basis for claiming exclusive jurisdiction over marriage and divorce in its ecclesiastical courts in England. The common law courts did not dispute this secular jurisdiction even after Henry VIII's break with Rome. The Church of England simply took over administration of the ecclesiastical courts. Throughout their history, with but one short break in the late sixteenth century, these courts refused to grant divorce *a vinculo* (ab-

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"dissolution" cases welcome the change. San Diego Superior Court Judge William A. Yale is quoted as saying, "Instead of screaming and name-calling, we have a business proposition that goes off fairly simply." *Id.*

[6] This outline is based on materials found in CLARK, *supra* note 4, at 281-85; J. MADDEN, PERSONS AND DOMESTIC RELATIONS 256-61 (1931) [hereinafter cited as MADDEN]; PAULSEN, *supra* note 3, at 416-19; M. PLOSCOWE & D. FREED, FAMILY LAW 133-44 (1st ed. 1963); Weinstein, *Proposed Changes in the Law of Divorce*, 27 MO. L. REV. 307, 314-20 (1962); Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 33, 35-39 (1966) [hereinafter cited as Wadlington].

[7] *See, e.g.*, T. BOUSCAREN & A. ELLIS, CANON LAW: A TEXT AND COMMENTARY 447 (1957).

solute dissolution of an existing valid marriage).[8] They did decree divorce *a mensa et thoro* (physical separation from bed and board) for the severe marital offenses of adultery and physical cruelty.[9] Without a showing of such great fault one could not even obtain a judicial separation.

But in the late seventeenth century adultery did provide a basis for the wealthy nobleman to obtain an absolute divorce from his wife (but rarely vice versa). Armed with a divorce decree *a mensa et thoro* from an ecclesiastical court together with evidence of the successful prosecution of the wife's paramour for criminal conversation, the influential citizen could obtain a "legislative" divorce by private bill.

The development of divorce law was somewhat different in the American colonies. They were in large part settled by Protestants and no ecclesiastical courts were established. The common law courts with no inherited jurisdiction in the field of marriage and divorce made no effort to fill the vacuum. Thus it fell to the colonial legislatures and governors to provide for some form of divorce, be it *a viniculo* or *a mensa et thoro*. Because the Protestant view that marriage was a civil contract and not a sacrament was dominant in the colonies, legislative divorce became somewhat easier to obtain in pre-revolutionary America. However, the fault concept was retained.

Following the Revolution, the now independent legislatures had three major options available to them as suggested by the English experience. They could provide for jurisdiction in the local courts, or provide for legislative divorce by private bill, or provide for a combination of these two alternatives. In addition, each legislature had to decide for itself which grounds would be recognized. These options led to

[8] Their jurisdiction over marriage and divorce was finally ended by the Matrimonial Causes Act of 1857 which gave jurisdiction to grant divorces *a viniculo* to a civil court, at that time called the Court for Divorce and Matrimonial Causes. *See* MADDEN, *supra* note 6, at 256-59; Rye v. Fuljamb, Moore 683 (1601); 3 Salkeld 138.

[9] Annulment of a marriage might also be obtained from the ecclesiastical courts because of impediments to a valid marriage *ab initio*, *e.g.*, incest or lack of real consent. *See, e.g.*, CLARK, *supra* note 4, at 119.

great variation in divorce law from one state to another and later created disparities among the new territories. The hodgepodge of approaches to divorce in America was further compounded by the division between those states which accepted the substantive law developed by the ecclesiastical courts as part of the common law of England and those states which did not.[10] However, even in those states which rejected the ecclesiastical law, the concept was accepted that very specific fault grounds were required before an absolute or limited divorce could be granted.[11]

In the nineteenth century, legislative divorce was discarded because of the ill repute into which it had fallen, occasioned by high costs, fraud, bribery of legislators and often the failure to give the spouse against whom the divorce was sought notice and hearing.[12] Courts of equity were then given exclusive jurisdiction by the legislatures to grant absolute and limited divorces,[13] though the legislative branch continued to prescribe the grounds for divorce and the requisite procedures.

During the late nineteenth and the first half of the twentieth centuries, legislative action led to an increase in the number of fault grounds recognized by various of the American jurisdictions and the authorization of alimony, property

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[10] New York, for instance, rejected the law of divorce administered by the ecclesiastical courts. Missouri, on the other hand, accepted that body of substantive law except as modified by statute. *See* Burtis v. Burtis, 1 Hopkins 557 (N.Y. 1825); Chapman v. Chapman, 269 Mo. 663, 666-70, 192 S.W. 448, 449-50 (1917); Stokes v. Stokes, 1 Mo. 320 (1823); Weinstein, *Proposed Changes in the Law of Divorce*, 27 Mo. L. REV. 307, 317 (1962).

[11] New York is the prime example. While refusing to accept the ecclesiastical body of law, it provided in its first statute that absolute divorce could only be obtained for the ultimate marital offense, adultery. *See* PAULSEN, *supra* note 3, at 418.

[12] *See* 3 T. HOWARD, HISTORY OF MATRIMONIAL INSTITUTIONS 31-50, 96-101 (1904); CLARK, *supra* note 4, at 284; 1 W. NELSON, DIVORCE AND ANNULMENT 2-5, (1945).

[13] One exception was South Carolina where the courts were given no jurisdiction to grant absolute divorce until 1949 when a constitutional amendment was ratified which permitted absolute divorce on four grounds; adultery, desertion, physical cruelty or habitual drunkeness. Brown v. Brown, 215 S.C. 502, 505-07, 56 S.E.2d 330, 332-33 (1949). *See* 2 C. VERNIER, AMERICAN FAMILY LAWS 3 (Table 27) (1932) [hereinafter cited as VERNIER].

division, child support and child custody orders. These collateral orders were also made subject to considerations of fault.

B. The Fault Divorce System in General

While this brief history indicates that the grounds for divorce and the defenses to a divorce action will vary from state to state, one can look at one or two fault jurisdictions and make some fairly safe generalizations as to the fault system across the United States.[14] The authors have chosen to generalize from the experience of Missouri[15] and to make footnote comparisons to the District of Columbia because of their greater familiarity with the laws of these two jurisdictions.

Residence of the plaintiff (the equivalent of domicile) is required to confer divorce jurisdiction upon a Missouri Circuit Court (the court of general jurisdiction).[16] While the period of residence required can vary widely,[17] Missouri's normal one-year period is typical.[18] In addition to alleging compliance with the jurisdictional requirement, the plaintiff

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[14] This conclusion, we think, is supported by the tables painstakingly constructed by Professor Chester G. Vernier and included in his monumental work, *American Family Laws*, published in 1932. See especially Tables 27 through 39. VERNIER, *supra* note 13, at 3-91.

[15] Professor Zuckman is a co-reviser of the Missouri Bar's continuing legal education handbook, *Missouri Family Law* (rev. ed. 1970), and has taught family law at Saint Louis University School of Law and the Columbus School of Law of the Catholic University of America.

[16] Mo. Rev. Stat. § 452.050 (1959); Grant v. Grant, 324 S.W.2d 382 (Mo. 1959); Missouri Family Law 199-200 (rev. ed. 1970). *Compare* D.C. Code Ann. § 16-902 (1967). Residence is an almost universal requirement in the American jurisdictions. *See* VERNIER, *supra* note 13, at 108-12. In fact, there is considerable doubt whether a divorce decree unsupported by domicile of one or the other of the parties is constitutionally permissible. *See* Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), *judgment vacated*, 345 U.S. 610 (1954); Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236 (1948). *But cf.* Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954); Wallace v. Wallace, 62 N.M. 414, 320 P.2d 1020 (1958).

[17] *Compare, e.g.*, with Wisconsin, 2 years, Wisc. Stat. Ann. § 247.06 (Supp. 1972); North Carolina, 6 months, N.C. Gen. Stat. § 50-8 (Supp. 1971); Nevada, 6 weeks, Nev. Rev. Stat. § 125.020(e) (1969).

[18] Mo. Rev. Stat. § 452.050 (1959). *See* VERNIER, *supra* note 13, at 108-12. The District of Columbia also required a one-year wait but the residence for the period may be that of the plaintiff or respondent. D.C. Code Ann. § 16-902 (1967).

in his or her petition must include allegations of one or more of eleven fault grounds for divorce and his or her own innocence of marital fault.[19] The grounds recognized by Missouri include those of adultery, desertion and cruelty. The cruelty alleged must be such as to endanger the life of the innocent spouse. But Missouri does recognize less severe mental cruelty over a period of time in the form of "general indignities," the ground most often chosen by divorcing spouses.[20]

Some of the minor divorce grounds recognized are more appropriately ones for annulment since they represent impediments to the initial contracting of a valid marriage. These are: impotency at the time of marriage, the existence of a prior undissolved marriage of one of the spouses, conviction of a felony without the knowledge of the other spouse and the wife's pregnancy by another man at the time of marriage without the husband's knowledge. This mixing of the concepts of divorce and annulment by the legislature is quite common.[21]

Having made the required allegations, the spouse seeking the divorce bears the burden of proving the defendant spouse's guilt of marital fault and his or her own freedom from marital offense.[22] The defendant spouse may deny that any ground for divorce exists or that the complaining spouse

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[19] *See* MO. REV. STAT. § 452.010 (1959); Aschemeyer, *A Survey of Some Aspects of Missouri Divorce Law*, 27 MO. L. REV. 333, 334-44, 351 (1962); R. DAWSON, MISSOURI FAMILY LAW 205-06 (rev. ed. 1970).

[20] The indignities complained of must involve a continuous course of conduct connoting settled hate, manifest alienation and estrangement and consisting of unmerited contemptuous conduct, incivility or injury accompanied with insult and amounting to a species of mental cruelty. Politte v. Politte, 230 S.W.2d 142 (Mo. 1950); Hoffman v. Hoffman, 224 S.W.2d 554 (Mo. 1949). *See* MISSOURI FAMILY LAW, *supra* note 19, at 205, for examples of what do and do not constitute general indignities. *Compare* D.C. CODE ANN. § 16-904 (1967) which makes cruelty a ground only for limited divorce in the District of Columbia. Purely mental suffering is not enough to obtain even limited divorce in the District of Columbia. The complaining spouse must also show that the cruelty in whatever form resulted in injury to his or her health. *See* Kimmell v. Kimmell, 171 F.2d 340 (D.C. Cir. 1949); Ogden v. Ogden, 17 App. D.C. 104 (1900).

[21] *See* VERNIER, *supra* note 13, at 3-4, 38-48, Tables 27, 32, 33.

[22] *See, e.g.*, J. v. K., 419 S.W.2d 461 (Mo. Ct. App. 1967); L. v. N., 326 S.W.2d 751 (Mo. Ct. App. 1959); Pointer v. Pointer, 251 S.W.2d 334 (Mo. Ct. App. 1952).

is free from marital fault and may produce evidence to support such denials. The defendant may also allege certain affirmative defenses including condonation and recrimination. The defendant has the burden of proving condonation but not recrimination since the complaining spouse in Missouri has the burden of establishing his or her own innocence of having created grounds for divorce. In most jurisdictions this burden is not imposed on the plaintiff and the defendant must plead and prove that the plaintiff has committed acts creating a good defense to the divorce.[23]

The existence of these two defenses in Missouri and in a large number of other jurisdictions brings into sharp relief the pervasiveness of fault in the divorce process.[24] Condonation is the defense of the plaintiff's knowing forgiveness of the defendant's marital offense and his restoration to full marital rights on the condition that the same and other offenses will not occur in the future.[25] Recrimination embodies the concept of fault and punishment. As the Missouri courts have so succinctly put it, "If both parties have a right to divorce, neither party has."[26] Thus, the parties to a divorce

[23] Missouri also recognizes the well-known defenses of connivance and collusion. *See* MO. REV. STAT. § 452.030; Aschemeyer, *A Survey of Some Aspects of Missouri Divorce Law*, 27 MO. L. REV. 344-46 (1962). Connivance involves the corrupt consent of the complaining spouse to the other's marital misconduct, normally adultery. Collusion involves the corrupt conspiracy between the plaintiff and defendant to obtain a divorce decree for the plaintiff when he or she would not otherwise be entitled to it. *See* Rapp v. Rapp, 145 S.W. 114, 115 (Mo. Ct. App. 1912); CLARK, *supra* note 4, at 359-60. Connivance is rarely found in divorce actions and since collusion must, by definition, involve the defendant, it is rarely pleaded by him regardless of the frequency of its occurrence.

[24] The defenses of condonation, collusion and connivance are recognized in the District of Columbia by common law decision. *See* Geer and Geer, 134 A.2d 110 (D.C. Mun. App. 1957); Davis v. Davis, 191 A.2d 138 (D.C. Mun. App. 1963); Bateman v. Bateman, 42 App. D.C. 230 (1914). As a result of legislation in 1935, recrimination is no longer recognized as a defense to a divorce suit in the District of Columbia. 49 STAT. 539; Vanderhuff v. Vanderhuff, 144 F.2d 509 (D.C. Cir. 1944). Recrimination remains relevant, however, in determining which spouse is entitled to the divorce and whether alimony should be allowed. *See* Dausel v. Dausel, 195 F.2d 774 (D.C. Cir. 1952); Vanderhuff v. Vanderhuff, 144 F.2d 509 (D.C. Cir. 1944).

[25] *See* Weber v. Weber, 189 S.W. 577, 578 (Mo. Ct. App. 1916); O'Neil v. O'Neil, 264 S.W. 61 (Mo. Ct. App. 1924); CLARK, *supra* note 4, at 365-70; Madden, *supra* note 6, at 300-05.

[26] Hoffman v. Hoffman, 43 Mo. 547, 549 (1869); Langshaw v. Langshaw, 331 S.W.2d 15, 18 (Mo. Ct. App. 1960).

action may not free themselves from an obviously dead marriage if each can show that the other "sinned" against the marital relationship. The law leaves them in perpetual human bondage, free only to enter into meretricious relationships with third persons.[27]

The oppression of the fault system is magnified at trial by the adversary system. No one connected with the court proceedings is spared. In a contested case, the emotional trauma experienced by the parties as a result of the breakdown of the marriage is heightened by the armed camp atmosphere. Total warfare is required because the stakes are high. The one labeled "at fault" will be stigmatized and may lose rights in the marital property and custodial rights to the children of the marriage.[28] In an effort to "win," the parties are forced to demean themselves, their counsel and the court by parading in public the sordid aspects of their relationship and, too often, by engaging in personal vilification and even perjury. Friends and neighbors of the warring parties may be brought into the sordid little drama to provide "corroboration" of the defendant's or cross-defendant's wrongdoing and testimony of the plaintiff's good character. In Missouri, for instance, a divorce is rarely granted on the uncorroborated evidence of one of the parties.[29]

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[27] Despite attacks on this defense by legal scholars, *see, e.g.*, CLARK, *supra* note 4, at 373-74, and limitation of the defense by common law decision in some jurisdictions, *see, e.g.*, DeBurgh v. DeBurgh, 39 Cal. 2d 858, 250 P.2d 598 (1952) (trial courts given discretion whether to apply the bar); Hendricks v. Hendricks, 123 Utah 178, 257 P.2d 366 (1953) (divorce given to party least at fault—"comparative rectitude"); Hathaway v. Hathaway, 23 Wash. 2d 237, 160 P.2d 632 (1945). The Missouri courts continue to uphold the recriminatory defense without modification. *See* Hugeback v. Hugeback, 444 S.W.2d 894 (Mo. Ct. App. 1964).

[28] *See* Mo. REV. STAT. § 453.090 (1959). In referring to this statute a distinguished St. Louis County Juvenile Court Judge has said, "The fault concept is carried out in penal form in a statute which requires the forfeiture by the 'guilty party' of all rights and claims under the marriage. The financial status of the spouses, their needs in relation to their ages and economic and social status, their contribution to the family estate, their health, earning ability or capacity and all other valid considerations in determining the right to alimony are totally elminated if the party in want is, under the rule of decisions, determined to be the 'guilty party.'" Weinstein, *Proposed Changes In the Law of Divorce*, 27 Mo. L. REV. 307, 328 (1962). *See also, e.g.*, CAL. CIV. CODE § 139 (*repealed* 1954); CAL. CIV. CODE § 4509 (West 1971). *Compare* D.C. CODE ANN. § 16-913 (1967).

[29] *See, e.g.*, Haushalter v. Haushalter, 197 S.W.2d 703 (Mo. Ct. App. 1946).

One could be grateful that less than ten percent of all divorce actions in this country are contested[30] if it were not for the fact that the fault system seems to work even more oppressively in the uncontested case. There may be less personal vilification of the defendant but the increase in the amount of perjury and fraud more than offsets the decrease in name-calling and scandalmongering.[31] Inconsistent with the statutory mandate that an enumerated fault ground exist before the state will grant a divorce, the couple who wants to bury their dead marriage will agree to seek legal dissolution, cast about for the ground least offensive to the defendant (normally the husband) and then fabricate a case, complete with faithful character witnesses. In Missouri the ground usually chosen is "general indignities." Elsewhere it may be "mental cruelty."[32] Whatever this least offensive ground is called, the scenario will normally follow this line: after the collusive agreement is entered into, the wife will find a lawyer and tell him that her husband has been "cold and indifferent" toward her or has treated her badly. The attorney, knowing that no real ground for divorce exists, or that a real ground is too sensitive to use will ask about specific acts of the husband which might constitute general indignities or mental cruelty.[33] The power of suggestion is great

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Thirty-five states required corroboration of divorce grounds as of 1970. *See* NATIONAL LEGAL AID AND DEFENDER CHART ON DIVORCE ANNULMENT AND SEPARATION IN THE UNITED STATES (1971).

[30] *See* M. PLOSCOWE, D. FREED & H. FOSTER, FAMILY LAW: CASES AND MATERIALS 313, 344 (2d ed. 1972) [hereinafter cited as PLOSCOWE]; H. FOSTER, JR., COMMON LAW DIVORCES 46, 55-56 (1961); Walker, *Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws*, 10 J. FAM. L. 267, 283 (1971).

[31] Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633, 634 (1956); Walker, *Beyond Fault: An Examination of Patterns of Behavior In Response to Present Divorce Laws*, 10 J. FAM. L. 267, 285 (1971).

[32] "[A]nyone who takes a realistic look at the operation of the existing divorce law in states like Colorado must concede that it permits divorce by consent in all but a minute proportion of the cases, but that it does so by means of the transparent fiction that cruelty has occurred." Clark, *Divorce Policy and Divorce Reform*, 42 U. COLO. L. REV. 403, 407 (1971). Prof. Clark cites the fact that before recent legislative reform 95 per cent of all California divorces were granted on the ground of cruelty.

[33] Professor T. Walker discusses the ethical strains placed upon lawyers in uncontested divorce cases because of the fault system and their varying behavioral reactions in his article, *Beyond Fault: An Examination of Patterns of Behavior In*

in this situation and the lawyer soon has sufficient basis for framing a petition. The wife's lawyer will work out with the husband's lawyer the necessary property settlement and alimony and custody agreements to be ratified by the court. So long as these arrangements are reasonable on their face, the attorneys involved in the case have little fear that the judge will raise roadblocks to the parties' divorce scheme. While in theory, the judge is supposed to protect the interest of the state in safeguarding the integrity of its fault divorce system, he is a party (willing or not) to the subterfuge which unfolds in his courtroom. He has heard the dialogue before.[34] The wife testifies that she has been a resident of the jurisdiction for the requisite period of time. She testifies that she has been a good and faithful wife to the defendant. She then testifies to the mental suffering to which she has been subjected by, for instance, the husband's continual ridicule of her in front of family, friends and neighbors. At this point one or more of these friends and neighbors will step forward to testify to the good character of the plaintiff and corroborate the plaintiff's evidence of indignities or cruelty. The defendant husband, of course, does not appear to defend himself.

The judge will then ask if the parties have agreed on property division, alimony, child support and custody of the children, if any. The wife's lawyer will present the agreements to the court for quick perusal. The judge may ask a few questions to satisfy himself as to the fairness of the agreements. If he is so satisfied, he will then indicate that a decree will be granted.[35]

Response to Present Divorce Laws, supra note 30, at 279-91. Three distinct behavioral reactions are noted: (1) refusal to take the case and referral of the prospective client to another attorney, usually in a smaller or less-established firm; (2) acceptance of the case but careful structuring of the legal services provided so that no direct participation in the subterfuge could be asserted; (3) acceptance of the case with full knowledge of the collusion of the husband and wife. More than 40 per cent of the lawyers interviewed in the study relied upon by Professor Walker manifested the last behavioral reaction. *Id.* at 290.

[34] *See* CLARK, *supra* note 4, at 362; Kay, *A Family Court: The California Proposal*, 56 CALIF. L. REV. 1205, 1219 (1968); Walker, *supra* note 30, at 284-86.

[35] In the District of Columbia, the grounds for divorce are enacted by Congress

The whole stylized process may take less than ten minutes. But in those ten minutes the state's fault system has once again been subverted and all the persons involved diminished. The lawyers, though serving their clients' best interests, have bent or broken the ethical canons of their profession.[36] The judge, though serving the real needs of so-

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rather than by a local governing body. Perhaps the traditionally paternalistic attitude of Congress toward the District explains the severely limited grounds for absolute divorce. The present grounds for divorce *a vinculo* are adultery, desertion, conviction of a felony (with a prison term of at least two years) and voluntary separation for one year. A limited divorce may be granted on the ground of physical cruelty. D.C. CODE ANN. § 16-904 (1967). As a result of the lack of an adequate number of grounds, the same process of suborning perjury which results in the recitals of cruelty in other jurisdictions often occurs in the District with respect to the date of separation of the parties. At trial, since even an uncontested divorce based on voluntary separation must be corroborated, memories of the plaintiff and the supporting witness become strangely dim, dates become hazy and periods of actual separation of less than one year are mysteriously enlarged to exactly one year. That the sham involves a period of separation rather than "cruelty" makes it no less demeaning to the parties.

[36] The entire process of divorce severely strains present concepts of professional ethics. Several important questions often arise in divorce litigation which rarely if ever occur in other areas of the law. One of the most important issues revolves around the question of whether a lawyer has a duty to attempt conciliation of a couple even when adequate grounds for divorce exist. Since professional counselors are virtually unanimous in agreeing that successful marital counseling must involve both parties, may a lawyer who takes his duty to seek reconciliation seriously explore the possibilities of getting back together with both spouses? The New Jersey Supreme Court has answered this question in the negative, holding that a lawyer may not counsel both parties and then seek to represent one of the spouses if the reconciliation fails. *In re* Braun, 49 N.J. 16, 227 A.2d 506 (1967). *But cf.* Peeples, *Lawyers and Divorce*, 19 TENN. L. REV. 930, 936 (1947) (asserts that lawyers have a "duty" to seek the reconciliation of the parties).

Under the fault statutes, collusion by both parties is almost always a defense to the divorce action. May an attorney properly participate in a collusive divorce where grounds are manufactured by the consent of both spouses? Such collusion is quite a common practice in most jurisdictions, but is probably most frequently resorted to in those areas where grounds for divorce are limited. In New York, before the recent statutory changes, scenes of adultery were often fabricated. In the District of Columbia, the dates of separation are often falsified to permit divorce under the one-year separation ground. The ethical conflict is quite clear. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(a)(4) (a lawyer may not "knowingly use perjured testimony or false evidence."); Drinker, *Problems of Professional Ethics in Matrimonial Litigation*, 66 HARV. L. REV. 443, 448 (1953).

Present divorce litigation often causes deliberate and knowing violations of a lawyer's ethical responsibilities. Subornation of perjury is probably the most com-

ciety, has failed to defend laws which he has sworn to uphold. The parties, though seeking only a decent way to end an unfortunate relationship, have imposed on the court, committed perjury and perhaps suborned perjury.

The entire fault divorce system creates strains on our legal system. But perhaps more important, fault divorce fails to reflect sociological and psychological realities.

C. Marital Discord and Divorce: The Psychological and Sociological Factors

> It is common knowledge today that the social institution of marriage is not working as we should like it to. To be sure, the institution of marriage is here to stay, but it is not the same anymore. It is rickety; its joints creak. It threatens to crack wide open. Although marriage may be ordained in heaven, it is surely falling apart on earth, at least in our part of the world.[37]

Simply by virtue of his personal observation, it must be quite clear to a layman that the current divorce laws are dysfunctional. That these laws are not compatible with modern marital behavior and expectations is even more apparent to the social scientists in the field.

Perhaps the threshold question in this area is not the effect and operation of the divorce laws, but what, from a sociological and pscyological perspective, is American marriage. One writer examining the contemporary phenomenon of the widespread growth of marriage counseling services noted:

> The most curious thing about marriage, I think, is not that it fails so often but that it *happens* so often, considering that it and we are, in many ways, so grossly incompatible. We marry; we

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mon violation. But even under the new no-fault statutes, an attempt at reconciliation under the present ethical standards may bar the attorney from later representing the spouse. The dilemma forces a choice between the obvious social benefits of a reconciliation and the economic benefit to the lawyer (who may represent a single party and collect a fee if, and only if, he has not attempted joint counseling). The ethical problems peculiar to divorce litigation have not been given the attention they are properly due under either the old fault or the new non-fault statutes.

[37] Ackerman, *The Family Approach to Marital Disorders*, in Psychotherapies of Marital Disharmony 153 (B. Green ed. 1965).

> fail—something fails, at any rate; we remarry; we hope. What for?[38]

We cannot hope to answer this "What for?" but we can examine the institution in empirical terms. Undoubtedly, mate selection in the United States contains a strong, perhaps theoretically preeminent "love" factor; and this same factor does not exist in some other cultures. Additionally, Americans labor strenuously under some grossly incorrect and debilitating stereotypes, such as the notion, commonly accepted, that "opposites attract." The "opposites" theory is debilitating because people sometimes tend to base what would otherwise be more rational decisions on the concept. The theory is misleading because social scientists have shown us that the reverse is normally true. Similarities attract; opposites do not.

1. Mate Selection

The social sciences have developed at least two generally accepted theories with respect to mate selection. The first is commonly called the principle of homogamy. Its premise is the reverse of the "attraction of opposites" notion; and it holds, in part, that spouses are selected more for their similarities than for their differences. The group of couples studied, with all measurements being taken during engagement, had a similarity correlation ranging from -.02 to +.58 with median correlation for all couples studied of +.30.[39]

Given the general acceptance of this proposition—that persons of similar religion, economic status and personality

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[38] Lear, *Save the Spouses Rather than the Marriage*, N.Y. Times, Aug. 13, 1972, (Magazine), at 12.

[39] Kelly, *Consistency of the Adult Personality*, 10 AM. PSYCHOLOGIST 659, 680 (1955). While the expression of findings in terms of correlation factors is common in the social sciences, it is uncommon in legal research. To understand the concept generally one should think of the correlation spectrum as being a range of positive and negative numbers from -1.0 through 0 to +1.0. "0" indicates a purely random distribution, + 1.0 indicates a perfect positive correlation (for the purposes of this study, it would mean that both husband and wife each exhibited all the same characteristics such as religion, temperament, educational background, etc.). A correlation of - 1.0 indicates that a given couple had no characteristics in common. A correlation of +.30 in this area is generally regarded as significant.

tend to marry each other, the theory still does not explain the more specialized choices within the larger categories. Moreover, recent studies have tried to account not only for the dependent variables such as class, religion and education, but also for the independent variables which inevitably intrude but which are not always accounted for. In a 1963 study of engaged coeds at Duke University, the women were measured in terms of their geographic and social mobility and the occupations of their fathers, along with their own religions, economic and educational status.[40] In summarizing the results, Professor Alan C. Kerckhoff suggested that the principle of homogamy, while partially supported by the study, is not specific enough in terms of its incorporation of specific independent considerations. The conclusion was quite equivocal, indicating that further research is necessary: "In any future investigation we need particularly to differentiate clearly between the process of mate selection and the outcome of that process. . . ."[41]

A secondary hypothesis was thought necessary to aid in explaining the factors in the choice of mate within the larger areas of similarities which the principle of homogamy has identified. As noted above, the homogamy principle is fine for explaining a spouse's broad choice, but of no help whatsoever in determining how one narrows preferences, assuming a homogamous group. Professor R. F. Winch, in a series of articles, has devised an idea (more accurately a hypothesis) which explains selection of mate in terms of one's own needs as well as the spouse's attributes. As Professor Winch explains it:

> The theory of complementary needs offers the following hypothesis: in mate selection each individual seeks within his or her field of eligibles for that person who gives the greatest promise of providing him or her with maximum need gratification.[42]

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[40] Kerckhoff, *Patterns of Homogamy and the Field of Eligibles*, 42 SOCIAL FORCES 289 (1964).

[41] *Id.* at 297.

[42] Winch, *Another Look at the Theory of Complementary Needs in Mate Selection*, 29 J. MARRIAGE & FAM. 756 (1967) [hereinafter cited as Winch]. In a series of three articles Professor Winch outlined the results of an intensive study of

"Needs," in this sense, is to be regarded as a psychological term which expresses the desire of any living organism to seek gratification or fulfillment of particular wants. A need may be as simple as hunger or as complex as a desire for superior academic achievement. In the matter of spousal selection, the needs sought to be gratified are normally of a higher level than the elementary requirements of existence, for example, hostility, dependence, gregariousness.[43] Failure of the parties to a marriage to satisfy each others' needs can lead to marital difficulties.

Professor Winch's study tends to confirm two related hypotheses: (1) that often the same need is gratified in both husband and wife but at different levels of intensity (if one spouse is dominant, the other's dominance need will be low); and (2) that need gratification between spouses tends to be complementary (if one spouse is highly nurturant, tending to give rather than to receive, the other spouse will be high in a dependency need, tending to receive rather than give).[44]

The concept of complementarity leads to another important question, with both sociological and psychological implications. The initial idea of complementary needs began as a purely psychological construct; the needs were needs of personality. Professor Winch has since suggested that a new sociological dimension should be added to increase the ability of the theory to predict. He urges the incorporation of role theory in the principle of complementarity.

The idea of role is founded on the premise that an individual in any society is assigned a role both by his own per-

25 married couples, one or both of whom were undergraduate students. The testing procedures involved two interviews and a shortened version of the Thematic Apperception Test (the psychological "projective" test in which the subject is shown a provocative picture and asked to make up a story about it). The subjects were assigned ratings which were then extrapolated to the study's findings.

[43] *Id.* at 758.

[44] Psychiatrists have expressed virtually the same idea in psychiatric terms: that the neuroses of husband and wife complement each other and indicate that there is a dovetailing of conflict and defensive patterns. *See* Mittleman, *Complementary Neurotic Reactions in Intimate Relationships*, 13 PSYCHOANALYTIC Q. 479 (1944); Oberndorf, *Psychoanalysis of Married Couples*, 25 PSYCHOANALYTIC REV. 453 (1938).

ceptions and by social pressures. For instance, up to a few years ago, the socially acceptable role for a woman was generally that of a submissive, dutiful wife—a good homemaker. Cultural and social pressures forced most women to conform to this model. Conversely, a man's role was dominant and aggressive. The sociological viewpoint is that these social or interpersonal perceptions and reactions can, in and of themselves, shape behavior. As the distinction between role and personality has been explained:

> Role directs our attention to behaviors and attitudes that are appropriate to a situation, irrespective of the actor, whereas personality directs our attention to behavior and attitudes that are characteristic of the actor, irrespective of the situation.[45]

As the role theory has been incorporated into the hypothesis of complementarity, researchers have gone beyond the personality approach (which postulates that it makes no difference which spouse has what need as long as one is high and the other low). The newer approach favors asking the additional question of whether the need is affected by the specific role of man and woman. Professor Winch has explained the significance of this additional dimension as:

> where personality and role are mutually consistent, this . . . should not generate intrapsychic conflict, which the pair of actors would find that their relationhip is given normative support [*sic*]. On the other hand, where personality is in conflict with role, each actor is put in a situation to suffer intrapsychic conflict (unless each accepts a self-definition as a deviant) and criticism on normative grounds.[46]

By way of illustration, if a man (husband) is high on dominance and a woman (wife) is high on submissiveness by virtue of their personalities, there should be little conflict since these are also the roles society assigns to men and women

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[45] Winch, *supra* note 42, at 760.

[46] *Id.* at 761. It should be noted that both the role theory and the hypothesis of complementarity say nothing about mate selection processes of persons with mental disorders. Neurotic persons quite often engage in neurotic mate selection and thereby doom their chances of a successful marriage almost from the start. *See* Eidelberg, *Neurotic Choice of Mate*, in NEUROTIC INTERACTION IN MARRIAGE 63 (5th ed. Eisenstein 1968).

generally and to spouses. However, if a wife is high on dominance and a husband high on submissiveness, their personality traits conflict with societal roles and thus contain at least a potential for conflict.

2. *Marital Existence*

While mate selection is often fun, at least from the adolescent "dating" viewpoint, the status of being married is quite a different matter. It involves, as any married couple will concede, a considerable adjustment by both parties whether or not their initial selection of mate is correct. At least one study has indicated that most of the adjusting is done by the wife.[47]

Marriage is generally viewed from a sociological perspective as a matter of role, and marital behavior patterns are seen in terms of role theory. Role is essentially a matter of one's personal behavior regulated by a number of cultural norms, and one's perspective as to his "place" within these norms. Therefore, one would conventionally expect a marine drill-sergeant to act tough or an infant's nurse to be gentle. It is generally conceded that even when the individual's previous behavior does not match his role, social and cultural pressures may help him (or force him, depending on one's own views) to adapt. As one researcher has discovered:

> [T]he central problem of roles stems from the condition that the new husband or wife are usually not experienced in these new roles and the definition of these roles have often not been worked out between them but have been derived separately from the other social systems to which they were oriented before marriage.[48]

One's own role in marriage is additionally complicated by one's role expectations. Not only does a spouse have some idea as to his own marital behavior; he has additional preconceived notions about his spouse's role. Thus we have a

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[47] E. BURGESS, ENGAGEMENT AND MARRIAGE 614 (1953). *See also* BERNARD, *supra* note 1.

[48] Dyer, *Analyzing Marital Adjustment Using Role Theory*, 24 MARRIAGE & FAMILY LIVING 373 (1962).

perfect setting for conflict if the spouses cannot adjust: (1) with respect to one's role and (2) with respect to one's expectations for a spouse.

Role theory, of course, does not completely explain marital conflict; and role adjustment, in and of itself, may not resolve certain marital problems. Role theory does not delve sufficiently into specific psychological problems such as sexual conflicts and disorders of the personality—factors which may also disrupt marriage. Professor R. Stagner has pointed out that:

> the marital role can be played by an individual only within the limits defined by his already-crystallized personality. If this personality lacks integration (incorporates contradictory expectations and values) his enactment of the role is going to be erratic and disturbing . . . .[49]

The marital relationship is one of such intensity that the intensity itself perhaps breeds conflict. It is one of the few relationships in adult society voluntarily entered into in which the two participants agree to spend large amounts of time together, to establish themselves as a single economic unit and to engage in a sexual relationship.

The general professional attitude toward the role which sex, and concomitantly sexual difficulties, play in the marriage is summarized by the following:

> Clinical experience indicates that a good sex life does not insure a happy marriage, nor do sexual difficulties necessarily cause marital breakdown . . . . There is no question, however, that happy marriages are marked by a greater degree of sexual satis-

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[49] R. STAGNER, PSYCHOLOGY OF PERSONALITY 436 (3d ed. 1965). There is at least some evidence that marital adjustment can be predicted, although in a realistic sense it is questionable whether courting couples would seek to research these factors prior to marriage (this is perhaps a central defect of much psychological research; it has only after-the-fact significance). Professor Terman has isolated several factors which he claims are highly predictive of marital adjustment including: (1) superior happiness of children, (2) childhood happiness, (3) lack of conflict with mother, (4) home discipline that was firm not harsh, (5) strong attachment to mother, (6) strong attachment to father, etc. L. TERMAN, PSYCHOLOGICAL FACTORS IN MARITAL HAPPINESS 372 (1938).

[50] Eisenstein, *Sexual Problems in Marriage*, in NEUROTIC INTERACTION IN

faction, while unhappy marriages have a much higher incidence of sexual conflicts.[50]

Furthermore, generalized characteristics of unhappy couples can often be isolated. The following is a partial list of some of these factors in nontechnical language:

1. The couple is unfriendly toward each other and would be likely to be so whether they were married to each other or not;

2. They are basically suspicious of each other, distrust each other's motives and disrespect each other's judgment;

3. The couple's basic roles in life as man and woman are confused, refused or neglected;

4. The couple suffers from a blackout of communication;

5. The couple has only their desparation in common and their intentions and behavior are geared toward neutralizing and isolating the marriage from the rest of their lives.[51]

3. *The Concept of Divorce*

The sociological and psychological view of divorce is strikingly different from the ecclesiastical or legal concept. It is true that many marital difficulties can be overcome through the individual effort of the spouses as, for example, when one spouse consciously alters either his role or his role expectations for the sake of saving the marriage. Occasionally, spouses resort to third-party conflict resolution (the various types of marriage counselors).[52] Nonetheless there

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MARRIAGE 101 (5th ed. Eisenstein 1968). For example, Eisenstein says:

> Sexual frigidity very commonly results in marital infidelity—the frigid wife searches for sexual satisfaction, the husband reacts to his frigid and unresponsive wife. Legally, infidelity is grounds for divorce. Psychiatrically, however, it is generally the acting out of neurotic conflict. *Id.* at 107.

[51] Oates, *Paranoid Interaction in Marriage*, 4 J. FAM. L. 200, 203-04 (1964). *See also* Jacobson, *Conflict of Attitudes Toward the Roles of Husband and Wife in Marriage*, 17 AM. SOCIOLOGICAL REV. 146 (1952).

[52] The Los Angeles Conciliation Court, one of the largest and best staffed counseling services in the country, reports that a very large proportion of its cases (large, in the sense of what one would expect) are voluntary petitions for counseling

are some marriages which, contrary to *Good Housekeeping's* assertions, cannot be saved. Professor W. Goode views divorce as a sort of safety valve "for the inevitable tensions of married life."[53] He feels, quite simply, that there are relationships which cannot easily be altered to make the marriage smoother. Divorce provides a quick and unequivocal termination of such marriages.

4. *Divorce: Its Causes*

Goode advises us that any search for the "cause" or "causes" of divorce is doomed from its inception. He feels such a question is a "common sense one, and like most common sense questions it is not useful for scientific research."[54] It is possible to outline factors inherent in any marriage which tend to precede divorce, of course; but as we have seen these factors have little practical application since mate selection is not necessarily a rational process.[55]

In Goode's study, he was often troubled by the fact that our culture tends to rely on the traditional legal grounds for divorce as a complete and full explanation of why a given marriage breaks up. Thus, if a wife receives a divorce on the grounds of adultery, the conventional wisdom accepts the showing of the adultery as the "cause" of the divorce, regardless of whether the adultery was an isolated incident, a series of affairs or a long-standing triangular relationship.

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sought by couples who have not filed any divorce pleadings. The court indicates that in 1971, 37 percent of the petitions for counseling filed (1,754 of 4,688 total) came from couples between whom no court action was pending.

[53] Goode, *A Sociological Perspective on Marital Dissolution,* SOCIOLOGY OF THE FAMILY 301, 303 (1971). *See also* Lear, *Save the Spouses Rather than the Marriage,* N.Y. Times, Aug. 13, 1972, (Magazine), at 12.

[54] W. GOODE, WOMEN IN DIVORCE 113 (1969) [hereinafter cited as GOODE].

[55] Goode has summarized various characteristics which seem to indicate a sort of "divorce proneness." These factors include: (1) urban rather than rural background, (2) marriage at very young age, (3) short acquaintanceship before marriage, (4) short or no engagement, (5) marital unhappiness of parents, (6) mixed religious faith, (7) disapproval of kin and friends of marriage, etc. Perhaps not surprisingly, Goode also indicates that a propensity toward divorce is *inversely* related to the husband's income and social "rank" of his occupation, *i.e.*, the lower the husband's income and/or the lower his occupation status, the more likely he is to become divorced. Goode, *Family Disorganization,* in CONTEMPORARY SOCIAL PROBLEMS 417, 418, 425 (R. Morton & R. Nisbet eds. 1961).

It is often true, of course, that the incidents which provide legal grounds for divorce actually occurred; that is, they occurred in fact, and were not manufactured as the adultery scenes so common in the state of New York prior to their divorce reform in 1967.[56] Still, this can not completely explain the factors which lead to the breakup since many marriages have undergone similar experiences and remained intact.

Goode attempted to circumvent this problem by asking each divorced wife in the study what reasons she thought caused the breakup of her own marriage. The results were surprising. The most frequently assigned reason was nonsupport (a factor cited by a full third of the wives); second came authority conflicts (who dominates whom and to what extent); and far down the list was the notion of adultery (Goode uses the term "triangle" meaning a liaison between the husband and another woman whom the wife could specifically identify).[57] Perhaps the most surprising finding in the study is the lumping of sexual problems in the "miscellaneous" category coupled with Goode's assertion that "as every serious survey has shown, sexual problems do not account for any large proportion of the 'causes' for marital disruption. This was also the case for our own study."[58] Moreover, quite often each wife had a number of complaints to lodge against her husband, indicating that most marital breakdowns are the result of a multiplicity of factors rather than the result of a single unforgiven incident.

The answer to the question of what causes divorce is probably that there is no one answer. Each marriage is unique and has unique problems. No marriage founders for precisely the same reasons as any other marriage. We can isolate no single "cause" of divorce anymore than we can

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[56] For example, Professor Kephart found that when an accusation of alcoholism was made against a spouse, that accusation was quite often true. Kephart, *Drinking and Marital Disruption*, 15 Q.J. STUDIES ON ALCOHOL, 64, 65 (1954).

[57] GOODE, *supra* note 54, at 123.

[58] *Id.* at 118-19. It was also noted that "[a]lmost no wives claimed that the divorce was mainly their fault. . . . Even when the wife admitted that she had faults, she was not likely to admit that she was the major offender." *Id.* at 133.

attribute human behavior to a single, identifiable stimulus. Marriages between complex human beings break down for complicated reasons. Divorce laws in the United States will rest on a firmer base when all aspects of the divorce systems of all our states recognize this fact.

II. LEGISLATIVE REACTION TO MODERN DIVORCE THEORY

As we have just indicated, the social scientists have known for some time that the old ecclesiastical concepts of divorce are both outmoded and harmful. It is usually conceded that divorce is a necessary, if not generally favored institution. But scientific researchers do not normally vote in state legislatures, and there has been a considerable lag between the confirmation of the research findings and affirmative action by state legislatures.

When there has been legislative reaction, it has often been due to considerations apart from a genuine interest in either individual or public welfare.[59] Some legislatures have employed a cut-and-paste approach to the problems of marriage and divorce, merely adding easier grounds onto the more traditional grounds of adultery, desertion and physical cruelty.[60] Only a few states, eight at the time of this writing, have seen fit to completely alter their system of divorce by abolishing grounds and creating a statutory scheme whereby the courts may examine the whole marriage rather than isolated instances of misconduct. No state has seen fit to implement the considerably more drastic measures of registration marriage or divorce by consent.

It is virtually impossible to fully understand the actions of state legislatures on a national scale since few states have the means or the inclination to publish large scale legislative histories on enacted statutes. In most cases, underlying as-

[59] The state of Nevada has often been accused of manipulating its divorce laws deliberately to attract divorcing spouses from other states simply because the divorce industry is a significant part of the state's economy. *See generally* N. BLAKE, THE ROAD TO RENO (1962).

[60] For examples of this piecemeal approach to divorce reform *see* text accompanying notes 62 to 112 *infra*.

sumptions, investigations and findings of the legislatures are impossible to determine. Thus, any real understanding of the origins and motivation of the legislation is difficult to obtain.

But, with the exception of California whose legislature has provided the public with a comprehensive legislative history of its sweeping new Family Law Act,[61] and those few states which have adopted the new Uniform Marriage and Divorce Act, it seems fair to conclude from the face of existing divorce legislation that most state legislatures have paid little or no attention to the body of knowledge made availble through the empirical research of social scientists. This body of knowledge suggests that major change is necessary in the way we go about dissolving marriages. When the legislatures respond to this felt need with less than major revision of existing laws, their response must be categorized as too conservative.

A. Conservative Legislative Responses to the Need for Divorce Reform

In this century a number of state legislatures have responded to the felt need for some alternative to the unrealistic fault system. The conservative response has been to append certain non-fault grounds to the existing fault statutes, thereby purportedly permitting couples to dissolve dead

[61] In California, legislative activity in the area of divorce reform had been fermenting for years. In 1966, Governor Edmund G. Brown established the Governor's Commission on the Family, a multi-disciplinary venture which ultimately drafted the Family Court Act, a comprehensive statute which completely reformed family law in California and much of which became the Family Law Act of 1970.

Although everyone concerned, including Governor Brown, was willing to concede the inadequacy of the present divorce law, there was little agreement at the beginning on which approach to divorce law reform was preferable. The Governor's Commission finally concluded that no piecemeal attack on the problems of marital discord and family stability would suffice, that the necessity for lessening the friction and trauma of separation and divorce required a thorough revamping of the divorce laws. In his initial charge to the Commission, Governor Brown conceded that "the time has come to acknowledge that our present social and legal procedures for dealing with divorce are inadequate. . . ." California Governor's Commission on the Family, Report 1 (1966). For a lengthy description of the complete legislative history of the Family Law Act of 1970, *see* Krom, *California's Divorce Law Reform: An Historical Analysis*, 1 Pacific L.J. 156 (1970).

marriages without casting themselves in the roles of innocent and guilty parties.[62] Theoretically, the availability of such

[62] A typical example of this type of response is the recently amended Delaware divorce statute. Prior to its amendments in 1953, 1957 and 1968, this statute provided:

> The causes for divorce from the bonds of matrimony shall be—
>
> (1) Adultery;
>
> (2) Bigamy, at the suit of the innocent and injured party to the first marriage;
>
> (3) Conviction and sentence for crime by a competent court having jurisdiction, followed by a continuous imprisonment for at least two years, or in the case of indeterminate sentence, for at least one year, if, such conviction has been the result of trial in some one of the States of the United States, or in a Federal Court, or in some one of the territories, possession or courts subject to the jurisdiction of the United States, or in some foreign country granting a trial by jury, followed by an equally long term of imprisonment;
>
> (4) Extreme cruelty, on the part of either husband or wife, such as to endanger the life or health of the other party or to render cohabitation unsafe;
>
> (5) Willful desertion for two years;
>
> (6) Habitual drunkenness for two years;
>
> (7) At the suit of the wife if she was under the age of 16 years at the time of the marriage, unless such marriage is confirmed by her after arriving at such age;
>
> (8) At the suit of the husband if he was under the age of 18 at the time of the marriage, unless such marriage is confirmed by him after arriving at such age;
>
> (9) At the suit of the wife for congenital or guiltily after-acquired inability and failure to support his family, and of which congenital or acquired inability the wife neither had nor could have had any previous knowledge or warning at the time of the marriage;
>
> (10) When either the husband or wife had been adjudged feeble-minded, epileptic, or a chronic or recurrent insane person, and has been under the supervision or care of an institution for mental diseases, during a period of five years. In addition to complying with the requirements as to jurisdiction, residence, summons and service, as provided in this chapter, the petitioner shall request the Superior Court to appoint a commission of five persons to inquire into the respondent's mental and physical condition. One member of the commission shall be the State Psychiatrist, one, a licensed physician who has practiced medicine in the State for at least five years, one, an attorney-at-law who has practiced law in the State for at least five years, and the other two, laymen of good character who have been residents in the State for at least five years. If the report of the commission, so appointed, shall be that the person is feeble-minded, epileptic, or a chronic or recurrent insane person, and has been under the supervision or care of an institution for mental diseases for a period of five years, or more, then the Superior Court may grant

grounds should eliminate the need for public name calling and subornation or perjury. But as a practical matter many of the problems of the fault system have persisted, perhaps because these nonfault grounds for divorce have been tacked onto the fault system without sufficient legislative and judicial consideration of their unique nature.[63]

1. *Incompatibility*

In his classic work *American Family Laws*, Professor C. Vernier clearly perceived that the fault grounds listed in the various state statutes did not reflect the real reasons for marital failure.

> In fairness it may be freely admitted that it is incompatibility which induces married persons to do the specific things which the statutes name as causes for divorce. It may therefore be asked:

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a divorce *a vinculo matrimonii*, making, however, in its discretion such an order upon the petitioner for the support, care and treatment of the feeble-minded, epileptic, or chronic or recurrent insane person, as it deems fitting and proper. DEL. CODE ANN. tit. 13, § 1522 (1953). By amendments of 1957 and 1968, the following major non-fault grounds were added:

(11) When husband and wife have voluntarily lived separate and apart, without any cohabitation for 18 consecutive months prior to the filing of the divorce action and such separation is beyond any reasonable expectation of reconciliation.

(12) When husband and wife are incompatible in that their marriage is characterized by rift or discord produced by reciprocal conflict of personalities existing for 2 consecutive years prior to the filing of the divorce action, and which has destroyed their relationship as husband and wife and the reasonable possibility of reconciliation. DEL. CODE ANN. tit. 13 § 1522 (Cum. Supp. 1970).

[63] Again, the Delaware Code provides an example. Section 1531(a) of Title 13 provides that if a husband obtains a divorce "for the wife's aggression," the court will have discretion to restore to her "the whole or a part of her real estate, and also such share of her husband's personal property as seems reasonable." DEL. CODE ANN. tit. 13 § 1531(a) (1953). In Buonassisi v. Buonassisi, 267 A.2d 888 (Del. Super. 1970), the appellate court was forced to grapple with the concept of "aggression" by the wife in a husband's suit for divorce on the ostensible non-fault ground of incompatibility. In order to make possible the restoration to the wife of her real property, if any, and the transfer to her of a reasonable share of the husband's personal property, the court was forced to conclude that in reality the ground of incompatibility required *mutual fault*. Section 1531(a) was amended just prior to the court's decision in *Buonassisi* in such a way as to remove the fault-non-fault friction with Section 1522(12), DEL. CODE ANN. tit. 13, § 1531(a) (Cum. Supp. 1970).

> "Why not make incompatibility itself the main ground for divorce?"[64]

At the time Vernier wrote, only one American jurisdiction, the Virgin Island, recognized incompatibility of the marital partners as a legal basis for divorce.[65] Today, ten American states list incompatibility, or a variant thereof, as a ground for divorce.[66]

It is clear that the Danish law upon which the ground of incompatibility is patterned permitted divorce without a showing of fault.[67] And the generally accepted definition of incompatibility supports the conclusion that fault of either party ought to be irrelevant to an action for divorce on this ground.

> Incompatibility of temperament . . . does refer to conflicts in personalities and dispositions so deep as to be irreconcilable and to render it impossible for the parties to continue a normal marital relationship with each other. To use the ancient Danish phrase, the disharmony of the spouses in their common life must be so deep and intense as to be irremediable. *It is the legal recognition of the proposition* long established in the earlier Danish law of the Islands *that if the parties are so mismated that their marriage has in fact ended as the result of their hopeless disagreement and discord the courts should be empowered to terminate it as a matter of law (emphasis supplied).*[68]

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[64] VERNIER, *supra* note 13, at 65.

[65] *See* Burch v. Burch, 195 F.2d 799, 805 (3d Cir. 1952); V.I. CODE ANN. tit. 16 § 104(a)(8).

[66] ALA. CODE tit. 34 § 20(7) (Cum. Supp. 1971); ALAKSA STAT. § 09.55 110(5)(C) (1962) ("incompatibility of temperament"); DEL. CODE ANN. tit. 13, § 1522(12) (Cum. Supp. 1968); IDAHO CODE § 32-603(8) (Supp. 1972) ("irreconcilable differences"); NEV. REV. STAT. § 125.010(10) (1969) ("incompatibility"); N.H. REV. STAT. ANN. § 458.7-a (Supp. 1971); N.M. STAT. ANN. § 22-7-1(8) (1953) ("incomp."); N.D. CENT. CODE § 41-05-09.1 (Supp. 1971) ("irreconcilable differences"); OKLA. STAT. ANN. tit. 12, § 1271(7) (1961) ("incompatibility"); TEX. FAM. CODE ANN. § 3.01 (1969) (" . . . if the marriage has become insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation."). Only Delaware gives a statutory definition to incompatibility. *See* note 57 *supra*.

[67] *See* Burch v. Burch, 195 F.2d 799, 805 (3d Cir. 1952); Shearer v. Shearer, 356 F.2d 391, 399-402 (3d Cir. 1965) (dissenting opinion of Freedman, J.), *cert. denied*, 384 U.S. 940 (1966); CLARK, *supra* note 4, at 350.

[68] Burch v. Burch, 195 F.2d 799, 805 (3d Cir. 1952). *Accord*, Hughes v. Hughes, 363 P.2d 155, 157 (Okla. 1961); Stuart v. Stuart, 433 P.2d 951, 953 (Okla. 1967);

Under this definition, the only showing that should be required is that the marriage has irreparably broken down because the spouses are unable to live together with any degree of harmony.[69]

Perhaps because legislators, judges and lawyers have been conditioned to think in terms of fault when they deal with grounds for divorce, serious distortions have occurred in the operation of the incompatibility statutes, limiting their usefulness as a civilized means of dissolving dead marriages. By "civilized" we mean, of course, realistic and nonrecriminatory. There are at least four avenues by which fault considerations may be injected into incompatibility actions. First, legislatures may add the incompatibility ground without regard to the language of the existing basic fault statute or the collateral statutes dealing with certain of the incidents of divorce such as property division or alimony. The territorial legislature of the Virgin Islands, for instance, incorporating this uniquely Danish ground into American law, tacked it onto a statute providing for separation or divorce "at the instance of the injured party." Once one is forced to think in terms of "an injured party,"[70] it is also very easy to think of the defendant as being at fault and to accept the idea that only one of the spouses may be incompatible with the other.[71]

Chappell v. Chappell, 298 P.2d 768, (Okla. 1956); Annot., 58 A.L.R.2d 1218 (1958). *Compare* DEL. CODE ANN. § 13-1522(12) (Cum. Supp. 1968). One jurisdiction, however, has attempted to avoid defining "incompatibility" with specificity in order to insure that its courts will have flexibility in dealing with this ground. *See* Poteet v. Poteet, 45 N.M. 214, 114 P.2d 91 (1941). *See also* Chavez v. Chavez, 39 N.M. 480, 484, 50 P.2d 264, 267 (1935) (concurring opinion).

[69] This is often established by evidence that the parties have been unable to live together for a substantial period of time or, if they are still living under one roof, that their quarreling and noncooperation are incessant. CLARK; Comment, *Divorce: Incompatibility as a Ground For*, 7 OKLA. L. REV. 99, 101 (1954).

[70] V.I. CODE ANN. tit. 16, § 104(a) (1964).

[71] This rather absurd idea that incompatibility is not necessarily mutual was accepted and then rejected by the Oklahoma Supreme Court. *See* Chappell v. Chappell, 298 P.2d 768, 771 (Okla. 1956) (dictum), disapproved in Rakestraw v. Rakestraw, 345 P.2d 888, 890 (Okla. 1959). Fortunately, the United States Court of Appeals for the Third Circuit was not misled as to the issue of mutual incompatibility by the language of the Virgin Island statute. *See* Burch v. Burch, 195 F.2d 799, 808 (3d Cir. 1952). *See also* J.A.D. v. P.L.D., 259 A.2d 381 (Del. Super. 1969).

A second avenue for the entry of fault is judicial unwillingness to accept fully the implications of the non-fault nature of the incompatibility ground. A number of courts for instance recognize the epitome of fault—recrimination—as a discretionary bar to a divorce action based on incompatibility.[72] Whatever the plaintiff's offense, such a defense is illogical since fault is irrelevant to the question of whether the marriage is beyond redemption. If anything, proof of the plaintiff's transgressions ought to strengthen the ultimate conclusion that the parties are incompatible.

The height of judicial insensitivity to this non-fault ground has to be *Schlesinger v. Schlesinger*.[73] There, two oft-married middle-aged business executives were joined in matrimony. While the wife was in Europe seeking furniture for the new house they were planning to build, the husband became infatuated with a much younger woman. Upon the wife's return from Europe, she learned of her husband's new *amour* and his desire for a divorce. Bitter quarrels followed, marked by mutual violence, including biting, kicking and throwing of heavy objects. The husband, who was on the receiving end of the most of the thrown objects, brought an action for divorce on the ground of incompatibility. The wife cross-petitioned for a legal separation. At trial, despite her petition for separation, the wife testified that she wished to be reconciled. The husband testified to the contrary. The trial court found that a state of incompatibility of temperament existed between the parties which was so deep-seated that reconciliation was impossible and granted the divorce to the husband. The Third Circuit held that such finding was clearly erroneous and reversed the judgment. Ignoring the fact that by the time a husband and wife become adversaries in court their marriage is almost always dead, the court relied on the fact that the parties got along well before the

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For an example of the distortion which may be caused to proper construction of incompatibility legislation by fault language in a collateral statute, *see* Buonassisi v. Buonassisi, 267 A.2d 888 (Del. Super. 1970); note 61 *supra*.

[72] *See* Clark v. Clark, 54 N.M. 364, 225 P.2d 147 (1950); Burch v. Burch, 195 F.2d 700, 810 (3d Cir. 1952) (Virgin Islands).

[73] 399 F.2d 7 (3d Cir. 1968) (Virgin Islands).

wife's ill-fated trip to Europe. The court did not consider that the shorter stormy period after the wife's return from Europe constituted a ground for divorce. "Combatibility," the court said, "is not per se incompatibility."[74]

The reason for the court's willingness to reverse even in the face of the stringent "clearly erroneous" test was, in a word, "fault."

> To award a divorce, under the prevailing circumstances, to an unfaithful husband on the ground that the righteous wrath of his betrayed wife has made them incompatible would be to reward him for marital infidelity. The Virgin Islands divorce statute cannot be construed to sanction such an ironic result.[75]

But why shouldn't it be so construed when the court's own analysis of the history of the incompatibility statute in *Burch v. Burch*[76] clearly establishes the non-fault nature of the statute? Even more unusual is the court's willingness to permit the defendant to seek a legal separation on fault grounds on remand to the district court. Surely if the husband wishes an absolute divorce and the wife wishes a limited divorce, the trial's finding of incompatibility could hardly have been "clearly erroneous."[77]

Another avenue for the introduction of fault considerations is the evidence of incompatibility. The statutes fail to delineate the kind of evidence which is admissible. It is only natural then for the courts to hear evidence of the defendant's fault in determining whether incompatibility exists. Evidence of constant cruelty or adultery would certainly provide a basis for drawing a conclusion as to the incompatibility of the couple. Such evidence also, unfortunately, appears to invite the introduction by defendants of the fault defenses of recrimination and condonation. It should be enough for

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[74] *Id.* at 10.

[75] *Id.* at 10-11.

[76] Note 65 *supra*.

[77] Separation of the parties is in itself an important factor in determining incompatibility. *See* Poteet v. Poteet, 45 N.M. 214, 114 P.2d 91 (1951); Comment, *Divorce: Incompatibility as Ground For*, 7 OKLA. L. REV. 99, 100, 101 (1954).

the plaintiff to testify to the fact that he or she can no longer live with the defendant in any kind of harmony.[78]

Finally, because of the insertion of the incompatibility ground in an integrated system of fault legislation, fault considerations will be present with regard to the incidents of an incompatibility divorce, such as alimony, property division and child custody.[79]

While granting that the small number of reported cases in the seven American jurisdictions that recognize the ground may suggest that the incompatibility statute is operating at the trial level with some degree of success, it is also clear that it is not the civilized non-fault ground which we received from the Danes and that the divorcing parties still have to indulge in some degree of fault-fixing, with many of the attendant problems which that creates.[80]

2. Living Separate and Apart for a Stated Period of Time

By far the most widespread and influential non-fault ground found in essentially fault systems of divorce is the living separate and apart by the parties for a prescribed period of time. The thrust of this ground is a showing that the parties have ceased living together as husband and wife.

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[78] A colloquy on a petition for dissolution upon the default of the respondent might be conducted as follows:

> Q. You have stated that there are irreconcilable differences between you and your spouse. Is it your belief that your marriage has completely broken down?
>
> A. Yes.
>
> Q. Do you believe that conciliation counseling, the assistance of this court, or a waiting period can restore the marriage?

CALIFORNIA CONTINUING EDUCATION OF THE BAR MANUAL, FAMILY LAW PRACTICE § 2.26, 129-30 (1970).

[79] *See, e.g.*, Buonassisi v. Buonassisi, 267 A.2d 888 (Del. Super. 1970).

[80] Professor W. Wadlington holds out little hope for the future of non-fault divorce through the incompatibility ground. "[T]he preservation of such fault-oriented defenses as recrimination frustrates the apparent legislative intent that the addition of incompatibility as a ground should serve the purpose of dissolving hopeless marriages. It would therefore seem that there is little future in a general move to encourage other states to add incompatibility as a ground for divorce." Wadlington, *supra* note 6, at 52.

Theoretically, at least, the reasons for the cessation of cohabitation as well as fault defenses ought to be immaterial.

There are a number of statutory variations here. The leading commentators identify four main categories of living apart statutes.[81] The narrowest statutory mechanism authorizes divorce only when the parties have lived apart under a decree of separation or separate maintenance for the prescribed period.[82] A second and somewhat broader type authorizes divorce where the parties have voluntarily lived apart for the prescribed period.[83] A third variation makes divorce available only to the spouse innocent of causing the separation.[84] The fourth type (the most liberal and widespread) permits divorce solely upon proof that the parties have been separated for the requisite period.[85] Specific re-

[81] CLARK, *supra* note 4, at 351; PLOSCOWE, *supra* note 30, at 353-57, Wadlington, *supra* note 6, at 53-64.

[82] ALA. CODE tit. 34, § 21(1) (Cum. Supp. 1967); CONN. GEN. STAT. ANN. § 46-30 (1958); D.C. CODE ANN. § 16-904(c) (1967); HAWAII REV. LAWS § 580-41(9) (1968); LA. REV. STAT. ANN. § 9-302 (1965); MINN. STAT. ANN. § 518.06(8) (Supp. 1972); N.Y. DOM. REL. LAW § 170(5) (Supp. 1971); N.D. CENT. CODE ANN. § 14-6-05 (Replacement Vol. 1971); TENN. CODE ANN. § 36-802 (Cum. Supp. 1971); UTAH CODE ANN. § 30-3-1(8) (Supp. 1967); WIS. STAT. ANN. § 247.07(7) (Supp. 1972).

[83] DEL. CODE ANN. tit. 13, § 1522(11) (Cum. Supp. 1968); D.C. CODE ANN. § 16-903(a) (1967); MD. CODE ANN. art. 16, § 24(5) (Cum. Supp. 1971); N.Y. DOM. REL. LAW § 170(6) (McKinney Supp. 1971) (formal separation agreement required); WIS. STAT. ANN. § 247.07(6) (Supp. 1972).

[84] WYO. STAT. ANN. § 20-47 (1959). Prior to its amendment in 1972, VT. STAT. ANN. tit. 15, § 551(7) required that the libelant seeking divorce on this ground allege and prove absence of fault on his or her part for the separation. Winslow v. Winslow, 127 Vt. 428, 251 A.2d 419 (1969); Krupp v. Krupp, 126 Vt. 511, 236 A.2d 653 (1967); West v. West, 115 Vt. 458, 63 A.2d 864 (1949). The 1972 amendment eliminates the need for the plaintiff to establish his or her innocence. The Wyoming statute does not require the plaintiff to prove his or her innocence regarding the separation. Rather the burden of proof is placed on the defendant. Stinson v. Stinson, 70 Wyo. 351, 250 P.2d 83 (1952); Dawson v. Dawson, 62 Wyo. 519, 177 P.2d 200 (1947). In Wyoming it is clear that the fault necessary to bar a divorce is not to be equated to other grounds for divorce but may be any conduct which the trial court in its discretion finds to be blameworthy. Brydon v. Brydon, 365 P.2d 55 (Wyo. 1961); Jegendorf v. Jegendorf, 61 Wyo. 277, 157 P.2d 280 (1945).

[85] ARIZ. REV. STAT. ANN. § 25-312(7) (1956); ARK. STAT. ANN. § 34-1202'7) (1947) (1962 Replacement Vol.); HAWAII REV. LAWS § 580-41(11) (Supp. 1972); IDAHO CODE ANN. § 32-610 (1963); LA. REV. STAT. ANN. § 9:301 (1965); MD. CODE ANN. art. 16, § 24(7) (Cum. Supp. 1971); N.C. GEN. STAT. § 50-6 (1966); R.I. GEN. LAWS ANN. § 15-5-3 (1956) (discretion of the court); S.C. CODE ANN. § 20-101(5)

quirements may vary somewhat within each category. The mandatory separation period, for instance, extends anywhere from six months (Vermont)[86] to ten years (Rhode Island).[87] All in all, half of the states have embraced one or more of the forms of the living separate and apart ground.

There are a number of questions associated with the living apart statutes, including the nature of the required separation, the voluntariness of the separation (in those jurisdictions which require voluntary separation), the effect of insanity upon the availability of the ground, the effect of reconciliation attempts during the separation and jurisdictional requirements. These matters are thoroughly covered elsewhere and will not be discussed here.[88] But two critical matters are in need of further explication—retroactivity and the persistence of fault.

Because most of the living apart statutes fail to indicate whether a separation period experienced prior to the effective date of the legislation is to be recognized in meeting the required statutory period,[89] a vast amount of legal energy is expended in resolving the question of retroactivity. The modern trend of authority is to construe the statutes as encompassing separation periods begun prior to the effective date of the legislation.[90] Such construction appears correct because it helps to effectuate the purpose of the legislation, that is, permitting dissolution of marriages which are in fact dead. How much simpler it would be for the courts if the

(Cum. Supp. 1971); No. 238, [1971] Vt. Laws Adj. Sess.; WASH. REV. CODE ANN. § 26.08.020(9) (Supp. 1971); W. VA. CODE ANN. § 48-2-4 (Supp. 1972).

[86] No. 238, [1971] Vt. Laws Adj. Sess., *amending* VT. STAT. ANN. § 15-551(7).

[87] R.I. GEN. LAWS ANN. § 15-5-3 (1956).

[88] *See* PLOSCOWE, *supra* note 30, at 353-58; Wadlington, *supra* note 6, at 68-79.

[89] Exceptions are: ALA. CODE tit. 34, § 22(1) (Cum. Supp. 1967); S.C. CODE ANN. § 20-101(5) (Cum. Supp. 1971); VA. CODE ANN. § 20-91(9) (Cum. Supp. 1972). *See* Fuqua v. Fuqua, 268 Ala. 127, 104 So. 2d 925 (1958).

[90] *See, e.g.*, Singley v. Singley, 256 S.C. 117, 181 S.E.2d 17 (1971); Gleason v. Gleason, 26 N.Y.2d 28, 256 N.E.2d 513, 308 N.Y.S.2d 347 (1970); Hagen v. Hagen, 205 Va. 791, 139 S.E.2d 821 (1965); Gerdts v. Gerdts, 196 Minn. 599, 265 N.W. 811 (1936); Schuster v. Schuster, 42 Ariz. 190, 23 P.2d 559 (1933). *Cf.* R.M.H. v. S.M.H., 259 A.2d 376 (Del. 1969) (two year period of incompatibility required by statute met by tacking period immediately prior to effective date of statute to period immediately after).

legislatures were merely to add to the living apart statutes language to the effect that they apply whether the separations commenced prior to their effective dates or thereafter.[91]

Whether retroactive operation of the statutes is made possible by express legislative mandate or by judicial construction, important constitutional questions regarding due process arise because of the effect such operation might conceivably have on alleged rights of the defendant spouse. As one might deduce from the general trend toward retroactive operation, the judiciary has recently resolved such constitutional questions in favor of retroactivity.

In the leading case of *Fuqua v. Fuqua*,[92] the Alabama Supreme Court held in connection with a statute permitting the conversion of a limited divorce or separate maintenance into an absolute divorce after more than four years separation that the marital status was not a vested right protected by the state (and, by implication federal) constitution from retrospective destruction.[93] Nor was there any constitutionally protected right to assert the defense of recrimination which the Alabama statute had abolished.[94] These rulings are, of course, consistent with the strong majority view upholding statutes abolishing "heartbalm" actions such as breach of promise and criminal conversation[95] and bode well for more liberal no-fault divorce legislation.[96]

In addition to marital status and the availability of defenses, certain property rights arising out of the marriage may be affected by the retrospective application of living apart statutes. But unless those property rights are determined to be vested, there appears to be no constitutional

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[91] *Compare* VA. CODE ANN. § 20-91(9) (Cum. Supp. 1972).

[92] Fuqua v. Fuqua, 268 Ala. 127, 104 So. 2d 925 (1958).

[93] Gleason v. Gleason, 26 N.Y.2d 28, 256 N.E.2d 513 (1970); Hagen v. Hagen, 205 Va. 791, 139 S.E.2d 821 (1965); Stallings v. Stallings, 177 La. 488, 148 So. 687 (1933).

[94] *See also* Young v. Young, 207 Ark. 36, 178 S.W.2d 994 (1944).

[95] Anti-heart balm statutes have generally been held constitutional. *See, e.g.*, Fearon v. Treanor, 272 N.Y. 268, 5 N.E.2d 815 (1936); Annot., 158 A.L.R. 617 (1945).

[96] *See* text at notes 129-37 *infra*.

infirmity in such application of the statutes. In *Gleason v. Gleason*,[97] the contention was made that the retrospective operation of New York's new conversion statute[98] would constitutionally destroy Mrs. Gleason's social security, pension and inheritance benefits which she would otherwise obtain. Therefore, it was asserted that the conversion of her separation decree obtained more than ten years before the enactment of the statute into one of absolute divorce, at the behest of her husband, entertainer Jackie Gleason, constituted a taking of property without due process of law in violation of the due process clauses of the state and federal constitutions. The answer of Chief Judge Fuld was short and direct. A wife's prospective right of inheritance is not a vested one until the death of her husband, and inchoate rights may be changed or destroyed by the state either directly through change in the rules of succession or otherwise.[99] Prospective social security and pension benefits were also held to be inchoate.

> In short, the State, having the power directly to limit or abolish rights of succession to the property of a living person, may undoubtedly do so indirectly by providing a new ground for divorce. Since then, no vested rights of the defendants have been adversely affected, there has been no denial of due process.[100]

These state court rulings together with an earlier Supreme Court decision that the marriage contract is not one covered by the impairment of obligations clause,[101] make it appear that no real obstacle exists to the retroactive application of the living apart statutes. However, if legislative draftsmen would indicate clearly their desire regarding retroactivity, the courts could be spared considerable litigation at the outset of the operation of liberalized divorce statutes.

Perhaps the most serious problem associated with the living apart statutes is the persistence of fault concepts in the minds of those persons who have the most influence on

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[97] Gleason v. Gleason, 26 N.Y.2d 28, 256 N.E.2d 513.

[98] N.Y. DOM. REL. LAWS § 170(5) (1971).

[99] *Cf.* Simons v. Miami Beach Nat. Bank, 381 U.S. 81, 85 (1965).

[100] Gleason v. Gleason, 26 N.Y. 28, at 41, 256 N.E.2d 513, at 520.

[101] Maynard v. Hill, 125 U.S. 190, 210-14 (1888).

the law—the legislators, divorce lawyers and judges.[102] Two types of living apart statutes are drafted so as to insure continued emphasis on the fault of one or both of the parties. The more important conversion type requires the existence of a fault ground in the award initially of the separation or separate maintenance decree, which may thereafter be converted with the passage of time into a decree of absolute divorce.[103] And the "innocent spouse" type injects fault into the proceedings by requiring or permitting a fault contest much like the one fostered by the defense of recrimination.

Second, no matter what the type of living apart statute, it is inserted, like the incompatibility statutes,[104] into an essentially fault-oriented system; and a claim for alimony or a contest over division of the property, for instance, may be decided, at least in part, by weighing the claimant's or contestant's marital guilt or innocence.[105] Thus, what is irrelevant to the divorce itself takes on major importance in the same proceedings when these collateral matters are litigated. As a leading commentator has observed, "[T]he approach frequently involves a choice between letting the parties reach their own financial agreements or litigating the question of fault separately for alimony purposes."[106]

Without this fault context, some of the living apart statutes might serve to terminate dead marriages quite well even in contested cases. One of the most progressive living apart statutes in the United States is the one recently enacted in

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[102] *See* CLARK, *supra* note 4, at 252-54.

[103] The District of Columbia has what might aptly be called a "double fault" system in a non-love game. A fault ground, usually desertion, must be established by the petitioner before he or she may obtain the separation decree or limited divorce in the first instance. Later, only the innocent spouse may convert the separation decree into an absolute divorce. *See* D.C. CODE ANN. § 16-904(c) (1967).

[104] *See* text at notes 70-75 *supra*.

[105] *See, e.g.*, Lancaster v. Lancaster, 212 Va. 127, 183 S.E.2d 158 (1971); Guy v. Guy, 210 Va. 536, 172 S.E.2d 735 (1970); Fair v. Fair, 232 Ark. 800, 341 S.W.2d 22 (1960); Vicknair v. Vicknair, 237 La. 1032, 112 So. 2d 702 (1959). The Arkansas legislature has even included in its statute a provision that "who is the injured party shall be considered only in cases wherein by the pleadings the wife seeks alimony . . . or a division of property. . . ." ARK. STAT. ANN. § 34-1202(7) (1947) (1962 Replacement Vol.).

[106] Wadlington, *supra* note 6, at 23, 79.

Vermont.[107] It permits divorce when the parties have lived separate and apart for six months, whether voluntarily or not, for any reasons and the court finds that resumption of marital relations is not reasonably probable. If a contest develops as to the fact of separation or the reasonable probability of reconciliation the court may continue the proceeding and suggest marriage counseling.

The non-fault nature of the required findings and the provision for counseling are quite helpful. But the Vermont legislature did not go far enough. Fault grounds still abound in Vermont, and the statutes requiring the court to consider "the respective merits of the parties" in dividing the property and awarding alimony in a "just and equitable" manner encourage the parties to bring forth evidence of wrongdoing on the part of the other spouse.[108] Moreover, the divorce contest remains an adversary proceeding. If the legislatures

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[107] P.A. No. 238, [1971] VT. STAT. ANN. tit. 15, § 551(7). This statute provides *inter alia*:

> Sec. 1:
>
> (7) When a married person has lived apart from his or her spouse for six consecutive months and the court finds that the resumption of marital relations is not reasonably probable.
>
> Sec. 2:
>
> The court may appoint an attorney to represent the interest of a minor or dependent child with respect to his custody, support and visitation. The court shall enter an order for costs, fees and disbursements in favor of the child's attorney. The order shall be made against either or both parents, except that, if the responsible party is indigent, the costs, fees, and disbursements shall be borne as provided by rule of court.
>
> Sec. 3:
>
> If one of the parties has denied under oath or affirmation that the parties have lived apart for the requisite period of time or has alleged that reconciliation is reasonably probable, the court shall consider all relevant factors, including the circumstances that gave rise to the filings of the petition and the prospect of reconciliation, and shall:
>
> (1) make a finding whether the parties have lived apart for the requisite period of time or not and whether the reconciliation of the parties to the marriage is reasonably probable or not; or
>
> (2) continue the matter for further hearing not less than 30 or more than 60 days later, and may suggest to the parties that they seek counseling. At the adjourned hearing, the court shall make a finding whether the parties have lived apart for the requisite period of time or not and whether the reconciliation of the parties to the marriage is reasonably probable or not.

[108] VT. STAT. ANN. tit. 15, §§ 751, 754 (1972).

favor "no fault" living apart statutes they should, before enacting them, study the "entire" system of divorce in their respective states, and revise all the laws pertaining to the divorce process to create a non-fault context in which the living apart statutes might operate more effectively.

The present widespread practice of adding living apart grounds to a fault system provides still another avenue for the insertion of fault considerations by encouraging courts to impose their notions of fault on this kind of legislation, much as they do in connection with the incompatibility ground.[109] The classic instance, by all accounts, is that of North Carolina.[110] The North Carolina Statute provides that "marriages may be dissolved and the parties thereto divorced from the bonds of matrimony on the application of either party, if and when the husband and wife have lived separate and apart for one year, and the plaintiff or defendant in the suit for divorce has resided in the State for a period of six months."[111] By its terms this statute permits divorce to either party without regard to fault and without requiring mutuality of agreement as to the separation. Yet the North Carolina courts have construed the statute to require mutuality[112] and to bar divorce to the husband if he has wilfully abandoned his wife.[113] This bar can be raised by way of pleading it as an affirmative defense.[114] Thus, a limited form of the recriminatory defense is alive and well in North Carolina today to bar divorce on this non-fault ground.[115]

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[109] *See* text at notes 70-75 *supra*.

[110] *See* CLARK, *supra* note 4, at 353-54; Ploscowe, *supra* note 30, at 357; Wadlington, *supra* note 6, at 52.

[111] N.C. GEN. STAT. § 50-6 (1966).

[112] Moody v. Moody, 253 N.C. 752, 117 S.E.2d 724 (1961); 40 N.C.L. REV. 808 (1962). *But cf.* Byers v. Byers, 222 N.C. 298, 22 S.E.2d 902 (1942).

[113] *See, e.g.*, Overby v. Overby, 272 N.C. 636, 158 S.E.2d 799 (1968); Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968); O'Brien v. O'Brien, 266 N.C. 502, 146 S.E.2d 500 (1966); Taylor v. Taylor, 257 N.C. 130, 125 S.E.2d 373 (1962).

[114] *See, e.g.*, Eubanks v. Eubanks, 273 N.C. 189, 159 S.E.2d 562 (1968); Overby v. Overby, 272 N.C. 636, 158 S.E.2d 799 (1968); Taylor v. Taylor, 257 N.C. 130, 125 S.E.2d 373 (1962).

[115] That this need not be the case is demonstrated by the experience of the neighboring state of Virginia. Virginia's living apart statute is similar to that of North Carolina. "A divorce from the bond of matrimony may be decreed: . . . (9) On the application of either party if and when the husband and wife have lived

The failure of "living apart" legislation to fully eliminate distortions to the rational dissolution of dead marital relationships points up the need for some other more comprehensive legislative approach to divorce reform.

3. *The English Divorce Reform Act of 1969.*

Unfortunately, the new comprehensive English Divorce Reform Act[116] does not provide the model our state legislatures ought to emulate. Reform of the basic English divorce system, which had not changed fundamentally since 1857,[117] began promisingly enough with the report of the Archbishop of Canterbury's Group in 1966 recommending that breakdown of the marriage be made the sole ground for divorce.[118] The group also recommended that such marital breakdowns should always be investigated by the court whether or not the case was contested, in order to determine whether the breakdown was irretrievable.[119] The group's well-publicized report was followed by unfavorable reaction from conserva-

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separate and apart without any cohabitation and without interruption for two years." VA. CODE ANN. § 20-91-(9) (Cum. Supp. 1972). But the statute also says, *inter alia*, "A plea of res adjudicata or of recrimination with respect to any other provision of this section shall not be a bar to either party obtaining a divorce on this ground; . . . Drawing from this language the strong intention of the Virginia legislature to bar the introduction of fault considerations, the Virginia Supreme Court of Appeals has held that the party of fault may be granted a divorce when the husband and wife have lived separate and apart for the requisite period of time. Canavos v. Canavos, 205 Va. 744, 139 S.E.2d 825 (1965); Mason v. Mason, 209 Va. 528, 165 S.E.2d 392 (1969). Moreover, a 1970 amendment to the Virginia statute excluding the insanity of either party as a defense to a divorce action thereunder clearly implies that mutual agreement to separate is not required. This amendment in effect overruled Crittenden v. Crittenden, 210 Va. 76, 168 S.E.2d 115 (1969). *Cf.* Moody v. Moody, 253 N.C. 752, 117 S.E.2d 724 (1961). Such clear legislative drafting is a rarity in this field.

[116] Divorce Reform Act of 1969, C. 55.

[117] The last major revision of English law prior to 1969, placed divorce jurisdiction in the High Court and allowed as grounds, adultery, desertion for three years, cruelty, incurable unsoundness of mind and the husband's commission of rape, sodomy or bestiality. Matrimonial Causes Act of 1965, C. 72 § 1. The basic fault defenses remained at least in theory but were limited in practice. *Id.* at § 5. *See* Levin, *The Divorce Reform Act 1969*, 33 MOD. L. REV. 632 (1970).

[118] REPORT OF ARCHBISHOP OF CANTERBURY'S GROUP, PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY (1966).

[119] *Id. See* Rowland, *Matrimonial Law in England Today*, 57 A.B.A.J. 981 (1971).

tive quarters as well as a report of the British Law Commission challenging the practicality of the group's recommendations.[120]

What followed in Parliament was compromise legislation which, while paying lip service to the concept of marital breakdown, retains the ideas of fault and innocence to an unfortunate degree. After boldly announcing in Section 1 of the Divorce Reform Act of 1969 that irretrievable breakdown was to be the sole ground for divorce, Parliament, in section two, requires proof of such breakdown in the form of evidence of adultery, cruelty, desertion or living apart for a prescribed period of time. Only evidence of a living apart situation would provide a basis for true no-fault divorce. In the other three cases fault evidence is welcomed in determining marital breakdown. An anomaly created by the present statute in requiring evidence of acts giving rise to former fault grounds in establishing irretrievable breakdown is the increased difficulty of obtaining a divorce under the new *reform* Act. Under the predecessor statute, adultery, for instance, was an absolute ground for divorce. Today, however, the English petitioner would have to convince the court that the respondent's act of adultery was symptomatic of breakdown.[121]

Moreover, an important non-fault basis for divorce under the new act, that is, the living of the parties separate and apart for a period of five years,[122] is compromised by the provision of section four by which the respondent may oppose the grant of a divorce decree on the ground that the dissolution of the marriage will result in grave financial or other hardship to him or her and that "in all the circumstances it would be wrong to dissolve the marriage."[123] Hardship

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[120] REPORT OF BRITISH LAW COMMISSION, REFORM OF THE GROUNDS OF DIVORCE—THE FIELDS OF CHOICE (1966).

[121] *See* Levin, *The Divorce Reform Act 1969*, 33 MOD. L. REV. 632, 634-35 (1970). It is Ms. Levin's hope that petitioners will be allowed to convince the court of irretrievable breakdown on the basis of their own testimony. *Id.* at 639.

[122] Divorce Reform Act of 1969, C. 55 § 2(1)(e).

[123] *Id.* § 4. Decree to be refused in certain circumstances.

(1) The respondent to a petition for divorce in which the petitioner

is defined as including the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved.

These provisions smack of protection for the "innocent spouse" against the "guilty one" who leaves his or her marital partner without consent. Such provisions in the new New York statute might well have prevented Jackie Gleason from obtaining his long sought-after divorce because it resulted in the cutting off of Mrs. Gleason's statutory right to a widow's share of Gleason's estate, a valuable right, indeed.[124] Thus, section four of the English statute may prevent the decent burial of some, though not necessarily all, dead marriages in cases in which there is an absence of adultery, cruelty, desertion or consent to living apart.[125]

An approach more consistent with the marital breakdown philosophy than section four would be to permit the divorce, but require determination of the present value of future contingent financial rights cut off by the divorce and include that valuation in the property settlement. Such an approach does appear to be possible under section six of the

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alleges any such fact as mentioned in paragraph (e) of section 2(1) of this Act may oppose the grant of a decree nisi on the ground the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage.

(2) Where the grant of a decree nisi is opposed by virtue of this section, then, —

(a) if the court is satisfied that the only fact mentioned in the said section 2(1) on which the petitioner is entitled to rely in support of his petition is that mentioned in the said paragraph (e), and

(b) if apart from this section it would grant a decree nisi, the court shall consider all the circumstances, including the conduct of the parties to the marriage and the interests of those parties and of any children or other persons concerned, and if the court is of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage it shall dismiss the petition.

(3) For the purposes of this section hardship shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved.

[124] *See* Gleason v. Gleason, 26 N.Y.2d 28, 256 N.E.2d 347 (1970).

[125] *See* Levin, *The Divorce Reform Act 1969*, 33 MOD. L. REV. 632, 641-43 (1970) for a trenchant analysis of this section.

English Act which sets forth guidelines for the courts in protecting the financial interests of respondents in living apart divorce actions.[126]

While the English approach to marital breakdown is generally questionable, the drafters should be commended for expressly encouraging reconciliation efforts. Section three requires the petitioner's solicitor to certify whether he has discussed with the petitioner the possibility of reconciliation and has given him or her information on how to contact qualified marriage counselors. The section also empowers the court to adjourn the proceedings for appropriate periods to encourage reconciliation attempts if it appears the recon-

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[126] *Id.* at 645.

Financial protection for respondent in certain cases

(1) The following provisions of this section shall have effect where—

(a) The respondent to a petition for divorce in which the petitioner alleged any such fact as is mentioned in paragraph (d) or (e) of section 2(1) of this Act has applied to the Court under this section for it to consider for the purposes of subsection (2) hereof the financial position of the respondent after the divorce; and

(b) a decree nisi of divorce has been granted on the petition and the court has held that the only fact mentioned in the said section 2(1) on which the petition was entitled to rely in support of his peitioner was that mentioned in the said paragraph (d) or (e).

(2) The court hearing an application by the respondent under this section shall consider all the circumstances, including the age, health, conduct, earning capacity, financial resources and financial obligations of each of the parties, and the financial position of the respondent as, having regard to the divorce, it is likely to be after the death of the petitioner should the petitioner die first; and notwithstanding anything in the foregoing provisions of this Act but to subsection (3) of this section, the court shall not make absolute the decree of divorce unless it is satisfied—

(a) that the petitioner should not be required to make any financial provisions for the respondent, or

(b) that the financial provision made by the petitioner for the respondent is reasonable and fair or the best that can be made in the circumstances.

(3) The court may if it thinks fit proceed without observing the requirements of subsection (2) of this section if—

(a) it appears that there are circumstances making it desirable that the decree should be made absolute without delay, and

(b) the court has obtained a satisfactory undertaking from the petitioner that he will make such financial provision for the respondent as the court may approve.

ciliation is reasonably possible.[127] The drafters also acted wisely in expressly abolishing in section nine the old defenses of recrimination, condonation, connivance and collusion.

B. Liberal Legislative Responses and Proposals

The approaches to divorce reform just surveyed were categorized as "conservative" because of their failure to overhaul the fault system of divorce so as to eliminate all or nearly all vestiges of fault or moral guilt in the grant of divorce and the resolution of such collateral matters as property settlement, alimony, child support and custody.

Most divorce reform legislation of recent years may be characterized as conservative, but a handful of legislatures and the National Conference of Commissioners on Uniform State Laws (NCCUSL) have enacted or proposed sweeping reforms which, if they do not completely eliminate fault from divorce proceedings, go a very long way toward achieving this end. We now proceed to a comparative analysis of what we have chosen to term "liberal" divorce reform legislation or proposals.

At the time of this writing, eight states have enacted sweeping reform of their divorce laws: California,[128] Colorado,[129] Florida,[130] Iowa,[131] Kentucky,[132] Michigan,[133] Nebraska,[134] and Oregon.[135] Each of these states, to a greater or lesser degree, has adopted what this study has come to call a "pure" no-fault statute. In this context, by "pure" we mean a statute which effects a thorough revision of both

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[127] *See* Levin, *The Divorce Reform Act 1969*, 33 Mod. L. Rev. 632, 643-44 (1970) for critical treatment of this section.

[128] Cal. Civ. Code §§ 4000-5138 (Supp. 1969).

[129] Colo. Rev. Stat. § 46-1-1 to 46-1-32 (Supp. 1972). It is important to note that the Colorado statute and the Uniform Marriage and Divorce Act, note 137 *infra*, are virtually identical.

[130] Florida Laws 1971, ch. 71-241.

[131] Iowa Code Ann. §§ 598.1 to .34 (Supp. 1971).

[132] Ky. Rev. Stat. Ann. § 403.130 (1972). The Kentucky statute is much like the Uniform Marriage and Divorce Act.

[133] Michigan Laws 1971, P.A. 75.

[134] Nebraska Legislative Bill 820, enacted July 6, 1972.

[135] Oregon Laws 1971, ch. 280.

substantive and procedural divorce law by eliminating grounds, reforming the initial pleadings, abolishing the common law defenses and reforming collateral proceedings.[136]

In addition, a Uniform Marriage and Divorce Act (UMDA)[137] has been promulgated by the NCCUSL, but American Bar Association approval of the Act was denied on February 7, 1972.[138] In setting out the UMDA, the National Conference early concluded that

> There is virtual unanimity as to the urgent need for basic reform in both areas, not only of specific provisions but of the entire conceptual structure. The traditional conception of divorce based on fault has been singled out particularly, both as an ineffective barrier to marriage dissolution which is regularly overcome by perjury, thus promoting disrespect for the law and its processes, and as an unfortunate device which adds to the bitterness and hostility of divorce proceedings.[139]

One of the premises of this paper is that the UMDA represents a distillation and codification of the best current thought in American divorce law. With this in mind, this section will set out the various state statutory mechanisms by comparing their provisions with the corresponding portions of the UMDA.

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[136] Vermont, for example, has significantly changed its divorce law by now permitting divorce whenever spouses can show that they have lived apart for six months. VT. STAT. ANN. §§ 15-551(7) (1972). Because Vermont has not also modified the collateral areas of divorce, *e.g.*, alimony, or eliminated the older fault grounds, this article will not discuss it in the context of the "pure" nonfault statutes.

[137] The text, comments and some critical response from the American Bar Association have been set out in 5 FAM. L.Q. 251 *et seq.* (1971). The Uniform Marriage and Divorce Act will hereinafter be cited as UMDA.

[138] Wash. Post, Feb. 8, 1972, at 2, cols. 1 & 2. Curiously, when the National Conference was first founded in 1892 one of the first recommendations made to it with respect to developing a uniform law involved a major revision of marriage and divorce law. It took the National Conference eighty years to respond. Prefatory Note, *The Uniform Marriage and Divorce Act*, 5 FAM. L.Q. 205 (1971).

[139] Prefatory Note, *The Uniform Marriage and Divorce Act*, 5 FAM. L.Q. 206 (1971). The UMDA was five years in the drafting and is the work of a large number of participants as well as separate boards of advisers and consultants. Professor Robert Levy was selected as original reporter and Professor Herma Hill Kay was later made co-reporter. *Id.* at 205.

1. Dissolution

The UMDA and the statute of every state listed above, except Michigan, have abolished the adversary-styled caption in the pleading and require instead an *in re*-type caption such as "*in re* the marriage of _____ and _____."[140] The word "divorce" in every state statute, again with the exception of Michigan, has been eliminated and the term "dissolution" substituted. The thrust of these changes is to reduce the adversary factor in the proceeding and to channel juridical thinking along the lines of partnership dissolution.

Concededly, these modifications are more stylistic than substantive; but their ultimate effect should be to change the focus of divorce actions from the opposing parties ("Smith *against* Smith") to the marriage itself—the "thing" actually in controversy. A further beneficial effect should be to inhibit the emotional aspects associated with the word "divorce."[141]

Most of the negative commentary on present divorce law has focused on the defects in the traditional grounds for divorce.[142] Professor Clark, for example, has noted that the usual criticisms of divorce grounds may be summarized as permitting the spouses "to obtain divorce by consent, but subjects them to the humiliation, hypocrisy, sometimes perjury and needless hostility of having to testify to one of the prescribed grounds—usually cruelty."[143] A key reform in the no-fault divorce statutes has been the abolition of all traditional grounds based on fault and the enactment of a single, all-encompassing ground which purportedly lets the court

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[140] UMDA § 301.

[141] Perhaps it is questionable that mere changes in language will effect any long-range changes in public attitudes toward marital breakdown. The popular press in California has not seen fit to grant across-the-board acceptance to the new term "dissolution." *See, e.g.*, Kasindorf, *The Do-it-Yourself Divorce*, 17 LOS ANGELES MAGAZINE, May, 1972, at 52.

[142] *See, e.g.*, Wadlington, *supra* note 6, at 32; Alexander, *Let's Get the Embattled Spouses out of the Trenches*, 18 LAW & CONTEMP. PROB. 98 (1953); Foster, *Current Trends in Divorce Law*, 1 FAM. L.Q. 21 (1967).

[143] Clark, *Divorce Policy and Divorce Reform*, 42 U. COLO. L. REV. 402, 407 (1971).

examine the "whole" marriage rather than forcing the court to focus on a single, isolated act of misconduct.

The UMDA,[144] Colorado,[145] Florida,[146] Kentucky,[147] and Nebraska[148] permit dissolution when the court finds the marriage to be "irretrievably broken." Michigan[149] and Iowa[150] allow dissolution when "there has been a breakdown of the marriage relationship to the extent that the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved." California,[151] the first state to enact a sweeping no-fault statute, and Oregon[152] sanction dissolution "when irreconcilable differences between the parties have caused the irremediable breakdown of the marriage."

The original source of each of these phrases is clearly the classic dictum of Chief Justice Traynor in *DeBurgh v. DeBurgh*.[153] What is not so clear, however, is the reason for the selection of the particular phraseology by each state. Michigan and Iowa have simply adopted the *DeBurgh* language verbatim. The UMDA and Colorado statute, explained by the UMDA comments, assert that the choice of "irretrievably broken" was done in this manner:

> "Irretrievably broken" was chosen because this has become a term of common use in the literature of divorce reform, and so has gained a significant meaning upon which judges may rely for

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[144] UMDA § 302.

[145] COLO. REV. STAT. § 46-1-6(1)(c) (Supp. 1972).

[146] FLA. STAT. ANN. § 61-052 (Supp. 1972).

[147] KY. REV. STAT. ANN. § 403.130-4(1)(c) (1972).

[148] Neb. Act (L.B. 820) § 1(1).

[149] MICH. COMP. LAWS § 552.6(1) (Supp. 1972).

[150] IOWA REV. STAT. § 598.17 (Supp. 1972).

[151] CAL. CIV. CODE § 4506(1) (West 1971).

[152] ORE. REV. STAT. § 107.025 (1971).

[153] 39 Cal. 2d 858, 250 P.2d 598 (1952). In *DeBurgh* Justice Traynor wrote: In a divorce proceeding the court must consider not merely the rights and wrongs of the parties . . . but the public interest in the institution of marriage. . . . [W]hen a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served. . . . Public policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been destroyed. *Id.* at 863-64, 250 P.2d at 601.

> guidance. It is closely related to the standard recently adopted in California . . . and in Iowa . . . and equates to the doctrinal result attained under the concept of incompatibility.[154]

By way of contrast, the California phrase apparently was selected "simply because it is in fact descriptive of the frame of mind of the spouses in a marriage which is no longer viable."[155]

While the problems of definition of the no-fault ground will be dealt with at length later in this article,[156] it is fair to say here that none of these definitions is satisfactory in an applied sense. Neither the reference to "literature," the "frame of mind" test nor the *DeBurgh* quotation is sufficiently descriptive and definitive to be of much value to judges or practitioners.

Consistent with the trend toward abolition of grounds has been the simultaneous abolition of the common law defenses to divorce. Most obervers of American family law have seen that the defenses have often been the hidden "kicker" in many divorce actions. Even where grounds have been painstakingly established, a defense properly interposed may still prevent divorce. It may be said that the common law defenses have caused as much psychological and social harm as have the traditional grounds.

The UMDA,[157] Colorado,[158] Florida,[159] Kentucky,[160] and Oregon[161] have expressly barred the common law defenses. Iowa has expressly abolished only the defense of recrimination,[162] and the California, Michigan and Nebraska acts contain no express abolition.[163] However, California, prior to

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[154] Comment, 5 FAM. L.Q. at 224.

[155] ASSEMBLY JUDICIARY COMMITTEE, REPORT ON ASSEMBLY BILL NO. 530 AND SENATE BILL NO. 252 (The Family Law Act) (1969) at 5.

[156] *See* text accompanying notes 302-10.

[157] UMDA § 303(e).

[158] COLO. REV. STAT. § 46-1-7(5) (Supp. 1971).

[159] FLA. STAT. ANN. § 61-044 (Supp. 1972).

[160] Kentucky has also abolished the defense of insanity. KY. REV. STAT. ANN. § 403.150-5 (1972).

[161] ORE. REV. STAT. § 107.036 (1971).

[162] IOWA REV. STAT. § 598.18 (Supp. 1972).

[163] It is arguable that these last three states abolish the defenses by implica-

1970, had codified the common law defenses as part of its divorce law; and these statutory defenses were repealed by enactment of the 1970 Family Law Act.[164]

The UMDA also abandons any requirement of a waiting period for a decree following the establishment of its one recognized ground for divorce. Assuming the state's residence period requirement is met, a spouse can obtain a divorce as soon as the marriage is "irretrievably broken." And while the Kentucky legislature made no change in the UMDA in this regard,[165] the Colorado legislature chose to impose a minimum ninety-day waiting period between commencement of the action and entry of the dissolution decree.[166] Some of the other states with sweeping no-fault legislation have also imposed waiting periods of one type or another. Iowa imposes a minimum ninety-day waiting period which may be waived by the trial court on grounds of "emergency or necessity."[167] Nebraska requires a six-month waiting period, but the trial court may waive this waiting period if it determines that conciliation efforts have failed.[168] In Florida no final judgment may be entered until at least twenty days have elapsed from the date of filing the original petition for dissolution. The court may waive this period on a showing that "injustice would result" from delay.[169] California and Oregon take a somewhat different approach. Both states may grant almost immediate interlocutory dissolution decrees upon marital breakdown, assuming residence requirements are met. But six months must elapse from the date of service of process before an interlocutory decree can become a final one in California.[170] In Oregon the interlocu-

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tion. While this is a questionable proposition at best, even if correct it is a substantial defect given the need for thorough reform of the divorce laws. See the conclusion of this article for a longer discussion of this assertion.

[164] CAL. CIV. CODE § 111 (West 1954) (repealed 1970).

[165] *Compare* KY. REV. STAT. ANN. § 403.140 (1972) *with* UMDA § 302(a).

[166] COLO. REV. STAT. § 46-1-6(1)(b).

[167] IOWA REV. STAT. § 598.19 (Supp. 1972).

[168] Neb. Act (L.B. 820) § 17.

[169] FLA. STAT. § 61.19 (Cum. Supp. 1973).

[170] CAL. CIV. CODE § 45 (West 1970).

tory period is sixty days from the date the decree is rendered.[171]

a. Evidence of misconduct

One of the more wretched aspects of current divorce laws requires that the complaining party testify to specific acts of spousal misconduct to establish the proper ground. In practice, moreover, this requirement has led to both perjury and *pro forma* recitals of "mental" cruelty. So strong, apparently, is the average spouse's aversion to such testimony that there is a pronounced "Gresham's Law" of divorce: that is, spouses seeking divorce continually strive toward the least distasteful ground on which divorce may be granted in the easiest possible jurisdiction. Professor Max Rheinstein has asserted that "whenever it is possible for divorce seekers to obtain divorces with some difficulty in one place and with greater ease or speed in another, cases tend to accumulate in the place of the easy . . . ."[172]

The same phenomenon operates within a single jurisdiction with respect to that jurisdiction's grounds. Easy grounds tend to overwhelm difficult or distasteful grounds.[173] P. Jacobson has found that the ground of cruelty, where available, is easily the most popular. In 1950, for example, 58.7 percent of all divorces granted in the United States were granted on the ground of cruelty.[174] The next most popular ground, desertion, lagged far behind cruelty; 17.6 percent of all divorces were granted on grounds of desertion.[175]

The no-fault statutes in one fashion or another have tried to mitigate the harm that flows from misconduct testi-

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[171] ORE. REV. STAT. § 107.115(1) (1971).

[172] Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633, 641 (1956).

[173] For example, in New Mexico, a state with ten separate grounds for divorce, N.M. STAT. ANN. § 22-7-1 *et. seq.* (1953), almost ninety percent of the divorces are granted on the single ground of incompatibility. P. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 126 (1959).

[174] P. JACOBSON, *supra* note 173, at 121 (table 58).

[175] *Id.*

mony. Colorado,[176] Iowa,[177] Kentucky,[178] and the UMDA[179] do not expressly bar evidence of misconduct, but require the parties to allege only that the marriage is "irretrievably broken." California[180] and Oregon[181] permit evidence of misconduct to show irreconcilable differences. Michigan bars allegations of misconduct in the pleadings by requiring that the complaint "make no other explanation of the grounds for divorce than by use of the statutory language."[182] Furthermore, the defendant in Michigan is also restricted and "may either admit the grounds for divorce alleged or deny them without further explanation."[183]

The necessity for corroboration, another point of acrimony in conventional divorce, has been virtually eliminated in most of the newer statutes. In six states, Michigan, California, Oregon, Colorado, Kentucky, and Nebraska and also under the UMDA there is no requirement of corroboration whatsoever; and Florida requires corroboration only to show proof of the residency requirement.[184] Iowa is the only state with a no-fault statute that retains an express corroboration requirement going to the proof of grounds.[185]

2. *Alimony and Property Settlement*

The financial aspects of divorce, except as they relate to tax matters, have been singularly ignored in the legislation. The UMDA is the first statute to provide both a no-fault mechanism and a thorough re-working of the older property and support concepts in divorce. Virtually every other act simply superimposes a breakdown standard on the current modes of spousal support and property distribution.[186]

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[176] COLO. REV. STAT. § 46-1-7(2)(a) (Supp. 1971).

[177] IOWA REV. STAT. § 598.17 (Supp. 1972).

[178] KY. REV. STAT. ANN. § 403.130-4(1)(c) (1972).

[179] UMDA § 303(b).

[180] CAL. CIV. CODE § 4509 (West 1971).

[181] ORE. REV. STAT. § 107.036(2).

[182] MICH. COMP. LAWS § 552.6(1).

[183] *Id.* § 552.6(2).

[184] FLA. STAT. ANN. § 61-052(2) (Supp. 1972).

[185] IOWA REV. STAT. § 598.10 (Supp. 1972).

[186] A leading discussion of alimony is a 1939 symposium which viewed alimony from several different perspectives both legal and sociological. *See* Cooey, *The*

a. Elimination of misconduct evidence

Colorado,[187] the UMDA,[188] California[189] and Oregon[190] expressly bar any evidence of specific misconduct in the proceedings bearing on property settlement or alimony. Kentucky prohibits misconduct evidence in property settlement but does not mention it regarding alimony.[191] However, the Iowa Supreme Court recently held that the Iowa dissolution statute does not permit the introduction of fault in either alimony or property division disputes.[192] Florida, curiously has retained an element of fault in its alimony provisions. Under the new Florida statute a court "may consider the adultery of a spouse and the circumstances thereof in determining whether alimony shall be awarded . . . and the amount of alimony, if any, to be rewarded . . . ."[193] But perhaps this new phrasing was regarded as an improvement since the older statute prohibited an alimony award entirely to an adulterous spouse.[194]

b. Criteria for alimony awards and property settlements

Exercise of Judicial Discretion in the Award of Alimony, 6 LAW & CONTEMP. PROB. 213 (1939).

[187] COLO. REV. STAT. §§ 46-1-14(2)(a) (alimony), 46-1-13(1)(a) (property settlement).

[188] UMDA §§ 307(a) (property), 308(b) (alimony).

[189] CAL. CIV. CODE § 4509 (West 1971).

[190] ORE. REV. STAT. § 107.036(3) (1971).

[191] KY. REV. STAT. ANN. § 403.190-1 (1972).

[192] *In re* the Marriage of Williams, 199 N.W.2d 339 (Iowa 1972). The court noted that the statute did not expressly bar fault even on the question of grounds. It found, however, that the statute did not allow fault allegations in the petition for dissolution and went on to conclude that such evidence should also be prohibited in alimony and property questions. Of interest here is that the court found the most persuasive sources for this proposition in the law review articles on the subject and not in the Iowa statute's legislative history. *Id.* at 343-45.

[193] FLA. STAT. ANN. § 61.08 (Supp. 1972).

[194] FLA. STAT. § 61.08 (1967). It should also be noted that the Florida Supreme Court has been extremely hostile to any constitutional arguments on this point. In Pacheco v. Pacheco, 246 So. 2d 778 (Fla. 1971), a wife raised a due process and equal protection argument on appeal contending that the statute does not single out any other form of misconduct as a bar to alimony. Her authority was primarily made up of citations to the Kinsey reports which the court summarily rejected, stating the reports were "no justification for denying to the Florida Legislature a proper exercise of its police power in an area as sensitive as the divorce laws." *Id.* at 780.

Much of the existing legislation regulating the economic consequences of divorce has been flawed by a lack of an overall philosophy or coherent approach to the problem. Alimony began as a means of supporting divorced wives who were prohibited by the social barriers of the times from working and thereby supporting themselves.[195] The property division statutes[196] grew out of a desire to ensure that when each spouse has made a contribution to ownership of property or owns the property outright, as from a separate inheritance, that he or she would be able to retain that ownership.[197]

However, as Professor H. Clark points out, courts have tended to blur the distinction between alimony and property settlements often with severe and perhaps unintended consequences. Without proper labeling:

> the method of enforcement and the existence of power to modify the decree are at stake. Alimony orders are generally held modifiable and enforceable by contempt proceedings while property orders are not. Alimony generally ends on the remarriage of the wife, while property orders do not.[198]

With the exception of the Colorado and Kentucky version of the UMDA, few of the no-fault statutes attack these problems adequately. Michigan,[199] Oregon,[200] Iowa,[201] Florida,[202] and Nebraska[203] merely permit such property division or alimony awards as the court deems "just" or reasonable, with no additional guidelines. The UMDA is the first of the

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[195] *See* Vernier & Hurlbut, *The Historical Background of Alimony Law and its Present Structure*, 6 LAW & CONTEMP. PROB. 197 (1939). It is purely statutory in origin. *Id.* at 201.

[196] The common law rule is that there may be no property division incident to divorce without express statutory authority to do so. Griste v. Griste, 171 Ohio St. 160, 167 N.E.2d 924 (1960); Eakin v. Eakin, 99 So. 2d 854 (Fla. 1958).

[197] *See, e.g.*, ILL. REV. STAT. ch. 40, para. 18 (1947): "Whenever a divorce is granted, if it shall appear to the court that either party holds the title to property equitably belonging to the other, the court may compel conveyance thereof [to the other spouse]."

[198] CLARK, *supra* note 4, at 449.

[199] MICH. COMP. LAWS § 552.19 (Supp. 1972).

[200] ORE. REV. STAT. § 107.105(1)(e) (1971).

[201] IOWA REV. STAT. § 598.21 (Supp. 1972).

[202] FLA. STAT. ANN. § 61.052(3) (Supp. 1972).

[203] Neb. Act (L.B. 820) § 17.

"pure" no-fault approaches to provide a reasoned and coherent approach to the proper separation of alimony and property division and statutory guidelines in both areas.

The UMDA comments strongly disfavor any award of spousal support to either party when the property division is adequate to provide maintenance.

> Only if the available property is insufficient for the purpose and if the spouse who seeks maintenance is unable to secure employment appropriate to his skills and interests or is occupied with child care may an award of maintenance be ordered.[204]

However, if spousal maintenance is dictated, the UMDA, Colorado and Kentucky provide six criteria for the award: (1) the financial resources of the party; (2) the time necessary to acquire additional education or training; (3) the standard of living; (4) the duration of the marriage; (5) the age and health of the spouse; and (6) the ability of the obligated spouse to pay.[205]

California and Oregon also provide criteria for spousal support similar to those of the UMDA. California permits the court to examine "the circumstances of the respective parties, including duration of the marriage, and the ability of the supported spouse to engage in gainful employment."[206] Oregon provides eight criteria with the eighth factor stated as "such other matters as the court shall deem relevant."[207]

The other states do not provide any criteria for an award

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[204] National Conference of Commissioners on Uniform State Laws, *Uniform Marriage and Divorce Act*, 5 FAM. L.Q. 234 (1971) [hereinafter cited as 5 FAM. L.Q.].

[205] UMDA § 308(b)(1)-(6); COLO. REV. STAT. § 46-1-14(2)(a)-(g); KY. REV. STAT. ANN. § 403.200-1-2 (1972).

[206] CAL. CIV. CODE § 4801(a) (West 1970).

[207] ORE. REV. STAT. § 107.105(1) (1971). The other criteria are: (a) the duration of the marriage, (b) the ages of the parties, (c) their health and conditions, (d) their work experience and earning capacity, (e) their financial conditions, resources and property rights, (f) the provisions of the decree relating to custody of the minor children, (g) the ages, health and dependency conditions of the children. *Id.* § 107.105(1)(a)-(g). We have been continually alert to these aspects of the new statutes which may permit the intrusion of fault concepts in the litigation under the new acts. Phrases such as the "other factors" language in the Oregon statute, while used to broaden the court's inquiry may, in practice, permit the courts to revert to traditional, fault-oriented thinking.

beyond the "just" guideline which permits virtually unfettered trial court discretion. Neither has any other state seen fit to make alimony subordinate to property division by emphasizing property division as the preferred basis for generating income for the non-bread-winning spouse.

The property division provisions of the state statutes are similarly brief and noncomprehensive. In California, a community property state, courts were permitted to direct an unequal distribution of property upon a showing of fault.[208] Now the Family Law Act appears to compel an equal distribution of property in every situation with minor exceptions.[209] An equal division of property may, in most cases, be completely justified; but this rigidity prevents the court from looking to property division for spousal support in lieu of the ultimately more damaging alimony payments.

Oregon,[210] Iowa,[211] Michigan[212] and Nebraska[213] retain the "just" or "equitable" standard. Florida appears not to distinguish property settlement from its alimony provisons.[214] In the 1971 case of *Ferguson v. Ferguson*,[215] a trial court order awarding installment alimony of one dollar per year and "lump sum" alimony of the furnishings and a half-interest in the family residence was affirmed.

Only the UMDA, Colorado and Kentucky statutes establish specific standards for property division. The thrust of this portion of the Act as revealed by the comment indicates that:

> the distribution of property upon the termination of a marriage

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[208] Eslinger v. Eslinger, 47 Cal. 62 (1873). Unequal distribution was permitted on a showing of either adultery or extreme cruelty.

[209] CAL. CIV. CODE § 4800 (West 1970): "The court shall . . . divide the community property and quasi-community property equally." The exceptions are: (1) the court may award "any asset" to one party if that award results in a "substantially equal" division; (2) award whatever assets necessary to one party to offset a misappropriation by the other party. *Id.*

[210] ORE. REV. STAT. § 107.105(1)(e) (1971).

[211] IOWA REV. STAT. § 598.21 (Supp. 1972).

[212] MICH. COMP. LAWS § 552.19 (Supp. 1972).

[213] Neb. Act (L.B. 820) § 20(3).

[214] FLA. STAT. ANN. § 61.08 (Supp. 1972).

[215] 243 So. 2d 439 (Fla. Ct. App. 1971).

> should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership.[216]

The UMDA takes a two step approach to property division. First, the property is separated into marital and nonmarital property.[217] Following this initial separation the court then has discretion to make a property division which is "just" applying the following guidelines:

> (1) the contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;
> (2) the value of the property set apart to each spouse; and
> (3) the economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children.[218]

The effect of this separation of property into "marital" and separate portions is to insure that both spouses derive some benefits from their acquisitions during marriage. It is intended, for example, to permit the allocation of a portion of the marital property to the spouse who is not employed in a salaried position but has merely "kept house" during the marriage. The statute clearly recognizes that the economic contributions of a homemaker are as genuine as the contribution of the wage-earner.

Moreover, the statute keeps purely independent acquisitions or the proceeds of such acquisitions entirely out of the marital pot. It recognizes that there can be considerable emotional attachment to inheritances or gifts that are given

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[216] 5 FAM. L.Q. at 207.

[217] "Marital property is the residuum of all property acquired during the marriage after the following classes of property are excluded:

(1) property acquired by gift or bequest;
(2) property acquired in exchange for property acquired before marriage;
(3) property acquired . . . after a decree of legal separation;
(4) property excluded by valid agreement of the parties;
(5) the increase in value of property acquired prior to the marriage.

All other property is presumed to be marital property." UMDA §§ 307(b)(1)-(5), 307(c); COLO. REV. STAT. §§ 46-1-13(2)(a)-(f), 46-1-13(3) (Supp. 1971).

[218] UMDA § 307(a)(1)-(3); COLO. REV. STAT. § 46-1-13(1)(b)-(d) (Supp. 1971).

only to one spouse. To lump this sort of property with the joint purchases and acquisitions needlessly increases the friction of property settlement during divorce.

Most importantly, the property division section of the UMDA forces a commendable break with traditional practice by requiring the parties to look to presently owned possessions rather than future earnings for spousal maintenance. Under the statute the property is divided in such a way that it may provide the economic base necessary for one spouse to begin a new life outside the family. Normally, there will be no future wages committed by either spouse for spousal maintenance. The economic ties which so distastefully bind divorced couples under the alimony awards are eliminated in many cases under the UMDA.

3. *Child Custody*

The history of child custody in Anglo-American law has been a progression from a view of the child as mere property of the father to a belief that the child has intrinsic worth apart from that of his parents and, as such, has definite and protectable interests of his own.[219] The modern development has been toward a test generally characterized as the "best interests of the child." As Judge Cardozo formulated the test:

> [The court] does not proceed upon the theory that the petitioner, whether father or mother, has cause of action against the other or indeed against any one. He acts as *parens patriae* to do what is best for the interest of the child. . . He is not adjudicating a controversy between adversary parties, to compose private differences. . . Equity does not concern itself with such disputes in their relation to the disputants. Its concern is for the child.[220]

The best interests test has been subject to some modification through the application of various presumptions. In certain jurisdictions there is a presumption that a young

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[219] *See* King v. DeManneville, 102 Eng. Rep. 1054 (K.B. 1804); CLARK, *supra* note 4.

[220] Finlay v. Finlay, 240 N.Y. 429, 433-34, 148 N.E. 624, 626 (1925).

child is better off with his mother.[221] When the dispute is between a natural parent and a third party, there is almost always a preference for a presumption in favor of the natural parent.[222]

Fault has long been a factor in custody disputes. Many states have established a presumption of unfitness when one parent, especially the mother, has engaged in adulterous behavior.[223] Other jurisdictions require that a mother who has committed adultery be declared unfit as a matter of law.[224] It will be noted that this misconduct is not necessarily misconduct bearing directly on the child (as in the case of a mother who lets her child know of her adulterous behavior) but can arguably be merely a single act of infidelity completely outside the child's knowledge but nonetheless sufficient to provide grounds for the other spouse.[225]

a. Custody under the no-fault statutes

Every state statute, with the exception of Iowa and Michigan, and the UMDA have incorporated, in some fashion, the best interests tests.[226] Iowa[227] and Michigan[228] permit

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[221] Vanden Heuvel v. Vanden Heuvel, 254 Iowa 1391, 121 N.W.2d 216 (1963); Boone v. Boone, 150 F.2d 153 (D.C. Cir. 1945).

[222] *See* Foster & Freed, *Child Custody, (Part I),* 39 N.Y.U.L. REV. 423, 425 (1964).

[223] *See, e.g.,* Parker v. Parker, 222 Md. 69, 158 A.2d 607 (1960).

[224] *See, e.g.,* Beck v. Beck, 175 Neb. 108, 120 N.W.2d 585 (1963). However, it is unclear from the Nebraska decisions whether a single, isolated act of adultery will conclusively bar an award of custody to an adulterous spouse. The Nebraska cases all involved a continuing, long-term adulterous relationship.

[225] In their classic article on child custody, Professors Foster and Freed note a double standard in the custody area with respect to adultery. A mother's adultery is usually a much more persuasive factor in a custody dispute than is a father's adultery. Foster & Freed, *Child Custody (Part I),* 39 N.Y.U.L. REV. 423, 431 (1964). However, there appears to be a paucity of cases on this subject, perhaps because an adulterous father rarely seeks custody as against a non-adulterous mother. It is plain that a strong equal protection argument could be made in those cases where the double standard is applied. It is equally clear that the equal rights amendment will go far toward removing such inequities. *Cf.* Stanley v. Illinois, 405 U.S. 645, 648 (1972).

[226] CAL. CIV. CODE § 4600(a) (West 1971); COLO. REV. STAT. § 46-1-24 (Supp. 1971); FLA. STAT. ANN. § 61.13(2) (Supp. 1971); Neb. Act § 18; ORE. REV. STAT. § 107.105 (1971); UMDA § 402.

[227] IOWA REV. STAT. § 598.21 (Supp. 1972).

[228] MICH. LAWS § 552.16 (Supp. 1972).

custody awards within the court's discretion on any terms which are "just and proper."

Beyond the basic test, however, several states have adopted various little modifications and variations. For example, California has set up a hierarchy, or order of preference, in custody disputes which perpetuates the "preference for the mother" presumption.[229] Florida[230] and Oregon[231] have expressly abolished the mother preference.

Colorado,[232] Kentucky[233] and the UMDA[234] have set out a non-exclusive list of factors within the general scope of the best interest test which the court is required to consider.

As the UMDA comments indicate, this list is merely intended:

> to codify existing law in most jurisdictions. It simply states that the trial court must look to a variety of factors to determine what are the child's best interests. The five factors mentioned specifi-

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[229] CAL. CIV. CODE § 4600 (West 1971);

> Custody should be awarded in the following order of preference:
> (a) To either parent according to the best interests of the child, but, other things being equal, custody shall be given to the mother if the child is of tender years.
> (b) To the person or persons in whose home the child has been living in a wholesome and stable environment.
> (c) To any other person or persons deemed by the court to be suitable. . . .

The same constitutional arguments based on equal protection and due process which obtain when an adulterous mother but not an adulterous father is denied custody are applicable here. The Supreme Court has already applied a due process test to an Illinois proceeding in which fathers of illegitimate children were absolutely prohibited from seeking custody of their children and were deemed unfit as a matter of law. The Court held that this conclusive presumption violated an "unwed father's" right to due process. Stanley v. Illinois, 405 U.S. 645, 648 (1972).

[230] FLA. STAT. ANN. § 61.13(2) (Supp. 1971).

[231] ORE. REV. STAT. § 107.105(1)(e) (1971).

[232] COLO. REV. STAT. § 46-1-24(1)(a)-(b) (Supp. 1971).

[233] KY. REV. STAT. ANN. § 403.270 (1972).

[234] UMDA § 402(1)-(5). The factors are:

> (1) the wishes of the child's parent or parents as to his custody;
> (2) the wishes of the child as to his custodian;
> (3) the interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
> (4) the child's adjustment to his home, school, and community; and
> (5) the mental and physical health of all individuals involved.

> cally are those most commonly relied upon in the appellate opinions, but the language of the section makes it clear that the judge need not be limited to the factors specified.[235]

Several of the statutes, specifically California,[236] Colorado,[237] Kentucky[238] and the UMDA,[239] prohibit any evidence of fault except as such fault bears on the child itself. Oregon has enacted a rather curious provision which permits the court to examine the "past conduct and demonstrated moral standards of each of the parties."[240] There is at least a possibility that the broad language of the Oregon statute will lend itself to considerable judicial abuse. To permit examination of "past conduct and demonstrated moral standards" is to almost beg for reinstatement of the old fault concepts and to permit judges to examine virtually the entire gamut of one's behavior. We may concede that some analysis of prior behavior may be necessary to make an informed decision on parental fitness; but even an investigation of fitness should be somewhat limited. The Oregon statutory language is so broad that no limitations remain.

Furthermore, the Colorado–Kentucky—UMDA legislation incorporates some additional and provocative measures which are generally considered by commentators to be beneficial for the children.[241] This legislation permits consultation with child care experts,[242] interviews with the child in chambers rather than open court[243] and the appointment of sepa-

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[235] UMDA Comments, 5 FAM. L.Q. at 241.

[236] CAL. CIV. CODE § 4509(1) (West 1971).

[237] COLO. REV. STAT. § 46-1-24(2) (Supp. 1971).

[238] KY. REV. STAT. ANN. § 403.270 (1972).

[239] UMDA § 402.

[240] ORE. REV. STAT. § 107.036(2) (1971).

[241] *See, e.g.*, Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYRACUASE L. REV. 55 (1969).

[242] COLO. REV. STAT. § 46-1-26(2); UMDA § 404(b); KY. REV. STAT. ANN. § 403.290 (1972). The court may seek the advice of professional personnel whether or not they are employed on a regular basis by the court. The advice shall be given in writing and shall be made available by the court to counsel upon request. Counsel may call for cross-examination of any professional personnel consulted by the court.

[243] COLO. REV. STAT. § 46-1-26(1) (Supp. 1971); KY. REV. STAT. ANN. § 403.290 (1972); UMDA § 404(a).

rate counsel to see to the interests of the child independent of counsel in the divorce proceedings.[244] Finally, as part of a partial incorporation of what Dr. Andrew Watson has called the "psychological best interests of the child" test, Colorado,[245] Kentucky[246] and the UMDA[247] prohibit any motion to modify a custody decree within a specified period (UMDA 1 year; Colorado and Kentucky 2 years) after the entry of the decree.[248]

b. Extrajudicial resolution of alimony, property settlement and child custody

Another salutary development—one which may ultimately prove most effective in reducing the bitterness of divorce—has been enacted by Nebraska,[249] Colorado,[250] Kentucky,[251] and the UMDA.[252] A separate section of each of these statutes permits the spouses to reach their own agreement on property settlement, alimony and child custody outside the courtroom. The court may not set aside such an agreement unless it finds the terms unconscionable—an extremely difficult task to be sure. The parties may stipulate whether the agreement is to be incorporated into the final decree of dissolution or merely "identified" in the decree.[253]

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[244] COLO. REV. STAT. § 46-1-16 (Supp. 1971); UMDA § 310. Kentucky has no such provision.

[245] COLO. REV. STAT. § 46-1-31(1) (Supp. 1971).

[246] KY. REV. STAT. ANN. § 403.340 (1972).

[247] UMDA § 409(a). The UMDA also prohibits a subsequent motion to modify, whether the earlier motion was granted or denied within two years after disposition of the prior motion.

[248] 5 FAM. L.Q. at 247.

[249] Neb. Act (L.B. 820) § 20.

[250] COLO. REV. STAT. § 46-1-12 (Supp. 1971).

[251] KY. REV. STAT. ANN. § 403.180 (1972).

[252] UMDA § 306.

[253] This provision is such an unusual departure from the conventional settlement language in most divorce statutes that its language bears quoting in toto from the Kentucky provision:

> (1) To promote amicable settlement of disputes between parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for maintenance of either of them, disposition of any property owned by either of them, and custody, support and visitation of their children.

Under these provisions, none of the problems which arise collaterally to the divorce need ever be the subject of a judicially-imposed settlement. Unless the spouses are so estranged that they cannot communicate even through attorneys, each may bargain a settlement without fear that the court will later upset it. The mutual give and take of negotiation should produce a more mutually satisfactory solution than a similar settlement imposed by judicial edict. Of course, it may also sorely try the negotiating skills of the respective counsel.[254]

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(2) In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except those providing for the custody, support, and visitation of children are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

(3) If the court finds the separation agreement unconscionable, it may request the parties to submit a revised separation agreement or may make orders for the disposition of property, support, and maintenance.

(4) If the court finds that the separation agreement is not unconscionable as to support, maintenance, and property:

(a) Unless the separation agreement provides to the contrary, its terms shall be set forth verbatim or incorporated by reference in the decree of dissolution or legal separation and the parties shall be ordered to perform them; or

(b) If the separation agreement provides that its terms shall not be set forth in the decree, the decree shall identify the separation agreement and state that the court has found the terms not unconscionable.

(5) Terms of the agreement set forth in the decree are enforceable by remedies available for enforcement of a judgment, including contempt, and are enforceable as contract terms.

(6) Except for terms concerning the support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms if the separation agreement so provides. Otherwise, terms of a separation agreement are automatically modified by modification of the decree.

KY. REV. STAT. ANN. § 403.180 (1972).

[254] One practicing attorney has, with tongue in cheek, envisioned a new breed of "superlawyer" emerging from the intense demands placed on the negotiating skills of the average family law practitioner by the new no-fault laws. The new skills characteristic of the "superlawyers" will include:

(1) An insatiable curiosity for financial facts coupled with an ever-present means for independently obtaining and verifying them;

(2) An unparalleled skill in a new science—which I call "conflict resolution"—otherwise known as negotiating skills equal to the proverbial charming of the birds out of the trees;

4. Counseling and Conciliation

One of the more divisive issues in no-fault divorce is the specter, whether real or imagined, of the new statute permitting divorce upon demand without any effort by the courts to make some attempt to conciliate the spouse's differences and thereby save the marriage. Perhaps no one has stated this position with more force and vigor than the report of the American Bar Association, Section of Family Law, in its comments on the UMDA. The section believes that:

> The failure of the proposed Uniform Act to provide counselling or conciliation screening processes or services, the short period of 90 days continuance before a decree, and the "irretrievable breakdown" ground, in combination, constitutes an abdication of the public interest in the stability of marriage. There are no meaningful brakes on impetuous or hasty divorce, no incentives for second thoughts, and such is true regardless of children in the family.[255]

While we do not subscribe to the Family Law Section's attack on the irretrievable breakdown test, we do agree that the UMDA is deficient in its failure to make detailed provision for counseling and conciliation services. But in fairness to the drafters of the UMDA, it must be understood that there are several unresolved issues presented by the idea of a statutorily-established counseling or conciliation operation, which make the drafting of a model act for the various states difficult. Should it be compulsory or voluntary? If compulsory, how does one resolve the constitutional and psychological problems raised by the mandatory nature of the counseling? Given Jacobson's figure that approximately ninety percent of all divorces are uncontested,[256] is there a need for an elaborate counseling system for the small minor-

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(3) A computerized mental agility plugged directly to the multitudinous, prolix, involved sections of the Internal Revenue Code . . .
(4) The treasured . . . art of the ancient scrivener . . . who could weave a web of words from which there is no escape in this life or in the next;
(5) The combined talents of a latterday Sigmund Freud, Ann Landers, Dr. Spock, and friendly neighborhood bartender.

Ducanto, *The Age of Aquarius and the Matrimonial Lawyer*, 8 TRIAL 21 (1972).

[255] 5 FAM. L.Q. at 165.

[256] P. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 115 (1959).

ity of cases requiring counseling, irrespective of the cost to the taxpayers? Or should counseling be required in uncontested cases? Should the counseling system be court-connected or should spouses be referred by the courts to private counselors?

The no-fault statutes already enacted have taken various approaches to the conciliation question. Colorado has no established conciliation mechanism but simply advises that the court may continue a proceeding for not less than 30 or more than 60 days and "may suggest to the parties that they seek counseling."[257] Florida makes counseling dependent on both the court's discretion and whether there are minor children involved and permits court referrals to private or religious counseling services.[258] Iowa permits the judge within each judicial district to establish a court-supported counseling service through the county welfare board.[259] If such a

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[257] COLO. REV. STAT. § 46-1-10(2)(C) (Supp. 1971).

[258] (a) If there are no minor children of the marriage and if the respondent does not deny [the petition] the court shall enter a judgment of dissolution . . . if the court finds that the marriage is irretrievably broken.

(b) Where there are minor children or where the respondent denies [the petition] . . . the court may:

1. Order either or both parties to consult with a marriage counselor, a psychologist or psychiatrist, a minister, priest, or rabbi, or any other person deemed qualified by the court and acceptable to the party or parties . . .

2. Continue the proceedings for a reasonable length of time not to exceed three (3) months, to enable the parties themselves to effect a reconciliation; or

3. Take such other action as may be in the best interests of the parties and the minor children . . . FLA. STAT. ANN. § 61.052(2) (Supp. 1972).

[259] The Court shall require such parties to undergo conciliation for a period of at least ninety days. . . . Such conciliation procedures may include, but shall not be limited to, referrals to the domestic relations division of the court, if established, public or private marriage counselors, family service agencies, community health centers, physicians and clergymen. . . .

. . . .

The costs of any such conciliation procedures shall be paid by the parties; however, if the court determines that such parties will be unable to pay the costs . . . such costs may be paid from the court expense fund. IOWA REV. STAT. § 598.16 (Supp. 1972).

service is not established the court may use private counseling services. Moreover, the counseling appears to be mandatory and may not be waived if either party or the attorney appointed to look after the child's interest objects.[260]

Michigan has tacked their no-fault provisions onto an older counseling system which set up counseling services by district under the various county boards of supervisors.[261] The service functions under the circuit court's immediate supervision with a mandatory "first priority" going to "domestic relations action in which a complaint or motion has been filed. . . ."[262] Additionally, the director of the counseling service may make referrals to outside services which are, in his judgment, qualified to aid in reconciliation.[263] There appears to be no compulsory counseling requirement in the statute; the initial referral from the court is apparently discretionary.

Nebraska requires, prior to any decree of dissolution, that the court find that "every reasonable effort to effect reconciliation has been made."[264] This statute provides for a referral, at the discretion of the court, to a conciliation court in those counties with such courts, or to independent counselors where no conciliation court exists.[265]

Oregon permits each jurisdiction to establish a conciliation service and, if established, the court may refer couples to the service.[266] But the statute imposes a severe time limitation on the parties undergoing reconciliation by requiring that conciliation be terminated and the dissolution proceeding resume if there has been no reconciliation within 45 days.[267]

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[260] *Id.*

[261] MICH. COMP. LAWS ANN. § 551.332 (1967).

[262] *Id.* § 551.336.

[263] *Id.* § 551.337.

[264] Neb. Act (L.B. 820 § 14.

[265] *Id.*

[266] ORE. REV. STAT. §§ 107.520, 107.540 (1971).

[267] ORE. REV. STAT. § 107.540 reads, in pertinent part:

If within 45 days after the court commenced to exercise conciliation jurisdiction, a reconciliation or a settlement of the controversy has not been

By far, California has established the most elaborate system of reconcilation. As a part of the initial pleading the petitioning spouse is directed to file a confidential questionnaire along with the petition.[268] In those counties which have established conciliation courts the questionnaire is served on the other spouse along with the petition.[269] The document is a relatively simple document asking 45 questions relating to the spouses' personal background and the couple's marital experiences. Question 44, for example, the item calling for the most elaborate, free form response, asks "What do you feel is wrong with this marriage?"[270] The questionnaire becomes especially meaningful when coupled with the elaborate system of conciliation courts established in California.[271]

The Los Angeles Conciliation Court, the oldest member of the 16 county system was established in 1939 and by 1971 had received a total of 72,692 petitions.[272] The court's professional staff presently consists of a director, an assistant director and 13 Senior Family Counselors.[273] It is difficult to determine the ultimate effectiveness of the services furnished by the court. In its latest annual report the court indicates that it received 4,688 petitions for conciliation (including 2,934 filed as a mandatory part of the dissolution

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effected, the domestic relations suit shall proceed as if the court had not exercised conciliation. . . .

[268] CAL. CIV. CODE § 4505(a) (West 1971).

[269] *Id.* at § 4505(b).

[270] FREEMAN, ATTORNEY'S GUIDE TO FAMILY LAW ACT PRACTICE 205-06 (1970).

[271] Although only 16 counties presently have such courts, they are generally viewed as desirable. Moreover, these 16 counties contain 70% of the population of California. During the legislative proceedings leading to the enactment of the Family Law Act, one of the more important questions raised was the cost of conciliation. Another earlier bill had been proposed which would have established a state-wide family court system complete with full-scale counseling. Cost of these services were estimated at $4,400,000 statewide for the first year of operation. The presiding judge of the Los Angeles Superior Court, Family Court Department, contradicted this figure and estimated the total cost for one year at closer to $10,000,000. Krom, *California's Divorce Law Reform: An Historical Analysis,* 1 PACIFIC L.J. 156, 171 (1970).

[272] THE LOS ANGELES CONCILIATION COURT, 1971 ANNUAL REPORT 1 (1972).

[273] *Id.* It is important to note that the court not only treats foundering marriages but also handles the premarital counseling for minors required by CAL. CIV. CODE § 4101 (West Supp. 1971).

proceedings under the Family Law Act).[274] The court indicates that where both parties presented themselves for counseling 1,291 cases resulted in reconciliation and 512 remained irreconcilable.[275] Since it is generally conceded that few marriages can be saved when one of the spouses refuses to subject himself or herself to counseling, the percentage appears respectable. It is at least arguable that the court saved a sizeable number of marriages which might have gone under without counseling. Whether the results justify the expenditures is a matter for legislative consideration in the other states and was a consideration weighing heavily on the California legislature when it decided against requiring each county to set up a conciliation service.[276]

5. *Short Term Effects of Liberal Legislation*

While it is too early to make a fair appraisal of the operation of sweeping divorce reform legislation on the order of California's, some interesting short term effects should be noted. These include speedier and more efficient divorce proceedings, reduction in migratory divorce, an increase divorce rate, "do-it-yourself" divorce proceedings and the end to the cathartic function performed by acrimonious divorces.

In California, at least, divorce proceedings have become very streamlined and business-like. The entire process in cases in which prior property settlement and custody agreements have been entered into by the divorcing spouses may take no more than ten minutes. Judges have been known to handle twenty or more divorce cases in a day.[277] This can only

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[274] 1971 ANNUAL REPORT, *supra* note 272, at 36 (Table I).

[275] *Id.* Unfortunately there are no immediately available statistics on the number of dissolution petitions filed in Los Angeles County or on the number of dissolutions actually granted. A combination of these figures along with the court's conciliation reports might provide a clearer picture of the relative worth of the conciliation court. The conciliation court has reported also that the Family Law Act with its mandatory questionnaire has caused an increase of approximately 15% in petitions for counseling. *Id.* at 1.

[276] *See* note 264 *supra.*

[277] N.Y. Times, Mar. 7, 1971, § 1, at 62, col. 1. As one San Diego Superior Court Judge put it, "Instead of screaming and name calling, we have a business proposition that goes off fairly simple." *Id.* The speed with which these proceedings

result in judicial economy and the reduction of court backlogs, assuming that the divorce rate is not dramatically increased by the reform legislation.

In the first full year of operation of new California law, 1970, the divorce rate did jump nearly forty percent. Those who sponsored the law point out, however, that the major share of the 1970 increase came about in the first three months.[278] Persons who wanted divorces but might not have been eligible for them under the old law, and those who wished to avoid the hardships of the old fault system obviously waited for the advent of the present non-fault system. While a five percent decrease in the California divorce rate was recorded in 1971,[279] it can hardly be denied that liberalized divorce legislation may result in the short run, at least, in some increase in the divorce rate.[280]

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are carried on can be gauged by the experience of a member of Professor Zuckman's summer 1972 family law course. He and his attorney pulled into a public parking lot adjacent to the Los Angeles County Court House shortly before the time assigned for his hearing. The parking lot's rates are based on half-hourly time periods. The two men left the car, entered the building, reported to a central trial assignment room, obtained the information as to the location of their proceeding, went to the room, sat through the opening ritual and two or three prior divorce proceedings, had their proceeding (which lasted approximately two minutes), and then claimed the car from the parking lot within the initial thirty minute period.

[278] *Id.*

[279] Judge William Hogoboom, a trial judge in the California Family Court system, states that dissolution filings in Los Angeles County for the first full year of operation of the Family Law Act increased 8.8 percent, but this filing increase was roughly the same as the overall increase in other civil and criminal filings. In 1971, however, filings decreased by about 5 percent. Hogoboom, *The California Family Law Act of 1970: 18 Months Experience*, 27 MO. BAR J. 584, 588 (1971).

[280] Compare the New York, New Jersey, and Florida experiences following liberalization of their respective divorce laws. After two years of operation of the new law, effective January 1, 1968, the New York divorce rate more than tripled. N.Y. Times, Jan. 4, 1970, § 1, at 1, col. 4. Of course, it must be borne in mind that because of its prior law restricting divorce to the ground of adultery, New York was responsible for a very large number of the migratory divorces granted in Nevada, Idaho, and Mexico. Regarding the new New Jersey divorce law, the New York Times reported that between mid-September, 1971, and the end of January, 1972, the New Jersey divorce rate had increased more than 100 percent and that the chief clerk of the New Jersey Superior Court had expressed the hope that the increase for the first full year of operation of the new law would stabilize at a level approximately fifty percent previously experienced. As with New York, the prior New Jersey divorce statute was quite restrictive. *See* N.J. STAT. ANN. § 2a:34-2 (West

If the divorce rate in a jurisdiction increases following the advent of non-fault divorce, the migratory divorce rate should decrease. Liberalized divorce at home destroys one of the most compelling reasons for going to a foreign jurisdiction, that is, the desire to evade strict local requirements. This has proved to be the case in California where, prior to the enactment of the Family Law Act, a substantial number of Californians journeyed to Nevada for relatively quick and easy divorces. But, in 1970, the number of Nevada divorce decrees dropped approximately 15 percent and one Nevada legislator estimated that the new California legislation is costing his state one million dollars a year.[281]

1952); N.Y. Times, Feb. 6, 1972, § 1, at 75, col. 7. On the other hand, Florida, which had a relatively liberal fault system divorce law prior to its adoption of sweeping non-fault divorce legislation, *see* FLA. STAT. ANN. § 61.041 *et seq.*, (Supp. 1972), experienced a relatively slight increase in its divorce rate during the first month of operation—a time when the rate might be expected to soar, if it is to soar at all. Wash. Post, Aug. 29, 1971, § F, at 16, col. 3.

[281] N.Y. Times, Mar. 7, 1971, § 1, at 62, col. 1. The Times' report is corroborated by a letter to the authors from a Nevada lawyer. He said:

> Formerly, many California residents came to Nevada and established residence here for the purposes of getting a divorce. . . Since the enactment of the current California plan the number of Californians coming to Nevada has greatly diminished.

Comment on questionnaire by William C. Thorton, Esq., Reno, Nevada. Questionnaire on file with authors.

One may hope that as liberalized divorce legislation becomes widespread, the need of unhappy spouses to evade local law and, in the process, expend substantial personal resources in an effort to dissolve their marriages will all but disappear. For the moment, however, migratory divorce is alive and well in places like Haiti and Santo Domingo. At about the same time that the Mexican federal government outlawed quickie divorces in the state of Chihuahua, Haiti enacted a divorce law much like Mexico's old law, permitting divorce upon grounds of incompatibility without a showing of Haitian residence. All that is required is consent to the divorce by both spouses and the personal appearance of the petitioning spouse. Because of transportation schedules, an overnight stay at a Haitian hotel is necessary. One American lawyer who previously practiced in Juarez, Mexico, has a virtual monopoly over Haitian divorces sought by residents of the United States. *See* Wall Street Journal, Dec. 13, 1971, at 1, col. 4; Wash. Post, Oct. 31, 1971, § G, at 9, col. 1. Soon after Haiti got into the migratory divorce business, the Dominican Republic sought a piece of the action as well. *Id. See also* Wash. Post, Feb. 1, 1972, § A, at 18, col. 1 (editorial). The Post editorial attacked the present widespread fault system and commended the California approach to nonfault divorce. It concluded by saying:

> Washington area lawyers have recently been notified that a law firm in the Dominican Republic has appointed a local representative to help speed area residents to quick divorces. For $400, an airplane ticket, and

A particularly fascinating effect of the new California law and one that could have substantial impact on the practice of law is "do-it-yourself" divorce. Because the court forms are so easy to fill out (to a great extent merely checking boxes), and court procedures so streamlined, many Californians are availing themselves of the option to file for dissolution in proper person.[282] A Los Angeles County Superior Court judge who supervises the court's family law departments has estimated that two percent of the filings in Los Angeles County in 1971 were on a do-it-yourself basis.[283] The economies realized can be great. While California lawyers charge a minimum of $350 for relatively uncomplicated dissolution actions pursuant to guidelines provided by the state

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> the right papers, you can get a divorce in Santo Domingo within 24 hours. Unfortunately, you have to stay overnight because the first plane doesn't reach the island until noon, and that is precisely when the divorce court closes for the day. This sort of thing has gone on for a long time elsewhere—the same law firm had an office just across the border in Mexico—and it ought to stop. Something is wrong when people who have $400 and a plane ticket can get quickie divorces and those who don't have it can't. No-fault divorce would be a step not only toward reality and rationality, but also toward equality.

It is not yet clear whether Haitian and Dominican Republic divorces will be recognized in American jurisdictions. A lively debate is now in progress. *See* Wall Street Journal, Dec. 13, 1971, at 1, col. 4. In response to a request for a legal opinion regarding the foreign recognition problem made by the Haitian Agency, Inc. of Hartford, Connecticut, a combination travel and divorce procurement agency, Donald J. Cantor, a Hartford attorney, stated:

> This procedure (of Haiti in divorce proceedings) is specifically patterned after the law of the state of Chihuahua, Mexico which prevailed there until November of 1970. My opinion, therefore, is that the present law in Haiti, as amended June 28, 1971, provides a divorce for American residents which is as valid as that provided in the State of Chihuahua, Mexico prior to November of 1970.

Letter to the Haitian Agency, Inc. from Donald J. Cantor, Esq., dated July 30, 1971. This letter opinion was then circulated by the agency.

[282] *See* N.Y. Times, Mar. 7, 1971, §1, at 62, col. 1; Kasindorf, *The Do-It-Yourself Divorce*, 17 LOS ANGELES MAG., May, 1972, at 52.

[283] Kasindorf, *The Do-It-Yourself Divorce*, 17 LOS ANGELES MAG., May, 1972, at 52. This percentage may be on the rise. At the Van Nuys division of the Superior Court on one day recently ten of the 23 dissolution filings were pro per filings. And a radio report by WTOP-AM, Washington, D.C., a CBS affiliate, on October 23, 1972, stated that the clerk of the San Diego Superior Court had estimated that fifteen percent of the approximately 12,000 annual filings for dissolution are now of the do-it-yourself variety. The same report indicated that the pro per rate in Los Angeles County had reached approximately eight percent.

bar, the do-it-yourselfer can get a final decree in an uncontested case for under fifty dollars which includes the fourty-four dollar filing fee.[284] Needless to say, the divorce lawyers are less than over-joyed by this development.[285]

Finally, it should be noted that the availability of speedy, efficient, and relatively cheap marriage dissolution under the California approach is not without a hidden psychological cost for the allegedly wronged spouse. The acrimonious fault divorce proceeding could be used as catharsis by the supposedly innocent spouse. The spleen could be vented and perhaps some of the frustrations created by a bad marriage worked off. This is no longer possible in the courtrooms presided over by judges who understand the true nature of liberal divorce reform legislation.[286] On balance, however, the loss of the cathartic effect of fault divorce seems a small price to pay.

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[284] N.Y. Times, Mar. 7, 1971, § 1, at 62, col. 1; Kasindorf, *The Do-It-Yourself Divorce*, 17 LOS ANGELES MAG., May, 1972, at 52. One woman who went the do-it-yourself route gives lay persons who wish to follow in her footsteps the following advice:

> If you want to do your own divorce, read everything you can pertaining to the dissolution of marriage law. Go to the courthouse and sit in on divorce hearings—both contested and uncontested. When your time comes to testify you may antagonize and outrage the judge if you sound like Elmer Fudd. On the other hand, he will probably be sympathetic and downright courtly if you show you've taken the trouble to be well prepared. . . . You must know what to expect in your own arena.

Cohen, *Getting Through a Divorce for Under $50*, 17 LOS ANGELES, MAG., May, 1972, at 53. She further warns that the forms must be filled out perfectly or the clerks, whom she found to be hostile to her pro per action, will reject the filing. *Id.*

[285] Nevertheless, this movement has been nurtured by some members of the California Bar. The do-it-yourselfer's bible is *How to Do Your Own Divorce in California*, which was written by a Berkeley attorney, Charles Sherman. Several thousand copies of the book have been sold. The Crenshaw Women's Center of Los Angeles recently engaged a woman attorney to conduct a course for women on pro per divorce procedure. Kasindorf, *The Do-It-Yourself Divorce*, 17 LOS ANGELES MAG., May, 1972, at 52.

[286] Following a dissolution proceeding covered by the New York Times, the Times' reporter asked the newly divorced parties what they thought of the proceedings. They said, "It really was very painless and civilized." The wife found it too impersonal and cold blooded. "I wanted a chance to tell the judge how hard I tried to make our marriage succeed, and the anguish I went through before filing for divorce." N.Y. Times, Mar. 7, 1971, § 1, at 62, col. 1.

C. Radical Legislative Proposals

The immediately preceding legislative enactments or proposals are denominated "liberal" because while they make fundamental changes in the prevailing fault system of divorce they accept, at least *sub silentio*, the Western ideal of the permanent and monogamous marriage contract, the interest of the state in each marriage contracted, and the monopoly of the state courts in dissolving the status of marriage entered into through the present form of contract.[287] Not all divorce reform proposals such as those discussed below accept these fundamental tenets.

1. The Option Marriage Contract

For some time now, social scientists have been considering alternatives to the standardized permanent-exclusive marriage contract. Dr. Jessie Bernard, a noted sociologist, has recently pointed out that with divorce more readily available to the mass of people, "the current trend seems to be in the direction of commitment for only as long as the relationship between the partners is a good one."[288] This trend could be reflected in our legal system through legislation recognizing alternatives to the standard marriage contract.

The most intriguing alternative may be the option marriage contract similar to the old film industry option contract for performers. Under this commitment, a marriage would be entered into for a limited duration, for instance, five years. If at the end of the commitment period one or both of the spouses were dissatisfied with the relationship, the marriage would be terminated without the need for court-ordered dissolution. If both parties were satisfied with their marriage, each would pick up the other's option for another limited period. Of course, some type of registration for terminated contracts would have to be maintained by the state to give notice of the parties' status to interested persons such as

[287] For discussion of the state's monopoly in dissolving marriages, see Boddie v. Connecticut, 401 U.S. 371 (1971).

[288] Bernard, *supra* note 1, at 96.

creditors. It is Dr. Bernard's belief that legal recognition of this non-permanent form of marriage contract is not far off, and she points to a bill introduced in the 1971 session of the Maryland legislature designed to recognize such a contract.

This bill,[289] which to our knowledge, represents the first serious legislative challenge in this country to the monopoly of the standard marriage contract, provided that marriages performed in Maryland "shall be a contract of marriage for the term of three . . . years."[290] The bill died in committee and, we think, with good reason. For as originally drafted, the bill would substitute the monopoly of the option contract for that of the standard lifetime contract. The monopoly approach runs clearly counter to current sociological thought.[291] The bill was revised and re-introduced in the 1973 session of the Maryland General Assembly. As it now reads, the bill makes the option contract an alternative to the standard contract.[292] As an alternative, the option contract would

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[289] (1971) H.B. No. 633 (Dels. Lee and Boswell).

[290] *Id.* at § 1. *See* Note, *Untying the Knot: The Course and Patterns of Divorce Reform*, 57 CORNELL L. REV. 649, 661-63 (1972) for criticism of the bill.

[291] *See, e.g.*, BERNARD, *supra* note 1, at 270-71; Davids, *New Family Norms*, 8 TRIAL 14 (1972).

[292] (1972) H.B. No. 3(Del. Lee) prefiled for 1973 legislative session. The bill now provides:

> Section 1. Be it enacted by the General Assembly of Maryland, that new Section 32 be and it is hereby added to Article 16 of the Annotated Code of Maryland (1966 Replacement Volume), title "Chancery," to follow immediately after Section 31 thereof and to be under the new subtitle "Marriage—Contractual Renewal," and to read as follows:
>
> *Marriage—Contractual Renewal*
>
> (A) The provisions of this section are in addition to the provisions of law and of this state relating to divorce and annulment and shall be construed as increasing, but not limiting, the law presently existing in this state.
>
> (B) Any marriage performed in this state from and after July 1, 1972, may be a contract of marriage for the term of three (3) years. The contract at the end of that period of time shall be subject to renewal for an additional three (3) year period upon the mutual agreement of both parties thereto. The renewal option shall be available at the end of the original three (3) year period and each and every three (3) year period thereafter. If either party to the original marriage contract at the end of the original term or any extension thereof does not agree to an additional three (3) year optional extension to renew, and if the other agreeable

have the advantage of providing the prospective spouses with a choice between the supposed security of the standard contract[293] and the freedom and independence of the option contract. However, we doubt that such an approach would be a step forward at the other end of the marital rainbow. The option contract might be construed to require the parties to be bound to each other during the option period regardless of whether the marriage was then viable.[294] Thus,

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party so requests, the Circuit Court of the County or Baltimore City, as the case may be, whether either of the parties resides or works or maintains a principal place of business, has jurisdiction to determine:

(1) Alimony or maintenance, other support, if any, whether pendente lite or permanent, payable by the spouse not renewing the marriage contract to the person wishing to continue the marriage;

(2) Child support, if any, for issue born as a result of the initial marriage contract or any renewal thereof or adopted by the parties thereto during the original term or any renewal thereof;

(3) Property settlement between the parties to the initial marriage contract or any renewal thereof;

(4) Any and all other questions which would be within the jurisdiction of the appropriate court under the existing divorce and/or annulment laws of the state; and

(5) Attorney's fees of the party applying for relief hereunder.

(C) The Court has the same powers under this section as it would have under the laws of this state concerning divorce and annulment in regard to enforcement of court offers issued under any application for relief brought hereunder or by right under the divorce and annulment laws of this state.

(D) If the parties to the contract, or either of them, do not wish to continue the marriage for the original three year period, or any extension thereof, the party seeking relief or the other party to the contract may request the Circuit Court of the County or of Baltimore City, as the case may be, to proceed under the terms of the contract or under the existing laws pertaining to divorce.

Any agreement signed by the parties to the original marriage contract, with regard to alimony, maintenance and support, permanent or pendente lite, or any of them, and child support, property settlement, attorney fees, and other questions properly before the Court or within its jurisdiction, or any of them, shall be incorporated in a decree or order of the court.

Section 2. And be it further enacted, that this Act shall take effect on July 1, 1973.

[293] *Compare, e.g.*, the status of the tenured university professor, who can be removed from his position for grave cause only.

[294] As a student commentator has observed:

A marriage should be legally terminated when its emotional underpinnings no longer exist, not when the state or the parties predict that those

couples choosing this alternative might be deprived of recourse to divorce in whatever form normally available in the jurisdiction. Certainly, if recognition is accorded to the option marriage contract, the legislatures giving such recognition should make clear that the normal divorce process will be available during the option period should it be found necessary.[295]

Moreover, because option contract legislation approaches marriage dissolution from a time perspective prior to the individual marriage itself, permits automatic termination of significant relationships without regard to individual circumstances, and has nothing whatever to say about existing fault patterns in collateral proceedings regarding alimony, child support, property settlement and custody, we would caution against its utilization as a substitute for broad non-fault divorce reform legislation.

2. *Divorce by Registration*

By far the most radical proposal for direct divorce reform is divorce by registration. Either or both spouses would register the fact that their marriage was in fact at an end. The state would be stripped of its power of adjudication and would be limited to recording and providing public notice of the fact of dissolution. Of course, matters of property settlement, alimony, child support and custody would still have to be handled in collateral adjudicatory proceedings unless the parties were able to enter into an agreement as to these matters which might also be registered.

This approach to divorce directly recognizing consen-

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underpinnings will—or should—have dissolved. A state imposed marital contract of arbitrary duration provides no rational alternative to antiquated divorce laws.

Note, *Untying The Knot: The Course and Patterns of Divorce Reform*, 57 CORNELL L. REV. 649, 663 (1972).

[295] The original bill introduced in the Maryland legislature did not expressly provide for divorce during the three year option period. The revised bill permits spouses who do not wish to continue their marriage for the three year period to dissolve the marriage "under the existing laws pertaining to divorce." (1972) H.B. No. 3 § 1.

sual or even unilateral divorce without state intervention is politically unpalatable in this country[296] and we are unaware of any serious legislative effort to reform existing divorce law through this means, though the National Organization of Women (NOW) has drafted a proposed bill which permits divorce upon the filing of consent forms by both parties with the county clerk.[297]

Politics aside, we reject this approach to divorce reform because in its pure form it might encourage frivolous marriages, and would certainly permit frivolous or thoughtless divorces. And just as the present fault system errs in giving too much weight to the state's interest in promoting a reasonably stable society, permitting, for instance, the state to snoop into the most intimate details of a couple's relationship, the registration system errs in not recognizing any legitimate interest of the state in the marital relationship.[298]

In its less than pristine form calling for a waiting period,

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[296] Even the very liberal Report of the California Governor's Commission on the Family emphasized that the Commission was not recommending divorce by consent. CALIFORNIA GOVERNOR'S COMMISSION ON THE FAMILY, REPORT 23 (1966). After a brief experiment with it following the Russian Revolution, something resembling registration divorce became as unpalatable in the Soviet Union as in the United States. *See* G. FEIFER, JUSTICE IN MOSCOW 176 (1964); J. HAZARD & I. SHAPIRO, THE SOVIET LEGAL SYSTEM, pt. 3, at 99-102 (1962).

[297] The NOW Equal Right Divorce Reform Bill contains the following proposal as the basis for dissolution of marriage:

> Section 2.
>
> (1) Proceedings for the declaration of the termination of marriage. When both parties consent, by official written form, filed with the county clerk's office in the county of either party's residence, to a termination of their marriage, the court, after hearing, and finding that mutual consent in fact exists, shall declare the marriage terminated.
>
> (2) No marriage shall be terminated under this section unless both parties appear in the proceeding and are present at the hearing.
>
> (3) Proceedings under this section are not adversary actions between the parties to the marriage. There are no plaintiffs and defendants, and the proceedings shall be considered and described as directed against the existence of the marriage itself, and not as against a party thereto.

Unpublished notes on division of property and alimony compiled by Professor Herma Hill Kay. Copy on file with authors.

[298] For a contrasting view of divorce by registration in its pure form *see* Note, *Untying the Knot: The Course and Patterns of Divorce Reform*, 57 CORNELL L. REV. 649, 663-67 (1972).

divorce registration provides the opportunity for some reflection and perhaps attempts at reconciliation by the spouses.[299] But essentially the same goal of thoughtful and business-like divorce can be achieved by the utilization of a living apart statute of short duration such as that of Vermont which, in addition, recognizes the state's limited interest in marriage by requiring a finding by the court that reconciliation of the parties is not reasonably probable.[300]

All in all, divorce by registration seems to be an idea whose time has not yet come. Until there is a consensus that the state has no interest whatsoever in the marital status of its residents, the cause of divorce reform will be better served, in our opinion, by liberal non-fault oriented legislation which recognizes that the state has a limited interest in family stability.

We have examined all the new approaches to divorce in the United States and we have concluded that there is a definite and legitimate state interest in stable marriages, the maintenance of the nuclear family and a smoothly functioning, minimally disruptive divorce procedure. Yet the state's interest in these goals of stability need not take the form of rigid ecclesiastical or authoritarian pronouncements—a set of "thou shalt nots." It is perhaps enough that the state maintain some contact with the institution of marriage and the process of divorce, that it require compliance with certain minimal formalities both before one may marry and before a married couple may dissolve their marriage much in the same manner that the state currently prescribes rules and procedures for the execution and probate of a will. The formalities, and perhaps a waiting period of some short dura-

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[299] See the well thought out model statute proposed by Messrs. Goldstein and Gitter providing for divorce by pro forma court petition six months after the application for divorce is filed and after three months if the spouses have concluded mutually satisfactory financial and custodial arrangements. Goldstein and Gitter, *On Abolition of Grounds for Divorce: A Model Statute & Commentary*, 3 FAM. L.Q. 75, 89-98 (1969).

[300] P.A. No. 238, 1971 VT. STAT. ANN. tit. 15. The state's interest in stability is also furthered by the Vermont statute's provision for continuance of court proceedings of up to 60 days to permit the parties to seek counseling. *Id.* at § 3. Portions of the Vermont statute are set out in note 107 *supra*.

tion before both marriage and divorce, should discourage whimsical or precipitous action but not provide a stumbling block to serious persons.

At the same time, we fully recognize that perhaps all these requirements do not suit all persons who seek close, marriage-like relationships without the permanence of traditional marriage. Exploration of these alternatives is not, of course, within the scope of this article since we have, throughout, accepted the basic premise of the validity and continuing vitality of traditional marriage. We would merely assert that a large body of opinion is engaged in full-scale questioning of these postulates and that legislative draftsmen will almost certainly have to cope also with these more drastic alternatives.

III. THE REACTION OF THE ORGANIZED BAR TO NON-FAULT DIVORCE THEORY

Legislative schemes such as the California Family Law Act and the Uniform Marriage and Divorce Act which wipe away an entire system of law built up over hundreds of years, are bound to have profound effect upon the practice of law and the way attorneys earn their livelihood. This is particularly the case when such reform legislation fosters an increasing number of court filings in proper person.[301]

It could be expected, then, that the organized bar would react strongly to the growing movement for non-fault divorce reform legislation. At its 1972 mid-winter meeting, the House of Delegates of the American Bar Association had before it for consideration two major matters in the area of family law. One of these was a resolution endorsing the Uniform Abortion Act which, if adopted in a state, would permit unrestricted abortion up to the 20th week of pregnancy. The other was an endorsement of the Uniform Marriage and Divorce Act.[302] While liberalized abortion, an issue which has troubled moral theologians, clergymen, doctors, lawyers

[301] *See* note 276 *supra*.

[302] *See* 40 U.S.L.W. 2531 (Feb. 15, 1972); Wash. Post, Feb. 8, 1972, § A, at 2, col. 1.

and legislators for centuries, was endorsed without debate by the House of Delegates by an overwhelming voice vote,[303] the same body rejected the UMDA on a teller vote by the decisive margin of 170 to 72.[304]

There was debate on the UMDA, with many of those speaking strongly opposed either to the concept of non-fault divorce or to the lack of definition of the basic test for the dissolution of marriage, that is, irretrievable breakdown.[305] The unfavorable vote could have been predicted in light of the opposition of the Family Law Section.[306]

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[303] 40 U.S.L.W. 2531 (Feb. 15, 1972). The day following the vote approving the Uniform Abortion Act, E. Clinton Bamberger, dean of The Catholic University School of Law and delegate of the National Legal Aid and Defender Association asked the House of Delegates to reconsider its action so that some debate might be had on this troubling issue. This motion was quickly rejected. *Id.* at 2532.

[304] Wash. Post, Feb. 8, 1972, § A, at 2, col. 1.

[305] Frederick G. Buesser, Jr., a Detroit lawyer, argued that the Act would weaken the integrity of marriage and contribute to the disruption of marriage. He noted with disapproval that the Act forbade taking gross misconduct into account in granting a divorce. Ralph J. Podell, now a judge of the Milwaukee, Wisconsin Circuit Court and chairman of the ABA Family Law Section stated that his section opposed the Act as promulgated by the NCCUSL because of the lack of definition for "irretrievably broken" and the lack of guidelines for the judge in resolving whether a given marriage had so broken down that dissolution of it was proper. 40 U.S.L.W. 2531 (Feb. 15, 1972).

Both of these critical views were taken into account in the Family Law Section's proposed Revised Uniform Marriage and Divorce Act. *See* text at notes 285-90 *infra*.

[306] *See* note 298 *supra*. In a letter to the authors, Judge Eugene A. Burdick, president of the NCCUSL commented on the opposition to the UMDA by Judge Podell and the Family Law Section:

> All of the objections raised by the Family Law Council and others before the House of Delegates of the ABA were not only carefully considered by the Special Committee of the Conference which had primary responsibility for drafting the Act, but were also reconsidered at the special insistence of the Family Law Council. At the urging of the Family Law Council, at least nine major points of critical objection were reconsidered and as a result of which those relevant provisions of the Act were revised. Only one critical objection of the Family Law Council was rejected, namely the age of marriage without parental consent. The Family Law Council wanted the age to be 21 years of age, and the Conference steadfastly adhered to the age of 18 years as the age of majority without parental consent.
>
> In the light of the performance of acting chairman Ralph Podell of the Family Law Section, it seems unlikely that the Family Law Council would have unqualifiedly approved the Act even if the age of majority

Following the ABA's rejection of the UMDA, a special committee of the Family Law Section was formed to propose a revision of the UMDA to the NCCUSL. A Proposed Revised Uniform Marriage and Divorce Act draft (hereinafter referred to as the P.R. Draft) was adopted by the special committee and endorsed by the Family Law Section in late November, 1972.[307]

Throughout this paper we have used political, ideological labels to categorize the various types of enacted or proposed divorce reform legislation. Continuing in this vein, while there is much that is liberal and progressive in the P.R. Draft,[308] the key provisions respecting the availability of di-

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objection had been resolved in their direction. It is significant, however, to note that the Family Law Section has stated in writing that it would withdraw its objections to the Act if the National Conference would incorporate its comments on certain objectionable sections in the official comments to the Act. This suggestion, of course, was totally unacceptable to the National Conference as creating a precedent that would never end if objecting bodies were given the opportunity to voice critical objections to provisions of Conference Acts in the official comments of the National Conference. The National Conference will indeed press for the enactment of the Uniform Marriage and Divorce Act in state legislatures without the ABA approval. There has been extensive journalistic support for the Uniform Marriage and Divorce Act which has been critical of the failure of the House of Delegates to approve the Act. I would not care to speculate as to the chances of enactment without approval by the House of Delegates. While we would prefer to have approval by the ABA and will continue to seek it, the National Conference is autonomous and must proceed to promote enactment of Uniform Acts which it adopts irrespective of a failure to obtain responsible endorsement.

Letters from Judge Eugene A. Burdick to Professor Harvey L. Zuckman, June 15, 1972. The authors have been unsuccessful in obtaining comment on Judge Burdick's letter or a detailed explanation of the Family Law Section's position from Judge Podell.

[307] In providing the authors with a copy of the Proposed Revised Uniform Marriage and Divorce Act draft, Judge Podell cautioned that it had not yet been considered by the Board of Governors of the ABA or the House of Delegates or the NCCUSL. Letter from Judge Ralph J. Podell to Professor Harvey L. Zuckman, November 29, 1972. Thus, the draft represented only the views of the Family Law Section at the time this article was prepared. Revision or rejection of the Proposed Revised Draft by the ABA is possible at either the ABA's 1973 mid-winter meeting or 1973 summer meeting.

[308] *See, e.g.*, the detailed provisions concerning conciliation in §§ 302(3) and 305; the provision dealing with mandatory representation of the children's interests respecting support, custody, and other matters by a court appointed attorney found in § 310(a); the simplification of procedure in enforcing sister state support and

vorce strike us as reactionary when compared to the California Family Law Act and the UMDA.

A major criticism leveled at the California and uniform acts is their failure to define or set guidelines for the "irreconcilable differences"[309] or "irretrievable breakdown"[310] tests for the grant of marital dissolution. While the lack of definition and guidelines gives the courts flexibility in appraising the status of marriages,[311] it does create some uncertainty and may allow for arbitrary conduct by the courts.

If then there is to be definition, great care must be taken in delineating the critical test, or reform will fail. The definitional problem was the rock on which the English Divorce Reform Act foundered.[312] And it provided the opening for turning back the clock in the P.R. Draft. Section 302(a) of the draft, provides that the appropriate court shall enter a decree of dissolution of marriage if, *inter alia*:

> (2) the court finds that the marriage is irretrievably broken, which finding shall be established by proof (a) that the parties have lived separate and apart for a period of more than one year next preceding the commencement of this proceeding, or (b) that such serious marital misconduct has occurred which has so adversely affected the physical or mental health of the

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maintenance decrees in § 311(a); and the provision for the impounding of court records upon the reconciliation of the parties to protect their privacy in § 319.

[309] CAL. CIV. CODE § 4506(1) (West 1972).

[310] UMDA § 305.

[311] This lack of definition in the UMDA is not novel to uniform acts. The commissioners avoided defining the concept of unconscionability in Article 2 of the Uniform Commercial Code, though some very broad guidelines are provided in Comment 1 to § 2-302. The apparent philosophy behind this reluctance to define terms is that the courts should build the definition on a case by case basis and not be hampered by legislative preconceptions. Moreover, it is very difficult to articulate such inherently amorphous but recognized concepts as unconscionability of contracts and irretrievable breakdown of marriage. As Justice Stewart has said relative to the definitional problem in controlling hard-core pornography, "I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description; and perhaps I could never succeed in intelligibility doing so. But I know it when I see it. . . ." Jacobellis v. Ohio, 378 U.S. 184, 197 (1963) (concurring opinion). And certainly, competent judges will also know an irretrievably broken marriage when they see it.

[312] *See* text at notes 118-21 *supra*.

> petitioning party as to make it impossible for the parties to continue the marital relation, and that reconciliation is improbable
> . . . .

The section confronts the petitioner with some difficult choices: (1) living separate and apart for more than a year before filing for dissolution, even if this will present economic hardship; (2) going to Nevada for a "quickie" (but expensive) divorce; or (3) attempting to obtain an almost immediate dissolution in one's own jurisdiction by establishing the "marital misconduct," that is, fault of the respondent spouse and the impairment of one's own physical or mental health.

Ignoring economic realities and the availability to some, but not to others, of migratory divorce, the more than one year living apart provision does not seem unpalatable.[313] But these realities cannot be ignored. The old aphorism may not be completely accurate, but two persons can live more cheaply together, even if their marriage is dead, than two persons forced to live separate and apart, while awaiting dissolution. The P.R. Draft requirement may be a hardship on the very poor. A provision that spouses may live separate and apart while under the same roof would be somewhat ameliorating here.[314]

The living apart requirement also engenders the need for a proceeding to protect the financial interests of the spouses, particularly the non-breadwinning spouses, during the separation period. This proceeding is provided for in Section 317(a) and while such separate maintenance action may be converted to an action of dissolution after the requisite period of time has elapsed, the complexity of the litigation is increased.

If one does not wish to wait more than a year to file for

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[313] The trend, however, appears to be toward a very short period of living separate and apart. *See, e.g.*, P.A. No. 238, [1971] Vt. Adj. Sess. Law, *amending* VT. STAT. ANN. § 15-551(7) (six months).

[314] The law is presently unsettled as to whether the living separate and apart ground in many statutes is satisfied when the estranged couple continue to live under the same roof. *See* PLOSCOWE, *supra* note 30, at 439-40.

dissolution, he or she has two options. The first is to seek dissolution in a jurisdiction where it is more immediately available. To our minds any proposed legislation which encourages migratory divorce should be rejected. Migratory divorce discriminates against those who cannot afford the expense of traveling to another jurisdiction,[315] creates ethical problems for the lawyer, fosters cynicism toward the law, and encourages deception of the foreign court concerning the issue of the petitioner's domicile.[316] This is not to mention the legal confusion engendered if the home jurisdiction refuses to recognize the foreign decree.

The alternative to migratory divorce is to play the old and discredited fault game. One can file immediately for divorce by alleging "serious marital misconduct" on the part of one's spouse such as causes some substantial injury to physical or mental health. Rather interestingly, no definition is provided by the definition-conscious drafters of the term "serious marital misconduct." But can there be much doubt that when confronted with this phrase, the judges will equate it to the old fault grounds and require a showing of adultery, for instance? However, more than a showing of bare adultery will be required. The petitioner will have to demonstrate also that his or her physical or mental health has been so adversely affected as to make it impossible for the parties to continue to live together. Thus, whatever the form the marital misconduct takes, difficult questions of proof are introduced into the proceedings concerning the state of the petitioner's health and its relationship to the marital misconduct. Even the presently existing fault system does not re-

[315] *Cf.* Boddie v. Conn., 401 U.S. 371, 383-89 (1970) (concurring opinions of Douglas and Brennan, J.J.).

[316] R. CRAMTON & D. CURRIE, CONFLICT OF LAWS; CASES-COMMENTS-QUESTIONS 713-14 (1968). The counterargument that if the states adopted a uniform act on marriage dissolution migratory divorce would be curtailed lacks substance. Does anyone really believe that Nevada, for instance, would adopt an act which requires residency for six or more months (P.R. Draft § 302(a)(1)) or that the governments of Haiti and Santo Domingo will pull out of the "quickie divorce" market? The only way to eliminate the evil of migratory divorce is to make marriage dissolution almost immediately available in the home jurisdiction of those whose marriage has in fact broken down.

quire a showing of impaired health of the petitioner stemming from an unfaithful spouse's adulterous behavior.[317]

Compared with the California Act and UMDA, the net effect of P.R. Draft § 302(a)(2) is to make the dissolution process (1) more expensive and complex for the litigants, (2) sociologically and psychologically unrealistic and distorting of the judicial process insofar as it reintroduces fault into the proceedings; and (3) generative at nearly every turn of more business for the family law practitioner.[318]

Because of the regressive effects which will flow from the P.R. Draft, it is hoped that the National Conference of Commissioners on Uniform State Laws will reject the Family Law Section's draft (if it is approved by the ABA) and remain firm in its resolve to "press for the enactment of the Uniform

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[317] *Compare* text at note 121 *supra*.

[318] Separate maintenance proceedings under the living apart alternative, migratory divorce, and proof of fault and health status under the marital misconduct alternative of § 302(a)(2) are not matters which can be handled by the layman. *Compare* text at notes 256-59 *supra*.

There are other provisions of the Proposed Revised Draft which invite criticism but which are not central to the dissolution process. Section 305(a) provides *inter alia* that "no finding as to irretrievable breakdown of the marriage may be made under § 302 of this Act until 3 months have elapsed after commencement of the proceedings . . . ." This is the so-called "cooling-off" period provision designed to prevent hasty divorce decrees. *See* comment to § 305. While its intent is laudatory, its sweep is too broad. In cases where the appropriate court officer can immediately certify that the parties have lived separate and apart for one or more years, or that efforts at reconciliation would be impractical or not in the interests of the family a "cooling-off" period is gratuitous and provision for its waiver should be made.

Section 306(b) of the UMDA states that the terms of the separation agreement, except those providing for the support, custody and visitation of children, are binding upon the court unless it finds that the separation agreement is unconscionable. The purpose of the UMDA is to "reduce the adversary trappings of marital dissolution" by encouraging the parties to reach an amicable agreement among themselves. This purpose is strengthened by the section making clear that the terms are not to be interfered with by the court unless they are found to be unconscionable. The standard of unconscionability here is similar to that under the Uniform Commercial Code § 2-302. Comment to UMDA § 306. Proposed Revised Draft § 306(b) changes the emphasis on the court's role in overseeing agreements made between the parties by stating that "the court shall examine the terms of any separation agreement and if found to be fair and reasonable shall approve them . . . ." This is a more affirmative statement of the court's power and may encourage unnecessary tampering by the court with the agreement worked out by the parties.

Marriage and Divorce Act in state legislatures without the ABA approval."[319] For the Commissioners to do otherwise would surely result in a blunting of the first widespread movement in this country for truly liberal comprehensive divorce reform.

IV. CONCLUSION

In our discussion of the liberal statutory reform, we made no secret of our strong preference for the Uniform Marriage and Divorce Act as the prototype of a good, workable no-fault divorce statute which still retains minimal state interest and control. But research has shown us that not even the UMDA is completely correct. It contains one or two defects of major proportions—notably the lack of any counseling and conciliation mechanism.

Accordingly, we have isolated several factors, six, to be exact, which are, or should be, incorporated in a satisfactory no-fault statute. The basic premise underlying these factors is that a no-fault statute must break sharply with past attitudes and practices of divorce and yet retain at least a vestige of state control.

To this extent, the simple change in wording from "divorce" to "dissolution" is commendable. Any shift in language which provokes a change in traditional juridical thought on divorce should prove beneficial, if only to dislodge the stodgy vestiges of the old fault notions. Except for Michigan, every currently enacted no-fault statute does include this change.[320]

However, we have distilled certain provisions which we feel are essential to an adequate statute which are not to be found in every statute we have examined.[321] While we will not burden this conclusion with lengthy comparative mate-

[319] Letter from Judge Eugene O. Burdick, President of the NCCUSL to Professor Harvey L. Zuckman, June 15, 1972.

[320] *See* text at notes 140-41 *supra*.

[321] *See* the discussion of statutory mechanisms generally in text at notes 241-69 *supra*.

rial to the extent that any statute lacks one or more of these provisions, it may prove not entirely satisfactory in practice.

The six provisions are: (1) abolition of all grounds save for a generalized ground such as "irretrievable breakdown"; (2) abolition of all common law defenses; (3) an express bar on admission of evidence of marital misconduct except where such conduct affects one's parental duties; (4) a provision which establishes some type of formal counseling and conciliation either through private agencies or by governmental action; (5) abolition of the various presumptions which attach in child custody matters; and (6) revision of the traditional notions of spousal support and property settlement, and more effective discovery mechanisms for the financial inquiry.

Grounds and Defenses[322]

A generalized and rather vague ground which forces a court to focus on the marriage rather than on isolated acts of misconduct is essential to any reform of judicial thinking. No-fault grounds grafted onto fault statutes or fault concepts used as prima facie evidence of breakdown will inevitably permit the reassertion of traditional judicial behavior. Only when grounds and defenses are expressly abolished will judges be compelled to look beyond those acts presently constituting fault. While this type of inquiry may place severe strains initially on judges formerly used to a pro forma examination of misconduct evidence, in the long run the generalized ground will surely provoke a more rational and meaningful inquiry.

A significant backlash against a vague generalized ground was noted in the American Bar Association's Section of Family Law's comments on the UMDA.[323] The opposition to the single ground of "irretrievable breakdown" focused on the lack of precision in such a term, and the consequent problems of definition. While we do not agree with the

[322] *See* text at notes 140-64 *supra*.

[323] *See* discussion on the bar's reaction to the UMDA. Text at notes 294-98 *supra*.

suggestion that the proper approach is to define breakdown in terms of the fault concepts (cruelty, adultery, etc.), we have found that this impreciseness is often unsettling to divorcing couples as well as some attorneys.[324] Apparently, spouses, like judges and lawyers, have not yet grasped the import of the no-fault theory. The underlying purpose of the generalized ground is to require an inquiry into the relationship between the spouses. The question must be not "who did what," but "does the marriage presently exist as a viable, functioning unit." Any definition, if a definition must be attempted, should define breakdown in terms of a court's personal observation of the integrity and viability of a *given* marriage at the time of the dissolution proceedings. Once separated from the false crutch of fault concepts, this determination, at second glance, is not overly hard to make. So long as courts concentrate on the relationship *between* spouses and the status of the *marriage*, breakdown will come to be defined as the malfunctioning of the marital unit, not as an instance of spousal misconduct.

Misconduct Evidence[325]

Inquiry into specific acts of misconduct in dissolution proceedings should be permitted only when child custody is at issue and when a party's fitness as guardian is in question.

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[324] See one divorcee's comment on the California procedure at note 5 *supra*. We are cognizant that with the ABA's Family Law Section having created an issue regarding the meaning of "irretrievable breakdown," there may be political difficulties in getting the various legislatures to adopt the NCCUSL or California style of legislation. While we believe a definition to be unwise because, of necessity, it will result in inclusion of marital situations inappropriate for dissolution and some definition may be inescapable. In our view, the most palatable definition would be one requiring that the couple be living separate and apart at the time the petition for dissolution is filed. The definition should make clear that such living apart may be accomplished even while the parties are residing under the same roof. Unlike Proposed Revised Draft § 302(a), no period of time for living separate and apart is required by this definition. The breaking off of marital relations is a step of such consequence that it can with some degree of safety be taken to signify the breakdown of the marriage.

Should a legislature insist upon a time period for living separate and apart, it is suggested that a three month period would be the least pernicious because its encouragement of migratory divorce would be minimal. *Compare* note 274 *supra*.

[325] *See* text at notes 180-87 *supra*.

Application of evidence of misconduct to the purely financial aspects of divorce is abused at best and grotesquely unfair at worst. There is no rational explanation for Florida's incorporation of the provisions regarding an adulterous spouse's right to alimony in its new statute.[326] Such language can only be explained in terms of the long-standing prejudices of the members of the Florida legislature.

Even in custody proceedings, the issue of misconduct must be delicately raised. As a culture we have moved beyond the attitude that adultery is a heinous offense against both one's spouse and the state. Those statutory provisions which conclusively bar custody to an adulterous parent (and by long-standing practice especially to an adulterous mother) unhappily preserve stereotypes rather than provoke inquiry into true questions of fitness for custody. We do not claim that misconduct is never to be an issue in custody proceedings. We merely wish to see it relegated to its proper place—a factor only when the misconduct has actually affected one's relationship with the child.

Counseling and Conciliation[327]

While we strongly favor the UMDA as the proper approach to no-fault divorce, we are severely troubled by its lack of any express counseling and conciliation procedures. The state has a definite and identifiable interest in preserving marriages, and, as such, should not sponsor divorce reform without establishing a coordinate system of counseling. Counseling need not be mandatory. It need not be provided through a government agency. We recognize that there is wide room for experimentation and diversity in this area. Our contention is simply that a good no-fault statute will incorporate some language at least recognizing the need for counseling in many cases and providing some machinery whereby counseling may be secured. If a state seeks to assert its interest in marriage and divorce by prescribing plenary methods for dissolution, it would appear to incur a coordi-

[326] *See* text at note 186 *supra*.

[327] *See* text at notes 241-69 *supra*.

nate duty to establish some mechanism which seeks to help troubled couples avoid divorce wherever possible.

The Presumptions in Child Custody[328]

In our discussion on custody, we have speculated at some length on the possibility that the classic presumptions which obtain in child custody matters (for example, the "preference for the mother" doctrine) violate the Equal Protection Clause of the federal constitution and will clearly contravene the not-yet-ratified equal rights amendment. Similarly, the presumption of fitness which attaches to the natural parent as against a "stranger" is not wholly wise.[329] There are numerous situations where a third party is an eminently more suitable guardian than the natural parent.

We do not contend, of course, that these presumptions are in substance inherently incorrect or that they lack a rational basis. The defect we have observed lies not in the propriety of the idea of the presumption, but in the fact that a presumption in the law tends to rise to the level of an unassailable and incontrovertible truth. We find fault with the raising of these concepts to the level of a presumption in an extremely delicate area where stereotypes and preconceived notions can be severely damaging to the child's future. If there is a central truth in the area of child custody, it is that each case must be treated as a unique entity and must be dealt with as such by the court. Statutory presumption may make the task of judging simpler by summarily resolving custody disputes without reference to the specific situation but they do nothing to insure that the child's best interest will, in fact, be preserved.

Property Settlement, Alimony and Financial Discovery[330]

Too often courts have permitted extraneous considerations to influence the financial aspects of divorce. Fault has intervened; monetary awards have been used to "punish" an

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[328] *See* text at notes 216-41 *supra*.

[329] *See* text at note 215 *supra*.

[330] *See* text at notes 188-211 *supra*.

errant spouse. The criteria for an award of spousal support should be limited to an inquiry into that spouse's need. Property settlement should be used as the primary device for protecting a spouse from the potentially economically ruinous consequences of a divorce, and alimony should be viewed as merely a last resort mechanism for insuring such protection.[331] Often regular and unremitting alimony payments preserve ties which should be severed upon divorce. An unequal division of property in lieu of alimony, as unsettling as it may sound initially, is highly preferable to perpetuation of the bonds of a dissolved marriage through alimony payments.

The unfettered discretion of the trial court in alimony matters should be terminated by incorporating in the statute adequate guidelines for determining the award.[332] Too often, courts are left with no standards other than the judge's own intuition. The setting out of criteria, as in the UMDA, which help direct his decision without framing the award in terms of absolutes or "thou shalt nots" is essential to fair and consistent resolution of financial matters.

Moreover, a statute should contain an adequate mechanism for determining the true financial condition of each spouse with some degree of certainty. Concealment of assets has become a standard tactic in many jurisdictions. A good no-fault statute should either establish its own discovery mechanism or incorporate the discovery provisions of the state's civil procedure rule (if sufficiently liberal). If these methods are not adequately enlightening, a mandatory financial questionnaire similar, in effect, to the confidential questionnaire now used in California for counseling purposes should be implemented. Anything less than full disclosure of all resources is detrimental to a fair divorce proceeding.

Changes in the Profession

We have shown that the prevailing fault system places severe strains on the lawyer's conduct vis-à-vis his ethical

[331] *See* text at note 197 *supra*.

[332] *See* text at notes 197-200 *supra*.

commitments.[333] The most important ethical reform necessary if lawyers are to be permitted to be something more than mere technicians, is the relaxing of the restrictions on counseling of both spouses and the subsequent representation of one spouse at the dissolution proceedings. Such change in ethical conduct is consistent with the rejection in liberal non-fault statutes of the idea of adversariness. We do not recommend that lawyers hold themselves out as marriage counselors or that they engage in any form of in-depth conciliation. Lawyers do not necessarily make good counselors. But, at the same time, an attorney should be permitted to inquire sufficiently into the marriage (even if this inquiry involves both spouses) to determine, to his satisfaction, the possibility for reconciliation. The inquiry need not be extensive but neither should it prejudice his representing one of the spouses at a later date. To do so forces the lawyer to choose between his own economic interest (the fee for representing a client) and his equally strong desire to abide by the canons which urge him not to proceed with the divorce if reconciliation is possible.

No-fault statutes in general are a salutary and long overdue reform of the American law of divorce. In better reflecting the sociological realities of marriage and divorce, the new statutes will inevitably prove beneficial. Since none of the more thoughtful statutes eliminate state involvement in marriage and divorce entirely, they will still preserve the limited governmental supervision necessary to preserve stable family systems in the United States. If we have found defects in certain of the broad no-fault statutes, our comments are intended as particularized criticisms of specific statutory provisions and should not detract from our essential belief that no-fault divorce is both proper and necessary.

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[333] *See* note 36 *supra*.