Customized Marriage

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There is nothing intrusive or overbearing about offering the choice of a stronger marriage contract accompanied by preparation and reinforcement to a generation seeking what many of its members did not have as children—the security of a two-parent family.[1]

Would we be married, then? I said.
What would be the need of that? he said. Marriage never did any good, as far as I can see; for if the two are of a mind to keep together, they will; and if not, then one of them will run off, and that's the long and short of it.[2]

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1. Tony Perkins, *Reforming Divorce Reform*, POL'Y INSIGHTS, Nov. 1997, at 2.

2. MARGARET ELEANOR ATWOOD, ALIAS GRACE 268 (1996).

INTRODUCTION: AMERICAN MARRIAGE AND DIVORCE AT THE DAWN OF THE TWENTY-FIRST CENTURY

Americans have always taken their pursuit of happiness to the altar, and the frequent failures of our marital enterprises have diminished neither our efforts nor our expectations. In a 1930 essay entitled *Romantic Divorce*, Katharine Fullerton Gerould identified "the American habit of acting promptly on our marital dissatisfactions,"[3] a predilection stemming from "our seeing marriage as an intensely personal and an intensely romantic affair."[4] Connubial individualism has a lengthy pedigree.[5] The legal theory of marriage insisted that once wife and husband wed, the legal status of their marriage was placed almost exclusively in the state's hands. But this formulation was honored only in the breach and in the halcyon rhetoric of appellate opinions.[6] For

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3. Katharine Fullerton Gerould, *Romantic Divorce*, 88 SCRIBNER'S MAG. 485, 485 (1930).

4. *Id.*

5. In the words of a modern family law scholar, Americans believe in a "fundamental right to marry, and marry, and marry." Mary Ann Glendon, *The New Marriage and the New Property*, *in* MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES: AREAS OF LEGAL, SOCIAL AND ETHICAL CHANGE 59, 63 (John M. Eekelaar & Sanford N. Fetz eds., 1980). A popular anti-divorce tract points to a "nagging paradox: Americans express a high regard for marriage and a great willingness to end marriages." MAGGIE GALLAGHER, THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE 219 (1996). Nor is this sentiment new. *See, e.g.*, *Decency in Divorce*, 127 NATION 214 (1928) ("American divorce used to be considered a scandal; it has become an institution. It used to be considered a menace to the home; it may come to be looked upon as a bulwark of marriage."); W.D. Howells, *Editor's Easy Chair*, 140 HARPER'S MONTHLY MAG. 566, 566 (1920) ("In both [divorce and marriage] the main motive seems to be love, though the course of this popular passion is more circuitous in divorce than in marriage."); Doris Stevens, *Uniformity in Divorce*, 76 FORUM 322, 324 (1926) (stating that "easy divorce is a civilized thing" but the institution of marriage remains vital). *See generally* J. HERBIE DIFONZO, BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH-CENTURY AMERICA 43-61 (1997) (describing the popular and legal support for divorce in the 1920s).

6. The Supreme Court limned the three-party social contract of marriage over a century ago in a case in which it condemned the "loose morals and shameless conduct of the husband" as "meriting the strongest reprobation," but nonetheless declaimed marriage as a lofty ideal:

> Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.
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> . . . .
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> . . . The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.

Maynard v. Hill, 125 U.S. 190, 205, 211 (1888). These oft-cited formulations of marriage's moral purity are at odds with the opportunistic conduct at issue in the case. The husband left his first wife and children in Ohio in 1850 and headed for the Oregon Territory, promising to continue to support them and either to return within two years or to send for them. But the husband reneged on his promise of support and instead abandoned them. He then secured the passage of a legislative act in the Oregon Territory granting him a divorce from his first wife, and soon afterwards married again. The Supreme Court condemned the husband's behavior

at least a hundred years, argued Gerould, Americans "have envisaged marriage as a purely individual, not at all as a social, contract, and have refused to consider any marriage successful that did not maintain, for both parties, a high romantic satisfaction."[7] We pay a price in this quest for "white-hot emotional perfection,"[8] of course. And Gerould judged the matter correctly, for her generation as for its successors: "As long as personal happiness is made the only desideratum in marriage, the divorce courts will be full."[9]

But even the equable Gerould would likely have been astonished had she lived to see just how full divorce courts became in the wake of the no-fault divorce revolution.[10] Between 1970 and 1996, the number of divorced Americans more than quadrupled, from 4.3 million to 18.3 million.[11] Although the divorce rate declined

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but held that the territorial legislature had the power to award the legislative divorce. *See id.* at 210. This lack of congruence between legal theory and reality in domestic relations developed in the infancy of American history. *See* NORMA BASCH, FRAMING AMERICAN DIVORCE 38-39 (1999) (describing post-Revolutionary pressure for consensual divorces); MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 58-80 (1986) (describing colonial practice of "wife sale" and arbitrated extra-legal divorces).

7. Gerould, *supra* note 3, at 486. Gerould's reference in 1930 to the passage of a hundred years constituted more than rhetorical flourish. The 1830s marked the beginning of a public argument between feminism and the "ideology of domesticity," focusing on tensions in the hierarchical relationship between men and women. NANCY F. COTT, THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1780-1835, at 5-9 (1977); *see also* MICHAEL GROSSBERG, A JUDGMENT FOR SOLOMON: THE D'HAUTEVILLE CASE AND LEGAL EXPERIENCE IN ANTEBELLUM AMERICA (1996) (case study of American marriage in the 1830s, documenting the early inroads of romantic individualism into the realm of matrimonial hierarchy).

8. Gerould, *supra* note 3, at 486.

9. *Id.* In this view, divorces are a product of our cultural assumptions about marriage. *See* David L. Cohn, *Are Americans Polygamous?*, ATLANTIC MONTHLY, Aug. 1947, at 30, 32.

> We teach our young that to be married is automatically to be happy. We believe that everybody is, ought to be, or can be made happy; that all are "entitled" to happiness as to fresh air. . . . But simultaneously, in our anarchy of impermanence, we believe that if we are not happy in one marriage we shall surely be happy in another.

Id. at 32; *see also* Christopher Lasch, *Divorce American Style*, N.Y. REV. BOOKS, Feb. 17, 1966, at 3, 4 ("Easy divorce is a form of social insurance that has to be paid by a society which holds up domesticity as a universally desirable condition . . . .").

10. On the history of modern no-fault divorce in the United States, see DIFONZO, *supra* note 5. *See also* HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES (1988); GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION (1991). Roderick Phillips provided a good international overview of divorce trends in the West in RODERICK PHILLIPS, PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY (1988).

11. *See* CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *Numbers of Divorced and Never-Married Adults Increasing, Says Census Bureau Report* (visited Apr. 13, 1998) <http://www.census.gov/Press-Release/cb98-56.html>. The question whether no-fault divorce *resulted* in the booming divorce rates is problematic and beyond the direct scope of this Article. Note, however, that a causative relationship is central to the no-fault divorce "counterrevolution." *Compare* H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private*

slightly after its peak in the mid-1980s,[12] we still fail at marriage almost as often as we succeed, and critics see a drift into a "divorce culture"[13] whose goal is "the abolition of marriage,"[14] to cite the titles of two recent popular broadsides.

In reaction to the perceived excesses of no-fault divorce, a movement has crystallized to reduce the incidence of divorce in America.[15] Reminiscent of the

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Contracting, 76 AM. ECON. REV. 437, 452-53 (1986) (finding that no-fault laws have virtually no influence on the probability of divorce), *with* Margaret F. Brinig & F.H. Buckley, *No-Fault Laws and At-Fault People*, 18 INT'L REV. L. & ECON. 325, 340 (1998) ("Our study of divorce rates . . . provides the strongest evidence to date that no-fault laws are associated with higher divorce levels."). On the no-fault "counterrevolution," see Part II.C.

12. The divorce rate per 1000 people declined from 5.0 in 1985 to 4.7 in 1990 to 4.1 in 1995. *See Decline of Traditional American Family Slows in 90's* (visited May 28, 1998) <http://cnn.com/US/9805/28/family.figures>; *see also* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 74 (1997). The recent history of Canadian divorce rates delineates a similar parabola. Before the Divorce Act of 1968, Divorce Act, ch. 24, 1967-1968 S.C. 187 (Can.), the divorce rate sat at eight percent. By 1987, a year after the institution of no-fault divorce, the rate had rocketed to 44%; 10 years later it had fallen to 40%. Robert Glossop, dircctor of the Vanier Institute of the Family in Ottawa, described the Canadian divorce experience in terms that apply equally to the United States: "'The levels [of divorce] have come down, and are relatively stable. But they are stable at a historically unprecedented high rate.'" Sharon Doyle Driedger, *After Divorce*, MACLEAN'S, Apr. 20, 1998, at 39.

13. BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE (1997). Whitehead's book had its genesis in her influential 1993 article, Barbara Defoe Whitehead, *Dan Quayle Was Right*, ATLANTIC, Apr. 1993, at 47. In that piece, Whitehead argued that Americans in the 1970s largely destigmatized divorce because the mores had shifted from protecting children's well-being to pursuing adult happiness. *See id.* at 52. Divorce became merely an escape hatch from a tumultuous relationship. But her review of social science studies reflecting the serious damage to children of divorce concluded that "growing up in an intact two-parent family is an important source of advantage for American children." *Id.* at 80. Whitehead's 1993 article "finally penetrated, and to some extent shattered, the widely popular public perception that divorce is a positive personal experience and that children are resilient and suffer only short-term harm from their parents' divorce." Katherine Shaw Spaht, *Propter Honoris Respectum: For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1555 (1998) (footnote omitted).

14. GALLAGHER, *supra* note 5. Gallagher's thesis is apocalyptic:

> The overthrow of the marriage culture and its replacement by a postmarital culture is the driving force behind almost all of the gravest problems facing America—crime, poverty, welfare dependence, homelessness, educational stagnation, even child abuse. Above all, the decline of marriage is behind the precarious sense of economic instability haunting so many Americans in this time of statistical economic abundance.

Id. at 3-4. Along with Whitehead, *see supra* note 13, Maggie Gallagher has been the most cited author in the current divorce debate. As an illustration of their influence, note that Katherine Shaw Spaht, who drafted the Louisiana Covenant Marriage Law, relied on what she termed the "powerful contributions" of Whitehead and Gallagher, remarking that she used Gallagher's *The Abolition of Marriage* as a "prop during testimony before the Louisiana legislative committees." Spaht, *supra* note 13, at 1547.

15. *See, e.g.*, Laura Gatland, *Putting the Blame on No-Fault: A Developing Legislative Movement Hopes To Slow the Nation's Divorce Rate by Making It Harder for Couples To Call*

outraged reaction against Victoria Woodhull's "war upon marriage"[16] a century ago, one recent indictment charged that "increased abuse and other undesirable behavior is a natural consequence of the fact that in some states the marriage contract cannot be enforced."[17] Iowa Governor Terry Branstad criticized no-fault divorce for "transform[ing] marriage into an arrangement of convenience rather than an act of commitment."[18] The Michigan Family Forum referred to marriage in the age of no-

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It Quits, 83 A.B.A. J., Apr. 1997, at 50; Rob Gurwitt, *The Politics of Divorce: That Broken Marriages Create a Societal Cost Is Now a Matter of Consensus. How To Reduce It Is a Subject of Ferocious Dispute*, GOVERNING, May 1996, at 34-40; Pia Nordlinger, *The Anti-Divorce Revolution*, WKLY. STANDARD, Mar. 2, 1998, at 25.

16. BARBARA GOLDSMITH, OTHER POWERS: THE AGE OF SUFFRAGE, SPIRITUALISM, AND THE SCANDALOUS VICTORIA WOODHULL 274 (1998). "'Law cannot compel two to love,'" Woodhull opined, and as a "free lover" in the Victorian age she claimed the "'inalienable, constitutional, and natural right to love whom I may, to love for as long or as short a period as I can, to change that love every day if I please!'" *Id.* at 301, 303 (quoting Victoria Woodhull).

17. Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 869 (1994); *see also* Gary L. Bauer, Editorial, *End No-Fault Divorce*, USA TODAY, Dec. 29, 1995, at 10A ("Marriage is more than a contract. But, in a peculiar twist of public policy, the parties to it are accorded less protection than they would enjoy in, say, the typical lawn care contract."); Melanie Phillips, *Whitehall Confetti for the Death of Marriage*, SUNDAY TIMES (London), Nov. 1, 1998, Features ("unlike anything in civil law, people can tear up the contract of marriage without justification or redress"). *But see* Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 772 ("Our examination . . . of Brinig and Crafton . . . finds no evidence to persuade us that fault divorce could confer benefits at all, much less benefits adequate to outweigh its costs.").

The complaint about the friable nature of contemporary conjugal relationships constitutes a historical transposition of Victoria Woodhull's assertion that the evils of marriage stemmed from the *enforcement* of the marriage contract, which allowed men to subjugate women. Woodhull claimed to make "'war upon marriage . . . because it is . . . the most terrible curse from which humanity now suffers, entailing more misery, sickness, and premature death than all other causes combined.'" GOLDSMITH, *supra* note 16, at 274 (quoting Victoria Woodhull) (first omission in original, second omission added); *see also* ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 64 (1973) (quoting the wedding vows of Lucy Stone and Henry Blackwell: "'the present laws of marriage . . . refuse to recognize the wife as an independent, rational being, while they confer upon the husband an injurious and unnatural superiority'"). A modern echo of Woodhull's plaint may be heard in Martha Fineman's call for the elimination of special rules governing marriage and divorce, and for regulating relationships between adult sexual partners according to the ordinary rules of civil and criminal law. *See* MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 228-29 (1995); *see also* JUDITH STACEY, BRAVE NEW FAMILIES: STORIES OF DOMESTIC UPHEAVAL IN LATE TWENTIETH CENTURY AMERICA 269 (1990) (arguing in favor of the demise of the family as an "ideological concept that imposes mythical homogeneity on the diverse means by which people organize their intimate relationships").

18. Terry Branstad, 1996 Condition of the State Address, *reprinted in Iowa "Vibrant and Growing"*, DES MOINES REG., Jan. 10, 1996, at Opinion 1, *available in* 1996 WL 6221171.

fault as "notarized dating."[19] A critical analysis identified characteristics of no-fault divorce culture which nurture divorce-related violence.[20] There are also some indications that no-fault divorce litigation is becoming more acrimonious, with the litigative fire transferred from conflicts over divorce grounds to those over children and property issues.[21] Indeed, some harms may be self-inflicted: David Larson, for many years a research psychiatrist at the National Institutes of Health, cites the greatly increased risk of psychiatric and physical disease attributable to the process of marital dissolution:

> Being divorced and a non-smoker is only slightly less dangerous than smoking a pack or more of cigarettes and staying married. Divorced men are twice as likely to die from heart disease, stroke, hypertension, and cancer as married men in any given year. Divorced women are two to three times as likely to die from various forms of cancer.[22]

The consensus on current domestic relations stresses that the legal structure of marriage and divorce has fallen into a "state of disarray."[23]

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19. Dana Milbank, *Blame Game: No-Fault Divorce Law Is Assailed in Michigan, and Debate Heats up*, WALL ST. J., Jan. 5, 1996, at A1. The reference to marriage as "notarized dating" also appears in MICHIGAN FAMILY FORUM, BREAKING UP IS EASY TO DO 4 (1995).

20. *See* Lynn D. Wardle, *Divorce Violence and the No-Fault Divorce Culture*, 1994 UTAH L. REV. 741, 746. Wardle notes that the ease and alacrity of the divorce process could dash a spouse's expectations, and the upheaval could lead to violence. *See id.* at 748-49. The alienation a spouse or child experiences can fuel demoralization and despair, preludes to violence. *See id.* at 764-65. Finally, "[b]y normalizing the expectation and incidents of conflict within the family, the no-fault divorce culture fosters and unleashes violence." *Id.* at 770; *see also* Brinig & Crafton, *supra* note 17, at 869 (suggesting that "increased abuse . . . is a natural consequence of the fact that in some states the marriage contract cannot be enforced" and thus "it is time to question whether unilateral no-fault divorce is worth the costs to the institution of marriage"); Christopher Price, *Finding Fault with Irish Divorce Law*, 19 LOY. L.A. INT'L & COMP. L.J. 669, 695 (1997) ("No-fault divorce does not prevent bitterness and violence, but causes it.").

21. *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in the Family Law: Children's Issues Take Spotlight*, 29 FAM. L.Q. 741, 768 (1996) ("As some states discuss a return to fault divorce, more family members seem to be finding a remedy for fault-based behavior by bringing tort actions."); William C. Smith, *See You in Divorce Tort: Splitting Spouses Raise RICO, Fraud, and Other Claims*, A.B.A. J., Jan. 1999, at 30 (stating that divorce suits increasingly include tort claims, including allegations of violations of the Racketeer Influenced and Corrupt Organizations Act); Bauer, *supra* note 17 (stating that no-fault divorce litigation transfers bitterness to the children, "making them pawns in battles over property and custody").

22. William A. Galston, *Divorce American Style*, PUB. INTEREST, Summer 1996, at 12, 16; *see also* B.M. ROSEN ET AL., DEMOGRAPHIC AND SOCIAL INDICATORS FROM THE U.S. CENSUS OF POPULATION AND HOUSING: USES FOR MENTAL HEALTH PLANNING IN SMALL AREAS (1977) ("The single most powerful predictor of stress-related physical, as well as emotional, illness is marital disruption.").

23. Gregory S. Alexander, *The New Marriage Contract and the Limits of Private Ordering*, 73 IND. L.J. 503, 505 n.7 (1998); *see also* MICHIGAN FAMILY FORUM, *supra* note 19, at 5; Daniel D. Polsby, *Ozzie and Harriet Had It Right*, 18 HARV. J.L. & PUB. POL'Y 531, 535

This Article examines the case against no-fault divorce, as it has been made in legislative halls, scholarly journals, and popular opinion over the past quarter century. The no-fault "counterrevolution"[24] takes as its starting point a conviction that the divorce revolution has resulted in a substantial deterioration in American family life. But this Article argues that the campaign against no-fault divorce attacks the wrong target for the wrong reasons, and that it largely—if unwittingly—replicates earlier misguided reform movements in refashioning the legal framework for family dissolution. The alternatives to no-fault divorce now proposed will make marital exits more acrimonious and will fail to either lower the divorce rate or improve domestic life.

Counterrevolutionary legal proposals on divorce include a range of overlapping options: restoration of fault as the exclusive dissolution ground; raising the bar of divorce for couples with children; delaying the process of obtaining divorces; and mandating or encouraging anti-divorce counseling and education at both the prenuptial and pre-divorce stages.[25] These legal experiments constitute the juridical counterpart to the popular sallies against no-fault divorce, and are best seen within the larger cultural shift away from irresponsible marital behavior, particularly in families with children. Both the legal and popular transformations also constitute a refocusing of the family dilemma from one of achieving an easy divorce to one of maintaining a good marriage.[26]

(1995) ("To the extent that we legitimate, subsidize, and accept at-will domestimorphs—which is what even marriage tends to become under no-fault divorce—we are asking for serious long-term trouble as a society."). Rather than "assuaging the bitterncss" of divorce,

> the introduction of no-fault divorce saw a mere transfer of the acrimony to the secondary issues of the divorce, such as child custody and property disputes, a loss of negotiating power for the spouse who opposed the divorce, an economic free-fall for many women and children, and an accelerated divorce rate.

Id.

24. *See* Jed H. Abraham, *"The Divorce Revolution" Revisited: A Counter-Revolutionary Critique*, 9 N. ILL. U. L. REV. 251 (1989) (presenting an economic argument for post-divorce joint custody); Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals To Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 617-20 (1997) (recounting various attempts by scholars and legislators to return to fault-based schemes); Milbank, *supra* note 19, at A1 ("A quarter-century after California launched America's divorce revolution, Michigan could set off a divorce counterrevolution."); Nordlinger, *supra* note 15, at 25 (discussing various religious and secular programs aimed at strengthening existing marriages as an important aspect of the "anti-divorce revolution").

25. *See infra* text accompanying notes 294, 298-99, 340, 465-70, 485, 487.

26. The Council on Families in America emphasized this counterrevolutionary goal of shifting focus from the death of marriage to its revival:

> The divorce revolution—the steady displacement of a marriage culture by a culture of divorce and unwed parenthood—has failed. It has created terrible hardships for children, incurred unsupportable social costs, and failed to deliver on its promise of greater adult happiness. The time has eome to shift the focus of national attenion from divorce to marriage and to rebuild a family culture based on enduring marital relationships.

COUNCIL ON FAMILIES IN AMERICA, MARRIAGE IN AMERICA: A REPORT TO THE NATION 1 (1995). This transition in the focus of the "counterrevolution" may also be traced in the

"Covenant marriage" statutes have recently been enacted in two states, and bills proposing covenant marriage are pending in many statehouses.[27] These laws allow a couple to opt out of the generally applicable no-fault divorce law and agree to terms which will make it more difficult for them later to divorce. Specifically intended to turn a "'culture of divorce'"[28] into a "'culture of marriage,'"[29] covenant marriage laws signify a major shift in the tactics of the divorce counterrevolutionaries.[30] For the first time in American history, the unitary marriage license has been broken into two rival commitments, and some couples must now contemplate which type of state-sanctioned marriage they desire. But the covenant marriage laws, enacted to induce couples to enforce contractually the traditional marriage vows, may have the unintended and paradoxical effect of encouraging greater ingenuity in couples to define their own marriages through greater reliance on more wide-ranging prenuptial contracts.[31] These couple-crafted covenants, tagged "supervows,"[32] may substantially expand the scope of both contractually governed behavior during the marriage and of the permissible exit grounds at its end. These supervows will also pose extraordinary problems for courts called upon to interpret and enforce this new wave of domestic agreements. Armed with the Uniform Premarital Agreement Act's ostensible liberality toward behavioral contracts, and cloning the process of legislative tinkering with the once-uniform marriage license, couples may increasingly contour their marriages to suit their needs and aspirations.[33] But customized marriage will not prove the panacea for the ills of modern marriage, as the law of relational contracts is often inadequate for the emotional and intimate dimensions of marriage and child-rearing.[34]

The focus of legal change as seen within the larger cultural matrix accounts for the large proportion of references in this Article to popular journals and to sources on the Internet, consonant with Karl Llewellyn's dictum that "divorce is the major area of

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phrasing of the titles of noted social researcher Judith Wallerstein's three volumes reporting her study of the impact of divorce on children: from JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980), to JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1989) [hereinafter WALLERSTEIN & BLAKESLEE, SECOND CHANCES], to JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, THE GOOD MARRIAGE: HOW AND WHY LOVE LASTS (1995) [hereinafter WALLERSTEIN & BLAKESLEE, THE GOOD MARRIAGE].

27. These statutes are discussed at *infra* text accompanying notes 228, 450-91, 494-507.

28. Joel A. Nichols, Comment, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L.J. 929, 929 (1998) (quoting State Rep. Tony Perkins, sponsor of Louisiana's Covenant Marriage Law).

29. *See id.*

30. *See infra* text accompanying notes 248, 450-91, 494-507.

31. *See infra* text accompanying notes 352-84.

32. Amitai Etzioni, *How To Make Marriage Matter*, TIME, Sept. 6, 1993, at 76.

33. *See* UNIF. PREMARITAL AGREEMENT ACT § 3, 9B U.L.A. 373 (1983); *see also infra* text accompanying notes 495-500. One popular book advocating prenuptial contracting relies upon the Uniform Premarital Agreement Act and includes the text of the Act in an appendix. *See* JACQUELINE RICKARD, SAVE YOUR MARRIAGE AHEAD OF TIME: PREMARITAL CONTRACTING—LOVING COMMUNICATION FOR TODAY'S COUPLES 215-18 (1991).

34. *See infra* text accompanying notes 510, 513-22.

interaction between the social institution and the legal."[35] The present Article thus continues my project on the "interrelationship of popular culture and legal rules in order to explore the causes and effects of American divorcing patterns."[36] One recent example of this intimate weaving of law and culture has occurred in the area of prenuptial contracts, whose growth may only be understood within a matrix incorporating formal legal rules of interpretation with the popular phenomenon of couple-driven autonomy expanding the range of these evolutionary hybrids of contract law and domestic relations.[37]

Part I of this Article explores the unacknowledged strains of fault concerns in modern no-fault divorce, beginning with this central paradox: no-fault reforms *were intended to increase the difficulty of procuring divorces* by subjecting marriages in jeopardy to the resuscitative tools of an ameliorative jurisprudence backed by social science. The reduced emphasis on—and frequent elimination of—fault grounds stemmed from a conviction that fault had functioned as a tunnel to divorce rather than a barrier, and thus a conclusion that the statutory grounds had become easily achieved entitlements to divorce. This oft-ignored character of the divorce revolution serves as a vital corrective in the current debate on the reintroduction of fault grounds into divorce cases. Moreover, the process of creating no-fault divorce provided rehearsals for many of the proposals debated in our contemporary effort again to remake the system of regulating marriages and divorces. Current reprises of these discussions include whether or not fault and no-fault grounds should co-exist, and if so, their interrelationship; the efficiency and propriety of mandatory divorce counseling; the best way to safeguard the needs of the children of divorce; and the role of the State in asserting interests contrary to those desired by divorce-minded wives and husbands. If no-fault divorce failed, it did not fail for want of trying.

Culpability analysis is attempting a comeback in the divorce ring, and contemporary divorce reform focuses on damage to children's welfare caused by easy divorce. In Part II, the operational plans of the divorce "counterrevolution" take center stage, including scholarly and popular commentary as well as legislation (both enacted and proposed) aimed at reversing many of the attributes of no-fault divorce. Perceiving that an excess of personal autonomy has destroyed American family structure, critics have debated measures to re-endow individual citizens with moral responsibility in family life. Deep frustration with no-fault divorce has led to calls for the return to a fault-based divorce jurisprudence in an attempt both to slow the marital dissolution rate and to reinject divorce proceedings with moral discourse, particularly concerning the fate of children. As a major component of this push to safeguard families with children from the harms of easy divorce, many proposals aim to

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35. Karl N. Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281, 1307 (1932).

36. DIFONZO, *supra* note 5, at 5. On the necessary intertwining of legal and broader cultural materials in the study of divorce, see *id.* at 5-10.

37. *See* Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 146 (1998) (noting that prenuptial agreements have recently "become more common—a trend reflected by, and probably also encouraged by, the attention these agreements command in the popular press"). On prenuptial contracts, see *infra* text accompanying notes 352-84.

bifurcate divorce law by raising the bar for legal dissolution of a marriage after the birth or adoption of children.

Part III discusses the drive to privatize the terms of the marriage contract, beginning with precommitment restrictions and the incipient Covenant Marriage movement, and exploring the latter's paradigmatic shift in the campaign to foster stronger marriages by introducing an alternative state-sanctioned prenuptial contract. These marital covenants constitute an odd outcropping of the expansion in scope of prenuptial agreements: unlike the traditional spousal contracts which focus on financial matters, this new generation of agreements encompass the private reformulation of divorce grounds and the regulation of behavior during marriage. Courts have been confronted with these types of marital contracts only infrequently to date, and have generally ruled them out of bounds. But the judicial recalcitrance at intervening in marital affairs may now be overcome by a legal and cultural dynamic driven by the counterrevolutionary thrust of the marital covenant movement and by the statutory opening provided by the Uniform Premarital Agreement Act. In short, the markers in the field of public policy for marriage and divorce are now under construction. This Part concludes with an argument that efforts to push couples into binding marriage contracts constitute a new paternalism which favors the agenda of those who want to restrict marital options and restore the traditional marriage to American life.

I. THE PERSISTENT SHADOW OF FAULT IN NO-FAULT DIVORCE

A generation ago, California led the way in the most radical transformation of divorce law in American history.[38] This divorce law "revolution"[39] spectacularly succeeded in removing marital fault as the primary legal principle for dissolving marriages. And today the no-fault divorce reforms are also spectacularly

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38. *See generally* Family Law Act of 1969, ch. 1608, § 4506, 1969 Cal. Stat. 3314, 3324 (current version at CAL. FAM. CODE § 2310 (West 1994)).

39. *See* JACOB, *supra* note 10. Every concept has its counter: Martha L. Fineman has criticized Jacob's terminology, suggesting instead that the burgeoning of no-fault statutes was "in fact *antirevolutionary*—operating to undermine the fledgling potential for freedom presented for women by newly won economic opportunities coupled with an ability to freely leave unsatisfactory marriages." Martha L. Fineman, *Neither Silent, Nor Revolutionary*, 23 L. & SOC'Y REV. 945, 947 (1989) (book review) (emphasis in original). Fineman expanded this point in MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991).

> [T]he move to no-fault divorce hardly represented such a dramatic deviation from existing practice as to be appropriately labeled revolutionary. What occurred in the move to no-fault was merely a formal change in rules which were already being freely manipulated and avoided. . . . The legal community had universally tolerated (and perhaps even counseled) fraud and collusion by its clients in order to secure divorces under the fault system.

Id. at 32 (emphasis omitted). For a contrary reading, suggesting that the legal regime of no-fault did revolutionalize the legal and social milieu of divorcing couples, see DIFONZO, *supra* note 5, at 172-77.

misunderstood. Indeed, the current widespread conviction that no-fault divorce has destroyed marriage is a historical irony, as critics often mistakenly assert that the reforms were intended to *expand* the freedom to divorce.[40] But the history of no-fault divorce illustrates the gulf between founding intentions and achieved effects: the major family law reforms on both sides of the Atlantic in the 1960s and 1970s were carefully considered efforts aimed at reinforcing the family and lowering the rate of divorce. They largely failed. But a fresh review of the course of these reforms in England and California is essential in contextualizing the current converse debate on the reintroduction of fault grounds into divorce cases. These transatlantic debates of the generation past provided a thorough scouring of many of the divorce-related issues now burnished anew by the counter-revolutionary critique. These freshly buffed concerns include the viability of a divorce grounds menu including fault and non-fault elements; whether requiring divorce counseling is appropriate or worthwhile; the emotional and financial costs of divorce to children; and the limits on the authority of the State to frustrate the desires of adults intent on divorce.

Understanding our present divorce law conundrum requires a pointed look at the past. No-fault divorce's debut in 1969 was not entirely unprecedented. It came at the cusp of a rich history of marked changes in divorce law and practice, a palimpsest seemingly erased by the conversion—at one stroke—of divorce grounds from an assortment of multifaceted fault,[41] "living apart,"[42] and even "temperamental

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40. Texts throughout the past generation have made this erroneous assumption. *See, e.g.*, PHILLIPS, *supra* note 10, at 571-72 (describing no-fault divorce as a product of "wide-sweeping liberalization of attitudes toward many institutions and forms of behavior that was characteristic of the 1960s and 1970s"); MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 317-405 (1972) (discussing the "extreme liberality" of the new divorce grounds); Lynne Marie Kohm, *Sex Selection Abortion and the Boomerang Effect of a Woman's Right To Choose: A Paradox of the Skeptics*, 4 WM. & MARY J. WOMEN & L. 91, 104 n.53 (1997) (noting that no-fault advocates heralded their reforms as a way to "liberate" women from "dissatisfying marriages" and to "make uncontested divorce easier"); William L. O'Neill, *Divorce as a Moral Issue: A Hundred Years of Controversy*, *in* "REMEMBER THE LADIES": NEW PERSPECTIVES ON WOMEN IN AMERICAN HISTORY 127, 142 (Carol V.R. George ed., 1975) ("[M]aking divorce easier might well have led to a burst of divorces."); Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 62 (1991) (observing that no-fault laws were intended to increase an individual's decisionmaking autonomy in divorce); Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 695 (1990) ("[L]egislators widely adopted no-fault laws to reflect the growing notion of marriage as a relationship terminable at will."). Popular reactions to no-fault divorce have similarly mistaken outcome with motive, as in Rev. Pat Robertson's declaration to a 1996 Christian Coalition rally:

> And I watched little by little an unremitting assault by the left-wing forces, the ACLU, and the National Organization of Women, and other radical groups who began . . . then to assault the institution of marriage . . . . [S]tarting about 1970 . . . in almost every state this left-wing radical extremist coalition battered down the walls of intact families and passed what were called no-fault divorce laws.

Speaker of the House Newt Gingrich (R-GA) Participates in the Christian Coalition Faith and Freedom Celebration, *in* 1996 FEDERAL DOCUMENT CLEARING HOUSE, INC., 1996 Presidential Campaign Press Materials 30 (Aug. 15, 1996).

41. *See* JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW § 7.01(B), at 186

incompatibility"[43] statutes, into the touchstone of the no-fault revolution: "irreconcilable differences."[44] In fact, however, the transformation of divorce grounds was far more complex, prolonged, and incomplete than this thumbnail sketch suggests. Beginning in the mid-nineteenth century many states added (and frequently later modified) a no-fault divorce provision onto the list of statutory marital dissolution grounds, while retaining a full menu of fault grounds.[45] In 1866, for

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(1993) (describing how America "traditionally regarded divorce as a statutory remedy available exclusively to an innocent spouse whose partner has caused the breakdown of the marriage by committing some enumerated type of egregious marital fault"). An illustrative example is *Henderson v. Henderson*, 35 A.2d 686, 690 (N.J. 1944) (holding that only "an innocent party who has been injured in the particulars specified in the statute and who for that cause and in good faith prosecutes his action" is entitled to a divorce). The nearly ubiquitous grounds for divorce included adultery, extreme cruelty, and desertion, but legislatures often also provided divorce relief in cases involving insanity, conviction of a serious crime, habitual drunkenness or drug addiction, and other "perceived evils." GREGORY ET AL., *supra*, § 7.01, at 187; *see also* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 204-07, 498-504 (2d ed. 1985).

42. "Living Apart" statutes recognized marital breakdown as a divorce ground, evidenced by the parties' separation for a specified time. Initially, many of these statutes demanded separations of 8 or 10 years, although these time periods were dramatically shortened as the century wore on. *See* J. Herbie DiFonzo, *Alternatives to Marital Fault: Legislative and Judicial Experiments in Cultural Change*, 34 IDAHO L. REV. 1, 38-53 (1997) (discussing "living apart" laws).

43. "Temperamental Incompatibility" statutes allowed a divorce to proceed on the ostensibly unvarnished ground that conjugal harmony was no longer possible. *See id.* at 26-38. But appellate courts often applied a gloss requiring the divorce-seeking spouse to establish his or her blamelessness. *See* Lester B. Orfield, *Divorce for Temperamental Incompatibility*, 52 MICH. L. REV. 659 (1954).

44. "Irreconcilable differences" demonstrating complete marital breakdown constituted the sole divorce ground fashioned by the California legislature in the first modern no-fault divorce statute. *See* Family Law Act of 1969, ch. 1608, § 4506, 1969 Cal. Stat. 3314, 3324 (current version at CAL. FAM. CODE § 2310 (West 1994)); *see also* J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519, 541-50 (1994).

45. The fault grounds themselves were not born in their contemporary shape. In mid-nineteenth-century Connecticut, for example, any marital "misconduct" was grounds for divorce if it "permanently destroy[ed] the happiness of the petitioner, and defeat[ed] the purposes of the marriage relation." An Act Concerning the Domestic Relations, ch. 21, § 2, 1849 Conn. Pub. Acts 17, 17 (current version at CONN. GEN. STAT. ANN. § 46b-40 (West 1995)). Maine allowed for marital dissolution if it was "reasonable and proper, conducive to domestic harmony, and consistent with the peace and morality of society." An Act Additional to Chapter 89 of the Revised Statutes, Respecting Divorce, ch. 13, § 1, 1847 Me. Acts 8, 8 (current version at ME. REV. STAT. ANN. tit. 19-A, § 902 (West 1998)). In Washington, a divorce could be premised on any ground "deemed by the court sufficient," so long as the court "be satisfied that the parties can no longer live together." 1881 CODE OF WASHINGTON, § 2000, at 340-41. From 1871 to 1877, the Territory of Arizona had a "general mischief" divorce ground which gave an extraordinarily wide berth to trial court divination of legislative intent:

> [W]herein in the developments of future events, cases may be presented before the courts falling substantially within the limits of the law, as hereinbefore stated,

instance, Wisconsin added a provision allowing for divorce if the couple had lived apart for five years.[46] An 1893 Rhode Island law similarly carved out an exception to the fault matrix for couples whose separation lasted ten years.[47] At the beginning of the decade which gave birth to modern no-fault, Virginia added a provision allowing for divorce after three years living apart,[48] but soon reduced the waiting period to two years.[49] At present, the living apart period consists of one year.[50] But if the couple have no minor children and have entered into a property settlement agreement, they need only live apart for six months.[51] Similarly, when New Mexico added an incompatibility divorce ground in 1933, as when Oklahoma did two decades later, none of the statutory fault grounds were legislatively repealed.[52] Through this incremental and tortuous fashion, more than half of American jurisdictions had enacted no-fault divorce grounds before 1970.[53] Thus, what truly marks California's divorce reform as revolutionary is not the creation of a no-fault ground, but rather the elimination of fault-based alternatives for divorce-minded spouses.

The "irreconcilable differences" standard minted in 1969 as the sole divorce criterion in California was designed to transform divorce litigation from an adversarial tempest to an amiable teapot. The routinization of divorce was intended to drain the anger from the process of family dissolution, thus ending the mutual

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> yet not within its terms, it is enacted, that whenever the judge who hears a cause for divorce deems the case to be within the reason of the law, within the general mischief the law is intended to remedy, or within what it may be presumed would have been provided against, by the legislature establishing the foregoing causes of divorce had it foreseen the specific case and found language to meet it without including cases not within the same reason, he shall grant the divorce.

Act Concerning Divorce § 3, ch. 31, Comp. Laws of the Ter. of Ariz., 1864-1871, at 303, 304 (Bashford 1871). Such "omnibus" divorce clauses were severely criticized for their potential to "reduce the marriage relation to a mere state of concubinage, at the mercy of the parties and the courts." ALVAH L. STINSON, WOMAN UNDER THE LAW 348 (1914); *see also* BASCH, *supra* note 6, at 39-66 (discussing state divorce legislation from the Revolutionary War period to the end of the nincteenth century); 3 GEORGE ELLIOTT HOWARD, A HISTORY OF MATRIMONIAL INSTITUTIONS 3-160 (1904) (same).

46. *See* 1866 Wis. Laws 37.

47. *See* An Act of and in Addition to Section 2 of Chapter 167 of the Public Statutes, ch. 1187, § 1, 1893 R.I. Acts & Resolves 237, 237 (codified as amended at R.I. GEN. ACTS. § 15-5-3 (1996) (indicating, at present, a three-year period)).

48. *See* Act of Feb. 29, 1960, 1960 Va. Acts ch. 108 (codified as amended at VA. CODE ANN. § 20-91(9) (Michie 1995)).

49. *See* Act of Mar. 31, 1964, 1964 Va. Acts ch. 363 (codified as amended at VA. CODE ANN. § 20-91(9) (Michie 1995)).

50. *See* VA. CODE ANN. § 20-91(9) (Michie 1995).

51. *See id.* For a table listing all living apart statutes enacted prior to the effective date of California's no-fault provision, see DIFONZO, *supra* note 5, at 78-79.

52. *See* DIFONZO, *supra* note 5, at 70-75.

53. *See id.* at 76. The shift away from culpability grounds was accompanied by the gradual evisceration of fault-based defenses to divorce, such as recrimination, connivance, collusion, and condonation. *See generally* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §§ 13.8-.11 (2d ed. 1988) (explaining that such fault-based divorce defenses are largely of historical, rather than practical, significance today).

flagellation thought to be endemic to divorce courtroom explosions. This thoroughly "depressing" character of American fault divorce was well captured by social philosopher Christopher Lasch, writing on the eve of the no-fault revolution:

> If divorce is depressing, American divorce is peculiarly so, because of the peculiarly irrational character of our divorce laws. If they had been deliberately designed to corrupt all whom they touched, the laws could not more effectively bring out the worst in everybody. The definition of divorce as an adversary proceeding, instead of a mutual agreement, turns husbands and wives into embattled witnesses against each other, poisons the air with recriminations, locks the contestants more firmly than ever in postures of outraged self-righteousness, and makes more difficult than it already was a peaceful parting of ways. Even if the couple agree to divorce, the law requires them to act out the charade of charge and counter-charge—prearranged discoveries of illicit assignations in "love-nests," fabricated injuries and affronts, rituals and conventions which deceive no one but which have to be performed in the name, of all things, of justice. Anyone who passes through this process must emerge in one way or another humiliated and degraded.[54]

No-fault divorce consisted of a massive effort to prevent divorcing wives and husbands from becoming "humiliated and degraded." But the movement also aimed to reinforce the family and lower the divorce rate. The English reform movement greatly influenced the terms of American no-fault divorce, and also provided rehearsals for many of the arguments swirling around the divorce counterrevolution.

A. Divorce in England

After the first third of the twentieth century, English divorce was available upon proof of adultery, cruelty, desertion for three years, or incurable insanity after five years confinement.[55] With the exception of insanity, matrimonial fault supplied the

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54. Lasch, *supra* note 9, at 3; *see also* Monrad G. Paulsen, *Divorce—Canterbury Style*, 1 VAL. U. L. REV. 93, 94 (1996) ("Although the theory of the Anglo-American law rejects the notion that spouses who wish to terminate their marriage may do so by mutual consent, the law in practice permits consensual dissolution through the means of properly arranged, undefended cases."); Austin Sarat & William L.F. Felstiner, *Law and Social Relations: Vocabularies of Motive in Lawyer/Client Interactions*, 22 L. & SOC'Y REV. 737, 750 (1988) (observing that today, when a client accuses her spouse of marital fault, the "[c]lient and lawyer are like performer and bored, but dutiful, audience—the lawyer will not interrupt the aria, but she will not applaud much either for fear of an encore").

55. *See* A.P. HERBERT, THE AYES HAVE IT: THE STORY OF THE MARRIAGE BILL (1937). Judicial divorces had only become available to English spouses in 1857. Private parliamentary bills had dispensed divorce to a privileged few beginning in the mid-seventeenth century. The 1857 legislation allowed divorce to be granted to men on the ground of their wives' adultery, and to women who could prove that their husband's adultery had been aggravated by some other offense against morals, such as bigamy, incest, sodomy, desertion, cruelty, rape, or bestiality. Only in 1923 did English women achieve equality at the bar of the divorce court, and no longer have to prove the factor aggravating adultery. *See* Ann Sumner Holmes, *The Double Standard in the English Divorce Laws, 1857-1923*, 20 L. & SOC. INQUIRY 601, 602 n.2, 604 & n.9 (1995). In 1937, Parliament extended the grounds of divorce to both spouses to include cruelty, desertion for three years, and incurable insanity after five years'

basis of every divorce action, requiring proof of the breaking of the pledge of fidelity or decent behavior inherent in the conjugal relationship. Since personal depravity was seen at the heart of all marital breakdown, "fault was the undisputed touchstone of divorce policy."[56] The prospect of an innocent, faithful spouse shackled to a conjugal demon only reinforced this view. Accordingly, a divorce decree represented a punishment inflicted on an unworthy partner by a court acting on behalf of the aggrieved social order as much as of the victimized spouse.

The massive effort undertaken by the Morton Commission to examine and revise the entire structure of English marriage and divorce law uncovered deep social fissures. In 1951, Eirene White, MP, had introduced a private member bill in Parliament proposing a "marital breakdown" standard for divorce, which could only be shown by a separation for seven years. Pulling back from the fault perimeter—even in so circumscribed a fashion—proved so controversial that White withdrew the bill in exchange for the government's pledge to establish a royal commission to study the issue. The Royal Commission on Marriage and Divorce, chaired by Lord Morton of Henryton, evaluated a gigantic quantity of evidence, received testimony from 67 organizations and 48 individuals, conducted 102 hearings, struggled with the issue for 4 years, and produced a report in 1956 containing more than 400 pages.[57] In the end, it settled nothing.

The range of proposals articulated by the nineteen members of the Morton Commission conveyed a radical divergence of opinion over the fairness of the divorce process, and reflected a range of views on the conditions necessary for the state to allow divorce, most of which have received renewed currency in the present debate over divorce reform. Eighteen of the nineteen Commission members agreed to retain the "doctrine of the matrimonial offence"[58] as the basis for divorce, but the key question of modifying the grounds of divorce provoked fundamental disagreement. Nine members insisted on retaining the matrimonial offense standard with no modification.[59] This group's rationale anticipated several features of the contemporary divorce counterrevolution. It rejected a marital breakdown standard for divorce since "in whatever form that principle might be introduced it would entail the recognition of divorce by consent."[60] In turn, consensual divorce was similarly condemned because the "consequences of providing the 'easy way out' afforded by

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confinement. *See* RHEINSTEIN, *supra* note 40, at 319-20; DOROTHY M. STETSON, A WOMAN'S ISSUE: THE POLITICS OF FAMILY LAW REFORM IN ENGLAND 97 (1982). On the history of English divorce generally, see a trilogy of works by Lawrence Stone: LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530-1987 (1990); LAWRENCE STONE, UNCERTAIN UNIONS: MARRIAGE IN ENGLAND 1660-1753 (1992); LAWRENCE STONE, BROKEN LIVES: SEPARATION AND DIVORCE IN ENGLAND 1660-1857 (1993). *See also* PHILLIPS, *supra* note 10.

56. PHILLIPS, *supra* note 10, at 566.

57. *See* REPORT OF THE MORTIMER COMMISSION OF THE CHURCH OF ENGLAND, PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY app. a, ¶ 19 (1966) [hereinafter PUTTING ASUNDER]; STETSON, *supra* note 55, at 161.

58. ROYAL COMMISSION ON MARRIAGE AND DIVORCE, REPORT 1951-1955, 1956, Cmnd. 9678, at 13 [hereinafter MORTON COMMISSION REPORT].

59. *See id.* at 14.

60. *Id.*

divorce by consent would be disastrous to stability in marriage."[61] In articulating this critique, these members outlined the precise terms constituting the contemporary "divorce culture" argument that our legal system facilitates the dissolution of salvageable marriages:[62]

> The inevitable result [of consensual divorce] would be the granting of divorces in cases where no real necessity for the remedy had arisen. In other words, the divorce rate would be swollen by the failure of marriages which would otherwise have held together with advantage to both parties as well as to children. People would then come to look upon marriage less and less as a life-long union and more and more as one to be ended if things begin to go wrong, and there would be a very real risk that in the end widespread divorce would come to be an accepted feature of our society.[63]

Widespread divorce is, of course, featured in our society. And the debate today has shifted to the wisdom of allowing wives and husbands to divorce themselves with minimal state regulation of the process, with the recognition that a too-easy divorce path leads ineluctably to a road too often taken. The contours of this precise argument were anticipated in the Morton Commission Report:

> As we have pointed out, to give people a right to divorce themselves would be to foster a change in the attitude to marriage which would be disastrous for the nation. People would tend to enter marriage more lightly, and with the reservation that, if it were not a success, they could always agree to put an end to it. And when difficulties arose in marriage life (as happens in most marriages), there would be much less incentive to overcome them. Husband and wife would be tempted to say to each other, "Let us have a divorce and start again." Thus, divorce would increasingly be sought in circumstances where, if a little effort were made, husband and wife could adjust their differences. Such an attitude would be fatal to stability and security in marriage, which in the end would come to be regarded as a temporary relationship, with divorce as a normal incident of life. For this calamity the State would bear the brunt of the responsibility since, in giving its blessing to divorce by consent, it would in effect have encouraged people to abandon their marriages on the flimsiest provocation.[64]

The plight of children injured by their parents' ready divorce has galvanized the current debate. The same group within the Morton Commission focused on the adverse consequences to children of divorce, also in prescient terms:

> We are deeply concerned about the effect on children of the present divorce rate: their suffering would be multiplied if divorce were to become more widespread. The best home for children is of course a happy home, but in our opinion (and most of our "expert" witnesses confirmed this) children can put up with a good deal of friction between their parents so long as the home remains intact. The relations between the parents must usually be very bad indeed before a divorce is in the interests of the children.[65]

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61. *Id.*
62. *Cf. supra* text accompanying notes 26, 28-30.
63. MORTON COMMISSION REPORT, *supra* note 58, at 14.
64. *Id.* at 15.
65. *Id.* at 14-15.

Finally, this group forecast that a court hearing the issue of marital breakdown would have an "impossible task," as the case would not be triable whether the breakdown allegation were controverted or undefended.[66] Such a standard would result in many divorces "on the ground of incompatibility or for such defects of temperament as should be regarded as coming within the ordinary wear and tear of married life."[67]

Another nine members supported supplementing the fault grounds with White's proposal allowing a "marital breakdown" divorce evidenced by seven years separation.[68] This group structured its recommendations for the "many cases where marriage breaks down irretrievably and where, as the law stands, no remedy is available."[69] Exclusive reliance on the doctrine of matrimonial offense was also criticized as serving no effective deterrent function:

> [T]he law of divorce as it at present exists is . . . weighted in favour of the least scrupulous, the least honourable and the least sensitive; and that nobody who is ready to provide a ground of divorce, who is careful to avoid any suggestion of connivance or collusion and who has a co-operative spouse, has any difficulty in securing a dissolution of the marriage.[70]

The nineteenth and final member of the Commission, Lord James Walker, advocated that all fault grounds be eliminated and replaced by a marital breakdown standard to be satisfied by three years separation plus evidence demonstrating the improbability that the couple would ever resume cohabitation.[71]

The hopelessly fractured Morton Commission thus presented at least three radically contrasting bases for a viable divorce system: matrimonial offenses only; a divorce grounds menu including both fault grounds and a breakdown standard evidenced by separation; and a breakdown-plus-separation ground as the exclusive prerequisite for divorce. No legal changes to the divorce law followed in the wake of the Morton Commission Report. In the 1960s, the dynamics of English divorce reform altered significantly. In 1963, Leo Abse, MP, attempted to revive Eirene White's separation divorce proposal. The House of Lords, led by the Archbishop of Canterbury,

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66. *Id.* at 21.

67. *Id. But see* PUTTING ASUNDER, *supra* note 57, ¶ 62 (suggesting that marital breakdown is justiciable).

68. *See* MORTON COMMISSION REPORT, *supra* note 58, at 24. Even this group was divided: five of these nine would have allowed a petitioner to divorce his or her spouse—even after seven years' separation—enly if the spouse did not object. The remaining four would have contemplated divorce over an objecting spouse if the petitioner could "satisfy the court that the [seven years] separation was in part due to the unreasonable conduct of the other." *Id.* at 25; *see also* O. Kahn-Freund, *Divorce Law Reform?*, 19 MOD. L. REV. 573, 585-86 (1956).

69. MORTON COMMISSION REPORT, *supra* note 58, at 23.

70. *Id.* For an analysis of American viewpoints on the advisability of divorce on the ground of separation for a specified period, see DiFonzo, *supra* note 42, at 38-53.

71. *See* MORTON COMMISSION REPORT, *supra* note 58, at 340-41. Lord Walker stated that if his view of complete replacement were not adopted, he would prefer to retain the undiluted fault standard. *See id.* at 341. His formulation was sharply criticized in B. MacKenna, *Divorce by Consent and Divorce for Breakdown of Marriage*, 30 MOD. L. REV. 121, 126-28 (1967). *See also* Kahn-Freund, *supra* note 68, at 589-90.

remained an implacable foe of reform, and the bill failed.[72] The Archbishop of Canterbury opposed a separation ground as a subterfuge for divorce by consent, and in the House of Lords he expressed both his dissatisfaction with the lax procedures in divorce courts and his hope for conservative reform:

> [I]f it were possible to find a principle at law of breakdown of marriage which was free from any trace of the idea of consent, which conserved the point that offences and not only wishes are the basis of the breakdown, and which was protected by a far more thorough insistence on reconciliation procedure first, then I would wish to consider it.[73]

The Archbishop thus intended any new conjugal breakdown standard as a vehicle for tightening, not liberalizing, divorce law and procedure.[74]

Conservative critics of divorce law in England and in America maintained that a single act (or even repeated incidents) of adultery or cruelty did not necessarily destroy the marriage.[75] The marital fault regime granted divorces upon proof of transgression, entirely without regard to the actual state of the marriage. But these critics saw that fault grounds had transmogrified into entitlements: if a spouse carried the normally minimal burden of proof, the court was obliged to award the divorce.[76] On "both sides of the Atlantic," the operating law held that "most people who want divorces get them and get them without great expense or undue delay."[77] Inquiry into

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72. *See* PUTTING ASUNDER, *supra* note 57, at 95; STETSON, *supra* note 55, at 169-70.

73. 250 PARL. DEB., H.L. (5th ser.) 1547 (1963).

74. *See* PUTTING ASUNDER, *supra* note 57, at 23.

75. The views of an English vicar and an American divorce judge are illustrative. *See, e.g.*, REGINALD HAW, THE STATE OF MATRIMONY: AN INVESTIGATION OF THE RELATIONSHIP BETWEEN ECCLESIASTICAL AND CIVIL MARRIAGE IN ENGLAND AFTER THE REFORMATION 105 (1952) ("[I]t is nothing short of astounding that there was so little realization . . . that worse things can happen to a marriage than adultery."); Paul W. Alexander, *The Follies of Divorce: A Therapeutic Approach to the Problem*, 36 A.B.A. J. 105, 107 (1950) ("[C]omparatively minor *legal* guilt can be and often is vastly more devastating to the parties and definitely more disruptive of family life than that guilt which the law, religion, and society regard as most offensive, to wit, adultery.") (emphasis in original).

76. On the farcical nature of divorce litigation, see NELSON MANFRED BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 1-8 (1962) (observing that under a fault-based system of divorce, thousands have had to "resort to some type of make-believe" in order to have the sour marriage dissolved); Paul Sayre, *Divorce for the Unworthy: Specific Grounds for Divorce*, 18 LAW & CONTEMP. PROBS. 26, 27 (1953) (stating that divorce litigation is the one striking exception to the rule that the defendant tries to prevent the plaintiff from succeeding); Stephen Ewing, *The Mockery of American Divorce*, 157 HARPER'S MONTHLY MAG. 153, 159 (1928) (reporting instances of divorces granted to a husband because the sound of his wife's voice was injurious to his fragile health, and to a wife because her husband had told her to go to hell once too often).

77. Paulsen, *supra* note 54, at 94. The Colorado Supreme Court agreed with this assessment of pre-revolutionary divorce in that state: "'Colorado . . . permits the parties to obtain divorces by consent, but subjects them to [the] humiliation, hypocrisy, sometimes perjury, and needless hostility of having to testify to one of the prescribed grounds.'" *In re* Marriage of Franks, 542 P.2d 845, 849 (Colo. 1975) (omission in original) (quoting Homer H. Clark, Jr., *Divorce Policy and Divorce Reform*, 42 U. COLO. L. REV. 403, 407 (1971)).

the actual state of the marriage was irrelevant. As Ohio judge Paul Alexander had written, the fault system "compel[s] the judge to grind out divorces regardless of the real facts, the underlying causes and the effect upon the parties, their families and the state."[78] The Archbishop of Canterbury was now suggesting that the law should go further and demand not only proof of conjugal transgression, but also resultant marital disintegration.[79] Divorce-seeking complainants would, as in the traditional model, have to establish their spouse's culpability as well as their own innocence of any marital fault.[80] But the divorce would still not be granted unless the complainant also convinced the tribunal that the marriage had been irredeemably ruined by the spousal misconduct. The process would be skewed in the direction of a "far more thorough insistence on reconciliation."[81] In short, the Church of England was placing its moral authority behind a new legal divorce regime, fault-plus. To mobilize support for a fault-plus divorce scheme, the Archbishop appointed a committee to explore the Church's position on marriage breakdown as a divorce standard. In 1966, the Archbishop's group published *Putting Asunder: A Divorce Law for Contemporary Society* ("*Putting Asunder*").[82] The report insisted on thorough divorce reform: "the doctrine of the breakdown of marriage should be comprehensively substituted for the doctrine of the matrimonial offense as the basis of all divorce."[83] Consistent with the Archbishop's earlier comments in the House of Lords, *Putting Asunder* declared that the breakdown standard was neither the equivalent of divorce by consent, nor "incompatible with a covenant of lifelong intention."[84] Launching a severe criticism of the hypocrisy and fraud of the marital fault system, the church group condemned the established statutory process "not only on moral and legal grounds, but on social and psychological [grounds] as well."[85]

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78. Paul W. Alexander, *Introduction* to DIVORCE AND FAMILY RELATIONS: A COMPILATION OF THE ORIGINAL *DICTA* PUBLISHED BY THE VIRGINIA LAW WEEKLY, 1949-1950, at iii, vi-vii (Stanley C. Morris, Jr., ed., 1950) [hereinafter DIVORCE AND FAMILY RELATIONS].

79. *See* 250 PARL. DEB., H.L. (5th Ser.) 1547 (1963). The Archbishop's position was thus more restrictive than *any* of the options presented in the Morton Commission Report. *See supra* text accompanying notes 58-71; *infra* text accompanying notes 82-96.

80. The necessity for a divorce complainant to prove not only the defendant spouse's guilt but also the complainant's own "clean hands" and absence of fault in the dissolution of the marriage constituted the core of the recrimination doctrine, applicable on both sides of the Atlantic. *See* GREGORY ET AL., *supra* note 41, § 7.03, at 215-16.

81. 250 PARL. DEB., H.L. (5th Ser.) 1547 (1963).

82. PUTTING ASUNDER, *supra* note 57.

83. *Id.* at 18.

84. *Id. Putting Asunder* served as a template for the later efforts culminating in California no-fault divorce. *See infra* text accompanying notes 137-39.

85. PUTTING ASUNDER, *supra* note 57, at 28. The group attacked the fault premise of divorce as psychologically simplistic and inaccurate, noting that

> if we concentrate our attention wholly on the actions that are designated "matrimonial offences," we inevitably fail to do justice to the complex of motives in the two interacting persons which finally drives the one to act and the other to treat the actions a ground for a divorce petition.

Id. at 144.

The Church proposal initially resembled that of Lord Walker, the "lone ranger" of the Morton Commission.[86] As had Walker, the Archbishop's group rejected a menu approach to divorce legislation, emphasizing that fault and breakdown were philosophically incompatible approaches.[87] But *Putting Asunder* went much further than previous plans. It articulated a system of legal proof of breakdown by analogy to a coroner's inquest.[88] Much as a coroner examines a corpse for clues to its demise, so too courts would conduct an inquest on each assertedly dead marriage to determine whether conjugal resuscitation is possible.[89]

The revolutionary nature of this reorientation of divorce procedure cannot be overemphasized. Because inquests would be conducted to ascertain the vital signs or moribund status of every proposed divorce, the pro forma procedure adopted by English courts in undefended petitions would be scrapped. Since approximately ninety percent of all divorce petitions were then currently unopposed, the increased demands on the justice system would have been astronomical. The Archbishop's group defiantly contended that, given the requirements of a matrimonial inquest, "an uncontested case could on occasion call for greater care and judicial skill than one that was contested."[90] The group called for "considerably expanded"[91] pleadings in all divorce cases. These would detail the "history of the marriage in question, the reasons alleged for its failure, any attempts made to achieve reconciliation, and all

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86. *See supra* text accompanying note 71.

87. PUTTING ASUNDER, *supra* note 57, at 16, 57-59. Acknowledging that the fault system bore no necessary relationship to marital breakdown, the church group asserted:

> [I]f the legislature came to the conclusion that it was right and proper to grant divorce, on the petition of either party and without proof of any specific offence, when—and only when—a marriage was shown to have broken down irreparably, how could it justify retaining grounds which depended on the commission of specifie offences, on which only injured parties might petition, and which required no evidence of breakdown at all?

Id. at 57.

88. *See id.* at 67.

89. By changing the focus of the inquiry from the proof of fault grounds to the viability of the marriage, the Archbishop's group intended to alter fundamentally the divorce process itself:

> What is essential is to render the procedure of the court appropriate to making inquiry into the condition of a marriage instead of determining the guilt or innocence of a person against whom the commission of an offence has been alleged. Under a law based on breakdown the trial of a divorce case would become in some respects analogous to a coroner's inquest, in that its object would be judicial inquiry into the alleged fact and causes of the "death" of a marriage relationship. It would have to be made possible for the court, therefore, to inquire effectively into what attempts at reconciliation had been made, into the feasibility of further attempts, into the acts, events, and circumstances, alleged to have destroyed the marriage, into the truth of statements made (especially in uncontested cases), and into all matters bearing upon the determination of public interest.

Id.

90. *Id.* at 77.

91. *Id.* at 68.

arrangements proposed for the care of any children, for the disposal of property, and for maintenance in general."[92]

Putting Asunder proposed, in short, a dramatic tightening of the divorce belt. It is important to recognize that this Report, one of the leading texts of the divorce revolt, strongly advocated reform legislation which would have made it exceedingly more difficult for *any* couple to divorce. Establishing fault under the existing divorce law would no longer guarantee the issuance of a decree. A divorce petitioner would still bear the burden of showing marital breakdown. *Putting Asunder* proposed that, to avoid the perceived insincerity of unopposed petitions, the court should have "discretionary power to require the attendance of both parties."[93] The drafters of *Putting Asunder* were not sanguine that all relevant facts would surface if the fact-finding process were left to the parties and their counsel. Indeed, they believed that the judicial process had effectively yielded a standard allowing for divorce by consent. Given the traditional reluctance of common law judges to engage in inquisitorial procedures, the church group recommended that, especially in uncontested cases, "provision should be made for the intervention, when needed, of counsel representing the public interest or the interests of children of the family."[94] The penalty for failing to satisfy this fault-plus standard would be denial of the divorce decree. *Putting Asunder* called for the refusal of decrees in cases in which the proposed maintenance of the dependent spouse or children was inadequate, or in which the "conduct of the petitioner in regard to the marriage was found to be such that in the court's judgment making a decree would be against the public interest."[95] The comprehensive therapeutic nature of the drafters' program was evident in their call for a massive infusion of forensic social workers "as part of immediate procedural reform."[96] These new court officers would assist judges in verifying attempts at reconciliation, testing the reliability of assertions made to the court, and providing further investigative services as requested.

The Lord Chancellor referred *Putting Asunder* to the Law Commission upon its publication in 1966.[97] The Law Commission promptly produced its own report, which echoed the Church group's rejection of the regime of matrimonial fault.[98] However, the Law Commissioners strenuously argned that the inquest system proposed by the Church was unworkable. Not only was marital breakdown not justiciable; the vagueness of the test would make it difficult for judges and solicitors to exclude their personal sentiment in an area of law where strong feelings dominate. Moreover, a

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92. *Id.*

93. *Id.*

94. *Id.* at 70; *cf.* RHEINSTEIN, *supra* note 40, at 326-27 (explaining that the church group denounced the hypocrisy of using the adversarial method in divorce proceedings).

95. PUTTING ASUNDER, *supra* note 57, at 75.

96. *Id.* at 70.

97. The Law Commission was statutorily charged with reviewing all English law "'with a view towards its systematic development and reform, including . . . the elimination of anomalies . . . and, gcnerally, the simplification and modernization of the law.'" RHEINSTEIN, *supra* note 40, at 332 (quoting Law Commissions Act, 1965, ch. 22, § 3(1) (Eng.)) (omissions added); *see also* STETSON, *supra* note 55, at 181-83.

98. *See* LAW COMMISSION, REFORM OF THE GROUNDS OF DIVORCE: THE FIELD OF CHOICE, 1966, Cmnd. 3123 [hereinafter FIELD OF CHOICE].

"detailed inquest into the whole married life would prove more distasteful and embarrassing"[99] than the established proceedings. Reconciliation efforts made mandatory would degenerate into wasting the "time of marriage guidance counselors . . . on 'cock and bull' stories to the detriment of sincere applicants."[100]

The Law Commissioners' core objections related to the vast requirement of time, personnel, and expense which *Putting Asunder* would entail:

> Court hearings would take far longer. Undefended cases at present constitute 93 per cent of the total and take about ten minutes each. Under the suggested procedure the length of trials could not at best be less than trebled. Present resources are fully extended to achieve about 35,000 divorces a year. Therefore great additional expenditure would be required on court-houses, Judges, court staff, etc. Scarce, highly skilled manpower would have to be diverted to this work. A great expansion of the Queen's Proctor's Office would be required, since it is proposed that numerous officials should be employed to investigate the truth of the evidence contained in the pleadings.
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> . . . [A] large number of trained social workers would be needed. There is a great shortage of them already.[101]

If breakdown plus inquest was unworkable, and both the Law Commission and the Archbishop's group had agreed on the objectionable nature of the marriage fault regime, what option remained? The Law Commissioners took *Putting Asunder*'s endorsement of a marriage breakdown standard to its logical conclusion, once the inquisitorial veneer was stripped away. The preferred route for English divorce was to be breakdown *without* inquest.[102]

The Law Commission dismissed the Church group's belief in the inappropriateness of a divorce menu system listing both fault and non-fault grounds. But the Commission supported this stand by merely quoting the opinion of American law professor Monrad Paulsen that the "legal system frequently chooses different principles to dispose of distinguishable situations."[103] The Commission's proposal represented a legislative stew of fault, no-fault, and the emerging breakdown standard. Divorce could be obtained upon the sole ground of marital breakdown, which could only be established in one of five ways: adultery, cruelty, desertion for two years, separation for two years if the respondent did not object, and separation for five years.[104] Thus, the Commission transmuted the old fault grounds into "elements" of a new breakdown standard.[105] One component of the proposal was devised to reverse the virtual automatic granting of divorces, once nominal proof of

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99. *Id.* at 31.

100. *Id.*

101. *Id.* at 30-31 (citations omitted).

102. The Law Commissioners purported to consider two further possibilities: divorce by consent and a pure separation ground. *See id.* at 39-49. However, it is clear from the discussion that these options were straw arguments whose rejection served to emphasize the merits of breakdown without inquest, which could be shown in a number of ways, including the parties' separation. *See id.* at 36.

103. *Id.* at 49 (quoting Paulsen, *supra* note 54, at 98).

104. *See The Grounds of Divorce*, 117 NEW L.J. 827, 827-28 (1967) (reproducing the full text of the Law Commission's proposal and explanatory notes).

105. *See* FIELD OF CHOICE, *supra* note 98, at 49.

fault had been entered. Proof of a fault "element" would specifically no longer entitle the petitioner to a divorce. Rather, the court would be authorized to make an independent evaluation of the alleged marital breakdown.[106] With only minor changes, the Law Commission's proposal became law in the Divorce Reform Act of 1969.[107]

B. Putting Asunder *in California*

According to Herma Hill Kay, a leading figure in the no-fault movement, by the 1960s "it was impossible to make divorce easier in California than it already was."[108] In typical ten minute court hearings, ninety-five percent of California divorce complainants recited accounts of their spouses' "extreme cruelty"[109] destroying their marriage. This statutory requirement could be met by the wife's simple assertion that her husband was "cold and indifferent,"[110] which caused her to become "nervous and upset."[111]

California's Supreme Court, in 1952, had seriously undermined the fault standard in a widely-noted opinion by Chief Justice Roger Traynor, which sharply limited the scope of the defense of recrimination and outlined an emerging family law jurisprudence both hostile to culpability analysis and intent on using the divorce process to try to reconcile the spouses.[112] The court described the family in elegiac terms and pointed the way to a jurisprudential turnabout:

> The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriages. But when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted. "[P]ublic policy does not discourage divorce where the relations between husband and wife are such that the legitimate objects of matrimony have been utterly destroyed."[113]

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106. *See id.*

107. Divorce Reform Act, 1969, ch. 55 (Eng.).

108. JACOB, *supra* note 10, at 46.

109. Elayne Carol Berg, *Irreconcilable Differences: California Courts Respond to No-Fault Dissolution*, 7 LOY. L.A. L. REV. 453, 454 (1974); *see also* Susan Westerberg Reppy, *The End of Innocence: Elimination of Fault in California Divorce Law*, 17 UCLA L. REV. 1306, 1307-08 (1970).

110. Berg, *supra* note 109, at 454.

111. *Id.*; *cf.* Max Rheinstein, *Our Dual Law of Divorce: The Law in Action Versus the Law of the Books*, *in* CONFERENCE ON DIVORCE 39, 40 (Ernest W. Burgess et al. eds., 1952) (explaining that California's cruelty statute encompassed conduct such as "bad cooking, nagging, or writing insulting letters").

112. *See* DeBurgh v. DeBurgh, 250 P.2d 598 (Cal. 1952).

113. *Id.* at 601 (alteration in original) (quoting Hill v. Hill, 142 P.2d 417, 422 (Cal. 1943)). The court favorably noted the parallel English development in which the interest of the community is "'judged by maintaining a true balance between respect for the binding sanctity

Belittling the role of "[t]echnical marital fault,"[114] the court insisted that the "perpetuation of an unwholesome relationship would be a mockery of marriage."[115] Instead, divorce courts weighing the equities in divorce cases with recriminatory allegations were instructed to consider first the "*prospect of reconciliation.*"[116] The court elaborated on the task of the divorce judge:

> The court should determine whether the legitimate objects of matrimony have been destroyed or whether there is a reasonable likelihood that the marriage can be saved. It should consider the ages and temperaments of the parties, the length of their marriage, the seriousness and frequency of their marital misconduct proved at the trial and the likelihood of its recurrence, the duration and apparent finality of the separation, and the sincerity of their efforts to overcome differences and live together harmoniously.[117]

In the 1960s, California's executive and legislative branches combined forces to try to buttress family life through divorce reform. In 1963, the same year in which Leo Abse's no-fault bill triggered the divorce reform process in Parliament, California Assembly member Pearce Young initiated a study aimed at "'developing a legislative program to strengthen family relations.'"[118] At hearings conducted the following year, a variety of witnesses testified before Young's committee to the effect that California's fault-based divorce law was too lax and thus contributed toward the social deterioration of California society.[119] Governor Edmund G. Brown told the

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of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down.'" *Id.* at 604 (quoting Blunt v. Blunt, 1943 App. Cas. 517, 525 (appeal taken from C.A.)). Nor was the California Supreme Court alone among American jurisdictions in its view of the futility of trying to resurrect dead marriages. One year after the *DeBurgh* decision, the Idaho Supreme Court expressed itself in similar grandiloquence in upholding that state's first no-fault divorce statute, which allowed marital dissolution upon proof of five years' separation of the parties:

> The family unit, constituting as it does the very base of our religious, cultural and moral life, is one of the principal supporting pillars of our civilization. The state created by the people for the protection and promotion of their common welfare, must protect and foster marriage and the family relationship. However... [w]hen the marriage relationship has completely and finally broken down and the relations of the parties have reached an impasse where reconciliation is impossible and the family unit has ceased to exist, no rule or regulation promulgated by authority of the state can restore it. The object of the state's protection has ceased to exist.

Howay v. Howay, 264 P.2d 691, 697 (Idaho 1953); *see also* Dever v. Dever, 146 A. 478, 479 (R.I. 1929) (upholding Rhode Island statute allowing divorce upon ten years' separation).

114. *DeBurgh*, 250 P.2d at 606.

115. *Id.* at 603.

116. *Id.* at 606 (emphasis in original).

117. *Id.*

118. Howard A. Krom, *California's Divorce Law Reform: An Historical Analysis*, 1 PAC. L.J. 156, 158 (1970) (quoting News Release from Office of Assemblyman Pearce Young, 5th Assembly Dist., Mar. 15, 1963).

119. *See* CAL. ASSEMBLY INTERIM COMM. ON JUDICIARY RELATING TO DOMESTIC RELATIONS, FINAL REPORT, 2 APPENDIX TO JOURNAL OF THE ASSEMBLY Vol. 23 No. 6, at 25-

committee that divorce "erodes the very foundation of our society"[120] and that the ease of obtaining divorce in California led to juvenile delinquency and crime. He pressed the committee to "probe and expose the core of this growing social problem."[121] When the state legislature failed to act, Governor Brown appointed the Governor's Commission on the Family in 1966 to mount a "'concerted assault on the high incidence of divorce in our society and its often tragic consequences.'"[122]

The Governor's Commission proposed no-fault marital dissolution to be processed by a therapeutic family court.[123] This divorce scheme principally relied on *Putting Asunder*, the proposal crafted by the Archbishop of Canterbury's group. Not only did the Governor's Commission quote extensively from the English study, it also replicated the heart of the Church of England Report in its bid to link the removal of fault to a transfer of domestic cases to an administrative and therapeutic—rather than a purely adjudicative—body.[124] In its radical restructuring of divorce law in order to strengthen marriages, the California reformers adopted the views of the advocates of therapeutic divorce, who argued that the primary role of the divorce court was to foster reconciliation rather than to ascertain culpability.[125] The Governor's Commission summarized the case against fault-based divorce in terms which made clear its commitment to use divorce law to keep marriages alive:

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44 (Reg. Sess. 1965) [hereinafter FINAL REPORT].

120. *Id.* at 176.

121. *Id.* at 177.

122. REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY 1 (1966) (quoting Governor Edmund G. Brown, *Charge to the Commission*, May 11, 1966). Some anxious Californians rushed to the courts to get divorced before the anticipated legal tightening took place. *See* MICHAEL WHEELER, NO-FAULT DIVORCE 27-28 (1974).

123. *See generally* J. Herbie DiFonzo, *Coercive Conciliation: Judge Paul W. Alexander and the Movement for Therapeutic Divorce*, 25 U. TOL. L. REV. 535 (1994) (discussing a therapeutic divorce campaign and family court models).

124. *See* Philip L. Hammer, *Divorce Reform in California: The Governor's Commission on the Family and Beyond*, 9 SANTA CLARA L. REV. 32, 33 (1968).

125. The reformers acknowledged that, as a barrier to divorce, culpability had proven a massive failure; they hoped to adapt the tools of social science to apply the brakes on the divorce rate. *See* DiFonzo, *supra* note 123, at 543-46, 552-59. Culpability was, in effect, perceived as irrelevant. Nester C. Kohut reflected the conviction of therapeutic divorce reformers: "A substantial number of marriages alleged by the parties and supposed by the attorneys and divorce court to be broken, lifeless or irreparable, are not in fact completely or irreversibly broken." NESTER C. KOHUT, A MANUAL ON MARITAL RECONCILIATIONS: A SOCIO-LEGAL ANALYSIS OF DIVORCE FOR THE UNBROKEN MARRIAGE 11 (1964); *cf.* Paul W. Alexander, *A Therapeutic Approach, in* CONFERENCE ON DIVORCE 51, 51-52 (Ernest W. Burgress et al. eds., 1952) (explaining that divorce petitioners and their counsel automatically—and often erroneously—insist that the marriage is dead); EXECUTIVE COMM. OF THE FED. COUNCIL OF CHURCHES OF CHRIST IN AMERICA, AN APPEAL FOR CHANGE IN DEALING WITH DIVORCE PROBLEMS, Sept. 19, 1950, *reprinted in* FOWLER V. HARPER, PROBLEMS OF THE FAMILY 771, 772 (1952) ("Even though a couple has diagnosed its own case as hopeless, the judge would be able to draw upon the help of a body of counselors representing religious, social, psychiatric and legal insights which might point the way to reconciliation.").

> [I]t is personally tragic and socially disruptive that the court should be absolutely required, upon proof of a single act of adultery or "extreme eruelty"—perhaps regretted as soon as committed—to end a marriage which may yet contain a spark of life.[126]

Accordingly, the Governor's Commission tied the elimination of fault grounds in divorce to the operation of a new and potent socio-legal agency, whose mission was to provide therapeutic aid to salvage a foundering marriage.

A formal termination of the conjugal union was sanctioned upon proof of marital breakdown, but only "after penetrating scrutiny and after the parties have been given by the judicial process every resource in aid of conciliation."[127] Mandatory counseling for divorce petitioners provided the epitome of the therapeutic divorce experiment. Phillip L. Hammer acknowledged that "requir[ing] a psychiatric type examination and counseling of persons seeking dissolution of their marriage is a potentially significant interference by the state with the privacy and personal liberties of the individual."[128] But, Hammer insisted, many situations warranted state interference: when one spouse opposed the dissolution, when minor children needed the state's protection, when the parties were experiencing difficulty working out a "rational" distribution of property, when custody and support were unresolved, and, in general, when psychiatric intercession was needed for the "reduction of anti-social hostility and tension."[129] The claims favoring state intervention in these instances "fairly clearly outweigh the interests of the individual in being free from inquiry by the state into the events of his private life."[130] Similar to many proposals of the contemporary

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126. REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY, *supra* note 122, at 27. That the filing of a divorce suit did not always spell doom for the conjugal bond was suggested in a study of divorce courts in Washington State: "[A]t least half of the people who start divorce suits are really hoping that something will stop them before it is too late." Alice O'Leary Ralls, *The King County Family Court*, 28 WASH. L. REV. 22, 26 (1953).

127. REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY, *supra* note 122, at 2. Proposals to convert divorce from a procedure grounded in matrimonial fault to one exploring conjugal breakdown were not unknown in the scholarly literature. *See, e.g.*, MORRIS PLOSCOWE, THE TRUTH ABOUT DIVORCE 261 (1955); John S. Bradway, *Family Dissolution—Limits of the Present Litigations Method*, 28 IOWA L. REV. 256, 266-72 (1943); Paul Sayre, *Divorce for the Unworthy: Specific Grounds for Divorce*, 18 LAW & CONTEMP. PROBS. 26 (1953); Charles W. Tenney, Jr., *Divorce Without Fault: The Next Step*, 46 NEB. L. REV. 24, 41-63 (1967).

128. Hammer, *supra* note 124, at 41.

129. *Id.* at 41.

130. *Id.* at 41-42. The therapeutic rationale was fully on display in this proposed reform. The new legal lexicon banished *divorce*. Candidates for a *dissolution of marriage* would file, not a *complaint*, but a *petition of inquiry*. The suit itself would no longer be captioned [*Wife*] v. [*Husband*], but the less-contentious *In re the Marriage of* [*Wife*] *and* [*Husband*], thus shifting the rhetorical nub from divorce to marriage. *Plaintiff* and *Defendant* would yield to *Petitioner* and *Respondent*. Stress on marital counseling, to be provided by a trained professional staff, would replace the former focus on adjudication and burdens of proof. The *Sturm und Drang* of the adversary system would become obsolete, the Governor's Commission believed, because grounds for divorce would no longer be relevant. REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY, *supra* note 122, at 80-85. *See also* CAL. CIV. CODE § 4503 (West Supp. 1969) (repealed 1994); CAL. R. CT. 1261 (repealed 1994), 1281-1282 ("A proceeding for dissolution

divorce counterrevolution, the process of obtaining a dissolution was restructured in an effort to frustrate the goal of dissolution. Upon receipt of the initial divorce pleading, now designated a petition of inquiry, the court clerk was to schedule a conciliation conference.[131] This initial interview was mandatory, and attendance could be compelled by court order.[132] Subsequently, the court's counselor was to inform the judge whether the parties had decided to (a) become reconciled, (b) continue counseling, or (c) resume "their application for an inquiry into the marriage, with a view to its possible dissolution."[133] This configuration of options discloses the naivete of the reformers in positing conciliatory resolutions as the first two alternative outcomes, and in cloaking the third option, the only one resulting in divorce, in the "psycho-babble" of the day. But even if later events have shown the reformers simplistic, their faith in the power of the therapeutic alliance of law and psychology to slow the divorce rate shows clearly. No-fault divorce was intended to fill the gap suggested by Judge Roger Pfaff's testimony before the Governor's Commission that nearly ninety percent of California divorces could be averted "if only they [the couples] knew."[134]

The belief—which contrary evidence cannot dislodge—that divorce is an impulsive act persists to this day, and lies at the core of contemporary proposals to extend waiting periods prior to awarding divorce decrees.[135] Each stage of no-fault divorce

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of the marriage . . . shall be commenced by filing in the Superior Court a petition entitled 'In re the Marriage of . . . .'").

131. *See* REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY, *supra* note 122, at 82.

132. *See id.* at 82-83.

133. *Id.* at 83.

134. Krom, *supra* note 118, at 160. After the initial interview, a minimum waiting period of 120 days was required before the formal dissolution hearing. During this time, the counselor was expected to work with the parties and prepare a written report setting forth "the counselor's recommendations together with supporting facts as to the continuance of the marriage." *Id.* at 166. If, despite the counseling efforts, the court presiding over the dissolution hearing decided that the marriage had irreparably broken down, an immediate order dissolving the union would follow. However, if the court was unable or unwilling to make such a finding, the parties would face a ninety-day continuance, during which time they were encouraged to utilize the professional counseling facilities of the court. After this last delay, the court would order the marriage dissolved upon the request of either party. REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY, *supra* note 122, at 83-84, 90-93.

135. *See, e.g.*, Aidan R. Gough, *A Suggested Family Court System for California*, 4 SANTA CLARA L. REV. 212, 212-17 (1964) (proposing a new family court system, in part, because it will be a time consuming process); Claire L'Heureux-Dube, *Equality and the Economic Consequences of Spousal Support: A Canadian Perspective*, 7 U. FLA. J.L. & PUB. POL'Y 1, 7 (1995) ("Divorce on demand . . . raised concerns about hasty and unconsidered divorces."); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 44 (1990) (theorizing that implcmentation of a legal rule requiring delay before dissolution "would discourage impulsive divorce and provide sufficient opportunity for reconciliation"); Abraham Stone, *Marital Counseling as Aid to Legal Profession*, *in* DIVORCE AND FAMILY RELATIONS, *supra* note 78, at 53-58 (reporting that many couples impulsively seek divorce). For contemporary proposals to expand divorce waiting periods, see *infra* text accompanying notes 418-20.

litigation was designed to convert the divorce action into a conciliation procedure.[136] A determined couple could, of course, dodge the persuasive machinations and endure the delays—eight months or longer in a busy urban court—until they were granted a "dissolution." But the very process of stalling divorce-minded partners was an integral component of therapeutic divorce, premised on its belief that slowing the divorce process would dissuade many couples from seeking to dissolve their marriages.

Earlier efforts at divorce reform had succeeded only in adding an ostensibly no-fault option to the statutory list of grounds. The framers of California's reform were anxious to eliminate grounds altogether in order to achieve total control of the dissolution process.[137] With this aim, the timing of the publication of *Putting Asunder* could not have been more fortuitous. The Archbishop's group set forth a detailed rationale for a clean slate, as well as an argument for ending the perfunctory registration of undefended divorce suits.[138] The California reformers joined the attack on fault grounds as conduits to divorce. As the English proposal had reasoned, the retention of fault grounds leads to needless divorces and "'invests with spurious objectivity acts [whose] real significance varies widely.'"[139] Marital breakdown, on the other hand, was theoretically not subject to collusive prior arrangement, and presented the issue of continuing the marriage in terms far more amenable to therapeutic intervention than did adultery or extreme cruelty, particularly when those fault grounds were so often understood to be faked.[140] In any event, divorces would no longer be "undefended" in any justiciable sense. Since the emphasis was no longer on contesting charges but on crafting conciliation, the heart of the judge's role had now been transformed from weighing accusatory ripostes to facilitating reconciliation. To provide teeth for these jaws of harmony, the court was empowered to command both parties' participation.[141] The Report of the California Assembly stressed that the difference between fault and no-fault divorce lay in the new law's concern with evaluating and, if possible, preserving, the marriage in conflict:

> Under the old law the court granted a decree once the statutory grounds were established. There was no requirement that it consider all the circumstances of the marriage at the time of the hearing and evaluate the chances for a successful reconciliation. But under the new law the emphasis is just the opposite.[142]

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136. To be sure, the legislature rejected the proposal of Governor's Commission for a comprehensive family court, to be staffed by counseling personnel. REPORT OF THE ASSEMBLY COMM. ON THE JUDICIARY ON A.B. 530 AND S.B. 252, *reprinted in* JOURNAL OF THE CALIFORNIA ASSEMBLY, 1969 REG. SESS. at 8055-56 (Aug. 8, 1969) [hereinafter ASSEMBLY REPORT].

137. *See* REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY, *supra* note 122, at 2.

138. *See* PUTTING ASUNDER, *supra* note 57, *passim.*

139. Richard C. Dinkelspiel & Aidan R. Gough, *A Family Court Act for Contemporary California: A Summary of the Report of the California Governor's Commission on the Family*, 42 CAL. ST. B.J. 363, 372 (1967) (quoting PUTTING ASUNDER, *supra* note 57, at 29).

140. *See* PUTTING ASUNDER, *supra* note 57, at 29-30.

141. *See id.* at 69-70.

142. ASSEMBLY REPORT, *supra* note 136, at 8058.

C. *"The Final Stage in the Evolution of Divorce?"*

Upon signing into law the first modern no-fault divorce statute,[143] California Governor Ronald Reagan affirmed that "[d]ivorce is a tragic thing."[144] He hoped that the new law would "do much to remove the sideshow elements of many divorce cases . . . [and] the acrimony and bitterness between a couple that is harmful not only to their children but also to society as a whole."[145] But the governor's message missed an important goal of the new statute. The Family Law Act of 1969 heralded the era of no-fault divorce, but it was intended to reuder divorce more difficult to obtain.

Scholarly commentary and appellate court interpretation immediately reinforced the notion that California had closed the door on easy divorce. In no-fault's inaugural season, Charles W. Johnson suggested in a practice guide to divorce lawyers that a dissatisfied spouse seeking a marital escape must establish irreconcilable differences by presenting "substantial reasons" for abandoning the marriage.[146] Appellate affirmation was not long in coming. In 1972, the California Supreme Court decided *In re Marriage of McKim*,[147] declaring that while the legislature had devised a no-fault, nonadversarial procedure, "it did not intend that findings of irreconcilable differences be made perfunctorily."[148] The supreme court pointed out that the legislature had rejected a proposal whereby the parties would be entitled to a dissolution upon the processing of certain steps and the passage of a certain period of time.[149] On the contrary, the Family Law Act placed the trial court in the role of "'an overseeing participant to do its utmost to effect a healing of the marital wounds.'"[150] To perform this critical task, judges needed to independently review evidence about the condition of the marriage.[151] The supreme court specifically

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143. *See* Family Law Act of 1969, ch. 1608, 1969 Cal. Stat. 3312, 3314-51 (repealed 1994).

144. *Id.* (Governor's statement).

145. *Id.*

146. Charles W. Johnson, *The Family Law Act: A Guide to the Practitioner*, 1 PAC. L.J. 147, 151 (1970); *see also* ASSEMBLY REPORT, *supra* note 136, at 8058.

147. 493 P.2d 868 (Cal. 1972).

148. *Id.* at 871.

149. *See id.*

150. *Id.* (quoting ASSEMBLY REPORT, *supra* note 136, at 8058).

151. Appellate courts in other jurisdictions similarly noted the requirement for trial court evaluation of assertedly broken marriages. *See, e.g.*, *In re* Marriage of Franks, 542 P.2d 845, 852 (Colo. 1975).

> Where the parties do not agree as to the breakdown of the marriage, it is imperative for the court to weigh all the evidence and make its own independent determination of that fact. While the dissolution of marriage act did eliminate all the former defenses to divorce in this state, it did not eliminate the necessity of proving an irretrievable breakdown where that basic allegation is denied in the pleadings.

Id.; *see also* Joy v. Joy, 423 A.2d 895, 896 (Conn. 1979) (rejecting contention that trial judge under no-fault law served merely ministerial function or administered divorce on demand, and declining "to circumscribe this delicate process of fact-finding by imposing the constraint of guidelines on an inquiry that is necessarily individualized and particularized"); Desrochers v. Desrochers, 347 A.2d 150, 153 (N.H. 1975) (no-fault law "contemplates the introduction of factual testimony sufficient to permit a finding of irreconcilable differences which have caused

rejected the notion that the parties could consent to dissolve their union and have that consent constitute the required proof of irreconcilable differences.[152] In emphasizing the statutory focus on dissolving only the truly hopeless marriages, the court continued its long-standing concern with collusion. It worried about the parties' agreeing "that one of them would present false evidence that their differences were irreconcilable and their marriage had broken down irremediably."[153] The court insisted that it was the function of the trial judge, not the parties, to decide whether the evidence sufficed to warrant dissolution.[154]

At the dawn of the no-fault divorce era, expectations were high that the process of marital dissolution had been transformed not only into a more rational process, but

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the irremediable breakdown of the marriage").

152. *See In re Marriage of McKim*, 493 P.2d at 872.

153. *Id.*

154. *See id.* Close on the heels of the state supreme court's ratification of the no-fault procedure, a California Court of Appeals rejected the argument that the new law had "delegated the function of dissolving marriages... to any litigant who wants to have his or her marriage dissolved and to the absolute discretion of the courts to either grant or deny the dissolution of a marriage without any guidelines whatsoever." *In re* Marriage of Cosgrove, 103 Cal. Rptr. 733, 736 (Ct. App. 1972). The court asserted that the no-fault statute required adequate proof of allegations and exhaustion of conciliation procedures:

> The guidelines for the proof and determination of the existence of "irreconcilable differences" are no more lacking in the present law than were the guidelines for the determination of fault under the former law. The rights of the responding party who elects to oppose the dissolution of the marriage are fully protected. The procedures prescribed for exhausting all reasonable efforts to save the marriage by reconciliation demonstrate the continuing concern of the law for the preservation of the marriage wherever possible. The continuing policy to avoid collusive dissolutions and to insure that dissolutions will be granted only upon adequate proof that the causes of the marital failure are in truth irremediable is emphasized by the recent decision of In re Marriage of McKim.

Id. (citations omitted). Note that the English reformers who authored *Putting Asunder* had similarly rejected the nontriability of marital breakdown:

> We are assured that, having considered the history of a marriage, the reasons alleged for its failure (together with, in contested cases, the arguments put forward on the other side), and the efforts which have been made—or not made—to achieve reconciliation, a court should find it possible to determine the probability of the joint life being revived.

PUTTING ASUNDER, *supra* note 57, at 44-45.

Following *McKim* and *Cosgrove*, the California Court of Appeals subsequently determined that the irreconcilable differences to be proven by the petitioner "must be substantial as opposed to trivial or minor." *In re* Marriage of Walton, 104 Cal. Rptr. 472, 480 (Ct. App. 1972). The respondent would always have the opportunity to prove the contrary proposition, and the trial judge retained discretion to receive evidence of specific acts of misconduct affecting the marriage. *See id.* at 480. The court of appeals rejected a standard "based upon the subjective attitude of the parties," and insisted that the Family Law Act did not constitute a "license for dissolution of marriage by consent of the parties." *Id.* at 479. The court concluded by emphasizing that the plaintiff had the burden of establishing the "existence of marital problems which have so impaired the marriage relationship that the legitimate objects of matrimony have been destroyed and as to which there is no reasonable possibility of elimination, correction or resolution." *Id.*

also into one focused on vouchsafing the traditional values of maintaining the American family.[155] Noted family law scholar Brigitte Bodenheimer predicted a smooth transition into this responsible divorce framework in her 1968 comment that "[e]ntirely unilateral divorce at the option of either spouse, without conditions, is seldom advocated today."[156] To the contrary, another critic observed, "under the no-fault concept there is even a greater chance that the devoted spouse may save the marriage through required conciliation."[157] The California legislature that framed modern no-fault relied on its view that the divorce court would now "sit as an overseeing participant to do its utmost to effect a healing of the marital wounds."[158] The goals of no-fault divorce were not only clear, they seemed easily within grasp: "By requiring the consideration of the marriage as a whole and making the possibility of reconciliation the important issue, the intent is to induce a conciliatory and uncharged atmosphere which will facilitate resolution of the other issues and perhaps effect a reconciliation."[159] America was nearing the "final stage in the evolution of divorce."[160] The reformers believed that they had clarified and sanitized divorce, and that through their efforts the flood of divorces had been held in check.[161] Unfortunately, the dam soon burst.

II. THE DIVORCE COUNTERREVOLUTION

"On September 5, 1969, with a stroke of his pen, California governor Ronald Reagan wiped out the moral basis for marriage in America."[162] Thus begins the revisionist history of the divorce counterrevolution. The mid to late 1960s have been described as the "cultural fault line, the B.C. and A.D. of American divorce."[163] After

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155. One domestic relations writer proclaimed that the passage of the no-fault statute rendered California the "most civilized state in the nation with respect to the handling of problems created by the breakdown of marriage." Edwin S. Saul, *Proof of a No-Fault Divorce Case*, 45 L.A. BAR BULL. 99, 100-01 (1970).

156. Brigitte M. Bodenheimer, *Reflections on the Future of Grounds for Divorce*, 8 J. FAM. L. 179, 193 (1968). To be sure, other voices criticized the California legislature for having enacted "'divorce for the asking.'" Reppy, *supra* note 109, at 1307 (quoting Rudy Villasenor, *Divorce Law: Guilty/Innocent to Go*, L.A. TIMES, Dec. 23, 1969, § 1, at 1). Similarly, an advertising circular sent by a publishing house to California attorneys handling domestic relations cases predicted the demise of the institution: "Starting January 1, 1970, divorce in California is *not* going on a trip. *Divorce is dead!*" *Id.* at 1306 n.3 (emphasis in original).

157. Clayton J.M. Adkinson, *No-Fault Divorce: A Proposal for Mississippi*, 45 MISS. L.J. 179, 200-01 (1974).

158. ASSEMBLY REPORT, *supra* note 136, at 8058.

159. *Id.*

160. Michael J. Whaling, *The No Fault Concept: Is This the Final Stage in the Evolution of Divorce?*, 47 NOTRE DAME L. REV. 959, 959-60 (1972) (supporting linkage of marital breakdown standard and mandatory conciliation procedures for couples seeking divorce).

161. *See, e.g.*, Adkinson, *supra* note 157, at 201 (acknowledging concern that no-fault laws might increase the divorce rate, but stating that "[a]t this point there seems to be no sound basis for this argument"); Whaling, *supra* note 160.

162. Elizabeth Schoenfeld, *Drumbeats for Divorce Reform*, POL'Y REV., May-June 1996, at 8.

163. WHITEHEAD, *supra* note 13, at 44.

that decade, the legal and social systems no longer considered divorce a concern involving "multiple stakeholders."[164] Divorce abruptly became a solo voyage, often characterized as an immoral flight from responsibility. The legal system rejected the culpability-ground-turued-entitlement theory of divorce. But enacting the marital breakdown standard never resulted in a searching judicial inquiry into the state of each marriage, as many no-fault divorce reformers had hoped.[165] Irreconcilable differences simply were not justiciable.[166] As Mary Ann Glendon later reported, "the virtually universal understanding . . . is that the breakdown of a marriage is irretrievable if one spouse says it is."[167] No-fault divorce became naked divorce.

Even had trial judges been inclined, they were ill-equipped and understaffed to perform the inquests which the therapeutic divorce reformers prescribed. The California legislature had refused to enact state-wide family courts with the capacity to conduct social investigations. Concerns about unwarranted judicial probing into bedrooms merged with the steep price quoted for reconciliation-oriented divorce. As the former executive director of the Governor's Commission on the Family observed, the demise of the therapeutic family court was owed to "cost, conceru that a family court structure would disrupt existing systems of court calendaring[,] and perhaps a fear that 'social work' would dilute 'hard legal process.'"[168]

But "hard legal process" itself disappeared under the fire sale which divorce now became. By 1977, only three states (Illinois, Pennsylvania, and South Dakota) remained wedded to exclusively fault concepts in marital dissolutions.[169] That same

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164. *Id.*

165. *See supra* text accompanying notes 143-61.

166. *See* Hagerty v. Hagerty, 281 N.W.2d 386, 388 (Minn. 1979) (holding irretrievable breakdown can be shown by "evidence of only one party's belief that it is the existing state, particularly where the parties have been living apart"); LAW COMMISSION, FACING THE FUTURE: A DISCUSSION PAPER ON THE GROUND FOR DIVORCE, 1988, Cmnd. 170, at 30.

> [A]lthough breakdown is a widely accepted *principle*, experience elsewhere bears out the Commission's earlier view that it is not a justiciable issue . . . . Any attempt at adjudication is likely to reintroduce an element of fault or at least of bitter recrimination. A logical application of the breakdown principle requires divorce on unilateral demand, at least if that demand is persisted in for any length of time.

Id. (citation omitted); *see also* WHITEHEAD, *supra* note 13, at 68 (no-fault divorce "established a disaffected spouse's right unilaterally to dissolve a marriage simply by declaring that the relationship was over"); Bodenheimer, *supra* note 156, at 200 (expressing concern over the credibility of evidence adduced to prove a marital breakdown since most will emanate from the litigants who "will inevitably be slanted in the direction of their ultimate goal, which is divorce"); Reppy, *supra* note 109, at 1323 ("[A] major problem presented by the new [no-fault divorce] law is whether the prima facie case for dissolution can be effectively contested, or, in other words, whether the issue of marital breakdown is triable."). *But see* Paulsen, *supra* note 54, at 96-97 (suggesting that "the issue of breakdown is triable," but cautioning that the question is not "whether a judge *can* arrive at a decision . . . but whether it is wise and expedient that he should do so") (emphasis in original).

167. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 81 (1987).

168. Aidan R. Gough, *Divorce Without Squalor*, 210 NATION 17, 20 (1970).

169. *See* Doris J. Freed & Henry H. Foster, Jr., *Divorce in the Fifty States: An Overview*, 11 FAM. L.Q. 297, 298 (1977). Pennsylvania adopted no-fault divorce in 1980, as did Illinois in

year, Riane Tennehaus Eisler reported that in the six years since the effective date of the irreconcilable differences standard in California, not a single divorce petition had been denied for failure to meet the standard of proof of irreconcilable differences.[170] The appellate admonitions setting forth the statutory requirements for adequate proof turned out to have a nonexistent shelf life. Indeed, none of the forty-four California domestic relations judges interviewed by sociologist Lenore Weitzman in the "mid-1970's" could recall ever refusing a request for a divorce under the new dispensation.[171] In 1975, the California legislature repealed the provision which had allowed proof of specific bad acts to show the existence of irreconcilable differences.[172] The legislature thus removed one of the few remaining exemplars of the fault mentality as it recognized that irreconcilable differences were nothing more than a self-operated escape hatch from any marriage. Even in contested divorce cases, a "perfunctory judicial acknowledgment of marital breakdown replaced the parade of witnesses and staged courtroom battles."[173]

The California story of legal and cultural transformation was quickly replicated. Reporting a "virtual unanimity as to the urgent need for basic reform,"[174] the National Conference of Commissioners on Uniform State Laws in 1970 proposed the Uniform Marriage and Divorce Act ("UMDA").[175] The UMDA specified that the sole ground for divorce should be an irretrievable breakdown of marriage.[176] Six months after the effective date of California's divorce reforms, Iowa became the second state to completely gut its fault system and replace it with an "irretrievable breakdown" standard.[177] A 1972 survey of twenty Iowa trial judges analyzed the 1810 divorce

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1983, and South Dakota—the 50th state to do so—in 1985. *See* Ira M. Ellman & Sharon L. Lohr, *Dissolving the Relationship Between Divorce Laws and Divorce Rates*, 18 INT'L REV. L. & ECON. 341, 347-48 (1998).

170. *See* RIANE T. EISLER, DISSOLUTION: NO-FAULT DIVORCE, MARRIAGE, AND THE FUTURE OF WOMEN 10 (1977).

171. *See* LENORE J. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA 19 (1985).

172. *See* 1975 Cal. Stat. 59.

173. LYNN C. HALEM, DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES 251 (1980). The almost total deference to unilateral party behavior is described in Elayne Carol Berg, *Irreconcilable Differences: California Courts Respond to No-Fault Dissolutions*, 7 LOY. L.A. L. REV. 453, 466 (1974); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 107.

174. UNIF. MARRIAGE AND DIVORCE ACT prefatory note (amended 1973), 9A U.L.A. 160 (1998).

175. *See id.*

176. *See id.* at 161. The American Bar Association approved the UMDA in 1974, and recommended its passage by the states. Section 302 of the UMDA currently provides that a court shall enter a marital dissolution when the court finds the marriage "irretrievably broken"; or if the parties have lived separate and apart for more than 180 days preceding the filing of the divorce action; or if "serious marital discord" adversely affects the attitude of one or both of the parties toward the marriage. UNIF. MARRIAGE AND DIVORCE ACT § 302, 9A U.L.A. 159 (1973). Eight states have adopted the UMDA (Arizona, Colorado, Illinois, Kentucky, Minnesota, Missouri, Montana, and Washington). *See id.* at 162-68.

177. 1970 Iowa Acts ch. 1266, § 18 (codified as amended at IOWA CODE ANN. § 598.17 (West Supp. 2000)).

cases they had heard within the previous year.[178] Of that total, 1599 had been uncontested, 211 contested, and in not one case had the prayer for a divorce been denied.[179] Similarly, a Nebraska survey of nearly 10,000 dissolution cases in the mid-1970s "failed to reveal a single instance in which it could be said with certainty that a divorce which was desired by even one of the spouses was ultimately refused."[180]

The emergence of divorce as an act of self-actualization was only one component in an emerging *Zeitgeist* emphasizing "personal autonomy with respect to intimate life choices."[181] The displacement of a formal culpability analysis in divorce cases was accompanied by cultural rifts in American society "leav[ing] the individual suspended in glorious, but terrifying, isolation."[182] This cultural primacy of detachment has produced the "*acontextual* self,"[183] a being "who stands apart from any social relationship in which he or she is involved."[184] Divorce lost its impact because marriage no longer appeared to require continual tending. "Love," as the posters advertising the wildly popular 1970s movie *Love Story* endlessly repeated, "means never having to say you're sorry."[185]

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178. *See* Stephen L. Sass, *The Iowa No-Fault Dissolution of Marriage Law in Action*, 18 S.D. L. REV. 629, 635, 650 (1973).

179. *See id.* at 635.

180. Alan H. Frank et al., *No Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary*, 58 NEB. L. REV. 1, 66 (1978). The argument in the text is not intended to imply that all, or even most, states have followed California down the path of eliminating fault grounds. To the contrary, 32 states still retain divorce grounds based on culpability, to which they have appended a no-fault ground. *See* Linda D. Elrod & Robert G. Speetor, *A Review of the Year in Family Law: Of Welfare Reform, Child Support, and Relocation*, 30 FAM. L.Q. 765, 807 (1997). However, the cultural changes sparked by California no-fault have resulted in the virtual evisceration of the once-prevalent fault grounds even in jurisdictions in which those grounds remain an option. Not only are the overwhelming number of divorces obtained under no-fault grounds, but even fault-based petitions often resolve into no-fault divorce decrees. *See, e.g.*, Williams v. Williams, 415 S.E.2d 252, 253 (Va. Ct. App. 1992) (affirming trial court's sua sponte grant of a no-fault divorce in a case in which wife filed for divorce on grounds of cruelty and constructive desertion and husband countered with allegations of the wife's desertion and adultery).

181. Perry, *supra* note 40, at 62; *see also* RHEINSTEIN, *supra* note 40, at 10-11 (identifying a transition from a "Christian-conservative ideology" to a "eudaemonistic-liberal one"); Carl E. Sehneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1807 (1985) (viewing family law changes as the result of the tradition of autonomy in family affairs, the ideology of liberal individualism, changing moral beliefs, and the prevalence of a "psychologic" perspective).

182. ROBERT BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 6 (1985).

183. MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 2 (1993); *see also* Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 3 (discussing how family law fosters "autonomous individualism" to the detriment of familial relationships).

184. REGAN, *supra* note 183, at 2.

185. ERICH SEGAL, LOVE STORY 131 (1970).

But in the generation since the creation of no-fault divorce, a strong argument has emerged that the "happiness principle embedded in the no-fault ground has dealt a devastating blow to the durability of marriages."[186] Contemporary scholarly accounts are rife with calls for an end to a divorce process seen as facilitating individual irresponsibility at the expense of mutuality and the welfare of children.[187] Many accounts in the popular press have also taken a cudgel to no-fault divorce, professing that "a whole generation . . . has placed its marital future in a [no-fault] law that favors the unfaithful, the uncommitted, the selfish and the immature. . . . 'Till death do us part' was replaced by 'as long as I'm happy.'"[188]

A. Fault, No-Fault, and Family Life

The nuclear family has, according to some observers, simply disappeared from the cultural radar screen.[189] Not only has the divorce rate dramatically escalated in the last

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186. Annamay T. Sheppard, *Women, Families, and Equality: Was Divorce Reform a Mistake?*, 12 WOMEN'S RTS. L. REP. 143, 146 (1990).

187. *See, e.g.*, Brinig & Crafton, *supra* note 17, at 871 ("The changes in the institutional structure that make marital promises unenforceable and allow opportunistic behavior are the enactment in many states of no-fault divorce with the simultaneous removal of fault (breach) as a consideration in grants of spousal support and property division."); Lynne Marie Kohm, *The Homosexual "Union": Should Gay and Lesbian Partnerships Be Granted the Same Status as Marriage?*, 22 J. CONTEMP. L. 51, 62 n.57 (1996) ("[T]he family instability our society is experiencing is due to a general breakdown in the value of the family, the ease of obtaining a divorce since the enactment of no-fault grounds, and a general tolerance for almost anything between consenting adults."); Adriaen M. Morse, Jr., Comment, *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 606 (1996) ("[T]he advent of no-fault divorce signaled an end to the notion of marriage as a status having at its core the concept of a contract with God and spouse, the breaking of which necessitated circumstances which were intolerable and unavoidable—fault."); Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2466 n.187 (1995) (advocating mandatory mediation of custody disputes and other reforms to safeguard children's interests in divorce).

188. Micah A. Clark, Editorial, *The Negative Effects of Easy Divorce*, INDIANAPOLIS STAR, Mar. 12, 1996, at A5; *see also* William A. Galston, *Making Divorce Harder Is Better*, WASH. POST, Aug. 10, 1997, at C3 (suggesting that by providing couples at marriage the option of rejecting no-fault divorce for themselves, the Louisiana Covenant Marriage Law might help decrease the divorce rate); Abby Goyette, Letter to the Editor, FRESNO BEE, Sept. 8, 1996, at B6 ("'No fault' equals 'no responsibility' equals 'no morals' equals 'no justice'!"); Walter Kirn, *The Ties That Bind: Should Breaking up Be Harder To Do? The Debate over Easy Divorce Rages on*, TIME, Aug. 8, 1997, at 48 (reporting the "backlash against divorce" spurred by disillusionment with the ease of marital escape); Michelle J. Moore, Editorial, *X'ers to Baby Boomers: Thanks for Nothing*, ORANGE COUNTY REG., June 10, 1998, at B6 (arguing that no-fault divorce laws, spawned by Baby Boomers "who have always had difficulty accepting responsibility for their own actions," are responsible for the "destruction of the family unit").

189. *See* Debra Baker, *Beyond Ozzie and Harriet*, A.B.A. J., Sept. 1998, at 59, 61 (1998) (describing the television family of *Something So Right*, consisting of a "woman with children from two marriages, a third husband and a stepdaughter"); Frank Bruni, *A Small-But-Growing Sorority is Giving Birth to Children for Gay Men*, N.Y. TIMES, June 25, 1998, at A12 (discussing surrogate mothers of children to be adopted by gay couples); Candace Purdom,

three decades, but the number of never-married adults more than doubled between 1970 and 1996, from 21.4 million to 44.9 million.[190] Within the same time frame, the number of unmarried households comprised of couples of opposite sexes grew from 523,000 to four million; the number of women living alone doubled, from 7.3 million to 14.6 million; and the number of men living alone tripled, from 3.5 million to 10.3 million.[191] The proportion of children under eighteen years of age living with both parents declined from 85% in 1970 to 69% in 1995.[192] More than 50% of all children born in 1992 are expected to live apart from one parent for at least some portion of their childhood.[193] And almost 40% of children one of whose parents remarry later experience a second divorce.[194] One observer has coined the term "American

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Split Decisions: To Kids of Divorce, Holidays Can Feel Like a Tug of War, CHI. TRIB., Dec. 15, 1998, at 3 (describing the Hallmark greeting card company's television commercial featuring a mother dropping her son off at his father's house for Christmas; the boy is glad to see his father but worried that Santa Claus will not be able to find both his mother's house—in which he lives—and his father's house which he is visiting); Ron Tank, *So Long, 'Ozzie and Harriet': Nuclear Families No Longer Dominate Cinema, TV* (last modified May 5, 1998) <http://www.cnn.com/SHOWBIZ/9805/05/90s.families/index.html> ("From the silver screen to the small screen, the traditional family of Mom, Dad, and 2.3 kids has given way to an updated version: divorced couples, gay significant others, and, of course, their offspring."). Psychiatrist Carol Lieberman concludes that, in this family revolution, life will chase after art: "By putting it on the screen, with millions of people seeing it, it becomes the norm and it influences people to have that kind of lifestyle." *Id.* On the historical and theoretical arguments surrounding the nuclear family, see Kris Franklin, *"A Family Like Any Other Family": Alternative Methods of Defining Family in Law*, 18 REV. L. & SOC. CHANGE 1027, 1033-50 (1990-91).

190. *See* CENSUS BUREAU, *supra* note 11, ¶ 1.

191. *See id.*

192. *See* CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS SERIES 23-193, HOW WE'RE CHANGING 1 (1997).

193. *See* SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 2-3 (1994).

194. *See* Frank F. Furstenberg et al., *The Life Course of Children of Divorce: Marital Disruption and Parental Contact*, 48 AM. SOC. REV. 656, 661 (1983). English society has experienced similar changes. In 1994, the number of first marriages for both partners had decreased to 174,000, the lowest since 1889, despite a much larger present-day population. Cohabitation has escalated dramatically: in the 1960s, fewer than 5% of women cohabited with their partners before marriage; 70% do so in the 1990s. The proportion of all British births occurring outside marriage has risen from 8% in 1971 to 13% in 1981 to 34% in 1995. Between 1970 and the present, the proportion of families headed by a lone parent rose from one in twelve families to one in four. A far greater percentage of the population now lives alone. Over one-quarter of households have just a single person living in them today. One in ten men aged between 25 and 44 now lives alone, three times the proportion a generation ago. *See* Jack O'Sullivan, *The Family Green Paper: The Dream of the Ideal Family Is Now a Thing of the Past*, INDEPENDENT (London), Nov. 5, 1998; *see also* Melanie Phillips, *Whitehall Confetti for the Death of Marriage*, SUNDAY TIMES (London), Nov. 1, 1998, Features ("[M]arriage is now extremely fragile. It has had the stuffing knocked out of it by divorce laws, financial disincentives and the myth assiduously peddled by media, academic and political circles that cohabitation is just as good.").

Polyintimacy"[195] to describe the emerging relationship trend involving a measure of closeness with a variety of partners. An English critic grimly wrote that "people no longer want to live in traditional families .... Family life for most people is awful. It is noisy, intrusive, demanding, boring, unrewarding and sexually frustrating."[196]

Other voices suggest, however, that the American family has not entirely lost its recognizable size and shape.[197] While the average family size shrank from 3.71 members in 1965 to 3.17 members in 1990, that latter statistical size has held—and slightly increased—through the 1990s.[198] The marriage rate for the twelve-month period ending June 1997 was up 2% from the previous year.[199] Commenting on the recent demographic trends, Census Bureau population analyst Ken Bryson observed that the "'perceived decline in the American family is vanishing and the 90's represents a stabilization period.'"[200] Barbara Dafoe Whitehead refers to this period as the "new familism," characterized by a "shifting away from expressive individualism and ... toward greater attachments to family."[201]

Nonetheless, for over a decade some legal scholars have portrayed no-fault divorce as the sieve through which family law has been drained of moral discourse, ever-shortening the distance between courting and court by substituting market incentives

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195. Green Onions, *American Polyintimacy in the 90s and the Internet*, ECLECTICA MAG., Apr. 1997, *available at* (visited Apr. 2, 2000) <http://www.eclectica.org/v1n7/intimacy.html>.

196. Minette Marin, *A Sense of Resolution*, DAILY TELEGRAPH (London), Dec. 31, 1998, at 30.

197. Indeed, historian John Gillis has observed that "one thing that never seems to change is the notion that family is not what it used to be." JOHN R. GILLIS, A WORLD OF THEIR OWN MAKING: MYTH, RITUAL, AND THE QUEST FOR FAMILY VALUES 3 (1996). *But see* STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 1-2 (1992) (observing a "historical, static notion of what 'the' family was like before ... an era of 'family collapse'" and hoping "to expose many of our 'memories' of traditional family life as myths").

198. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. 40, at 35 (1970); U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, tbl. 70, at 60 (1999). As another indication that family change has stabilized, note that the percentage of households comprised by married couples with minor children stood at 26% in 1990 and at 25% in 1998. *See id.* tbl. 73, at 62.

199. *See* NATIONAL CTR. FOR HEALTH STAT., BIRTHS, MARRIAGES, DIVORCES, AND DEATHS FOR JUNE 1997, MONTHLY VITAL STAT. REP. (No. 6) 2 (1998).

200. CNN U.S., *Decline of Traditional American Family Slows in 90's* (last modified May 28, 1998) <http://cnn.com/US/9805/28/family.figures/index.html> (quoting Ken Bryson).

201. Barbara Dafoe Whitehead, *The New Family Values: Striking a Balance Between 50's Family Values and 80's Individualism*, UTNE READER, May-June 1993, at 61, 63; *see also* David Popenoe, *Fostering the New Familism: A Goal for America*, RESPONSIVE COMMUNITY, Fall 1992, at 31-37 (describing the "rise of a new familism"). The covenant marriage movement is one sign of this resurgence of familism: "'If couples go into the marriage thinking it's a lifetime commitment, then it will help them stay together .... Most people have this strange idea of marriage. They think it's about love, but it's really about commitment.'" Kristi Wright, *Until Death Do Us Part: Covenants, Other Programs Help Couples Keep Their Vows*, OMAHA WORLD-HERALD, Dec. 28, 1997, at 1E (omission added) (quoting Rev. James Lancaster). For a discussion of covenant marriages, see *infra* text accompanying notes 453-56.

for moral certainties.[202] Carl E. Schneider has called attention to the transfer of power in family law from society to individuals, echoing the claim of Jana Singer that a shift to private decisionmaking is the sea change transforming modern family law.[203] At the time of its passage, for instance, the California law creating modern no-fault divorce was praised as a "major contribution . . . truely [sic] making marital dissolution a more honest and rational event—one for which the parties and not the State take responsibility."[204] But some say that the notion of responsibility itself has fallen out of favor, agreeing with Christopher Lasch that the "privatization of morality is one more indication of the collapse of the community."[205]

Schneider has pointed to a correlate shift, the "language of morals . . . being displaced by other discourses or even by silence."[206] William A. Galston highlighted

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202. *See* Schneider, *supra* note 181, at 1803 ("diminution in the law's discourse" about morality has metamorphosed family law and has correlated with the "transfer of moral decisions from the law to the people once regulated."); Milton C. Regan, Jr., *Market Discourse and Moral Neutrality in Divorce Law*, 1994 UTAH L. REV. 605, 607 ("[I]n both the legal and popular imagination . . . no-fault divorce tends to be associated with a decline in the use of moral discourse in family law."); MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 109 (1996) (observing that divorce and its financial consequences have become "detached from moral considerations of guilt and innocence, punishment and reward"). Market incentives work best within an established market, and Barbara Dafoe Whitehead has pointed to a "huge divorce industry, with a booming professional service sector of lawyers, therapists, financial experts, and child psychiatrists . . . sprung up to harvest the fruits of family discord." Barbara Dafoe Whitehead, *The Moral State of Marriage*, ATLANTIC MONTHLY, Sept. 1995, at 114, 116 (reviewing IVANA TRUMP, THE BEST IS YET TO COME: COPING WITH DIVORCE AND ENJOYING LIFE AGAIN (1995), and WALLERSTEIN & BLAKESLEE, THE GOOD MARRIAGE, *supra* note 26).

203. *See* Carl E. Schneider, *Marriage, Morals and the Law: No-Fault Divorce and Moral Discourse*, 1994 UTAH L. REV. 503, 534; Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443. For a contrary view, arguing that the state's *increased* role in marital affairs since World War II is a "direct consequence of the state's growing responsibility for the regulation of family welfare through Social Security and other benefits," see Katherine L. Caldwell, *Not Ozzie and Harriet: Postwar Divorce and the American Liberal Welfare State*, 23 L. & SOC. INQUIRY 1, 13 (1998). *See also* JAMES G. SNELL, IN THE SHADOW OF THE LAW: DIVORCE IN CANADA, 1900-1939, at 12 (1991) (arguing that early twentieth-century Canadians' increased "use of state divorce facilities . . . represents . . . a diminution of the perceived legitimacy of community and family informal divorce processes and a parallel rise in the perceived authority of the state and its institutions. State control might have been weakening, but the role of the state in familial matters was growing.").

204. Reppy, *supra* note 109, at 1332. On the California statute, see *supra* text accompanying notes 145-54.

205. CHRISTOPHER LASCH, THE REVOLT OF THE ELITES AND THE BETRAYAL OF DEMOCRACY 108 (1995).

206. Schneider, *supra* note 203, at 505; *see also* Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 BYU L. REV. 197, 198, 233-54 (exploring in detail the "role of moral thinking in the law of alimony"); GLENDON, *supra* note 167, at 107-08 ("no-fault terminology fit neatly into an increasingly popular mode of discourse in which values are treated as a matter of taste, feelings of guilt are regarded as unhealthy, and an individual's primary responsibility is assumed to be to himself"); David Selbourne, *Our Moral Wasteland*, TIMES (London), Dec. 30, 1998, at 16 (social institutions, including marriage, have

another moral vacuum in describing as a "casualty" of no-fault divorce "the idea of marriage as a presumptively permanent relationship—as a structure of incentives for individuals to contribute to the well-being of the family, and a framework of reasonable expectations of reciprocal benefits over the lifetime of the partnership."[207] In short, critics charge that the application of democracy to divorce has led to the short-term pursuit of happiness for individuals at the cost of long-lasting damage to the larger moral community.[208]

But the terms of engagement in the moral discourse of divorce must include accusations of blame, as the flip side to taking responsibility for one's marital obligations. Katherine Shaw Spaht has called for the return of "collective social condemnation . . . [and] [g]uilt and shame,"[209] which are "altogether missing in pure 'no-fault' divorce statutes."[210] However, seldom has analysis focused on how a revival of public accusations of marital infidelity and cruelty—both physical and emotional—would enhance the larger moral community. Presumably, the moral discourse whose passing is regretted buttressed the social standards which served as deterrents to behavior deemed to fall short of those guideposts. An increase in the accusatory component of moral discourse can, of course, also serve to undermine marital stability. It is hard to imagine the social utility of such a discourse involving, for instance, an adulterer, the aggrieved spouse, and the putative co-respondent. Professor Carriere has effectively outlined the potentially adverse consequences of reinvesting our legal system with "fault-talk":

> Encouraging fault litigation can harden attitudes of self-righteous defensiveness, contempt for the spouse, and vindictiveness that may contribute to the breakdown of the marriage, regardless of the specific fault ground on which divorce is

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ceased to follow rules of morality). Barbara Dafoe Whitehead praised the most recent research of clinical psychologist Judith Wallerstein for:

> [i]mplicitly present[ing] marriage as a school of virtue, a domain that requires tact and restraint along with open and honest communieation, kindness and gratitude along with assertiveness and autonomy. . . .
>
> At the same time, marriage requires the exercise of moral imagination. One thing the couples in these good marriages have in common is a vision of the marriage as a "superordinate" entity—something that is separate from and larger than its two parts. The men and women in this study speak of protecting "the marriage" almost as if it were their child; it is a creation they cherish and share.

Whitehead, *supra* note 202, at 118-19. For a discussion of the impact of Wallerstein's research, see *infra* text accompanying notes 282-84.

207. Galston, *supra* note 22, at 12, 13; *see also* Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 883 (1988) (representing no-fault divorce as "rebellion against the propriety of specific performance of the marital obligations").

208. David Blankenhorn argues that divorce has failed even in its more modest eudaemonistic aims: "'For the past 20 years, the image of divorce was of rebirth and renewal, a pathway to greater happiness and harmony. The divorce revolution has not delivered the goods, and now we're beginning to see divorce as the problem.'" Milbank, *supra* note 19, at A1 (quoting David Blankenhorn).

209. Spaht, *supra* note 13, at 1571.

210. *Id.*

> brought. It also discourages reconciliation; partners who are marshaling evidence against one another of fundamental violations of the marital understanding, and accusing each other of these in the public records, are more likely to nurse a sense of grievance and less likely to be in a mood to resume the marital life together than those who are merely living separate and apart. In fact, in order to avoid providing the guilty spouse with a defense of reconciliation in a fault-based divorce, the innocent spouse may refuse to attempt it.[211]

But those who bemoan the passing of moral discourse believe that acrimony serves a function, for blaming can be a cathartic ritual.[212] And others argue that the no-fault regime merely shifted the contest of bitterness from the divorce battleground to the fields of child custody, child support, property division, and spousal maintenance.[213]

The strongest force driving the attack on no-fault divorce is the concern that children have been seriously hurt in the divorce culture.[214] This new children's crusade, acknowledged as the "real catalyst"[215] behind legislative efforts to reform divorce laws, is driven by the knowledge that over one million children each year experience their parents' divorce,[216] and a belief that those parents have grievously sacrificed their children's welfare. In April 1993, *The Atlantic Monthly*'s entire cover was devoted to a large-print summary of Barbara Dafoe Whitehead's lead story, *Dan Quayle Was Right*:

> After decades of public dispute about so-called family diversity, the evidence from social-science research is coming in: The dissolution of two-parent families, though it may benefit the adults involved, is harmful to many children, and dramatically undermines our society.[217]

This viewpoint holds that parents who divorced under the fault regime were "forced

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211. Jeanne Louise Carriere, *"It's Deja Vu All over Again": The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 TUL. L. REV. 1701, 1723-24 (1998) (footnote omitted); *see also* Ellman & Lohr, *supra* note 17, at 735 (asserting that reinjecting fault grounds would "buy[] unpredictable results at a price of heightened transaction costs" and would prejudice the "financially dependent spouse who feels compelled to settle for a thinner financial package than she would get under a less discretionary no-fault system, for fear that the judge will be sympathetic to her husband's (or his wife's) story").

212. *See* Carriere, *supra* note 211, at 1722-23 (suggesting that some reformers might welcome the inevitable increase in acrimony caused by a revival of fault jurisprudence).

213. *See* MICHIGAN FAMILY FORUM, *supra* note 19, at 3-4 (citing Bryce J. Christensen, *Taking Stock: Assessing Twenty Years of 'No Fault' Divorce*, FAM. AM., Sept. 1991, at 1, 7).

214. *See* Robert M. Gordon, Note, *The Limits of Limits on Divorce*, 107 YALE L.J. 1435, 1438 (1998) (describing and rebutting the "Child-Centered Case Against No-Fault Divorce"). *See generally* AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES AND THE COMMUNITARIAN AGENDA (1993), *excerpted as Children of the Universe: Good Parenting Benefits the Community As Well As Kids*, UTNE READER, May-June 1993, at 52, 57 (discussing the "revaluation of the importance of children").

215. Jon Jeter, *"Covenant Marriages" Tie the Knot Tightly: Louisiana Begins Experiment in Commitment*, WASH. POST, Aug. 15, 1997, at A1.

216. *See* Andrew Schepard et al., *Preventing Trauma for the Children of Divorce Through Education and Professional Responsibility*, 16 NOVA L. REV. 767, 768 (1992).

217. Whitehead, *supra* note 13 (cover text).

to accept full responsibility" for the divorce.[218] By contrast, the children whose families are torn apart under no-fault divorce are "left to imagine that the 'fault' is somehow theirs."[219] The anti-divorce crusaders contend that divorce "generally scars children for life,"[220] and call for us to "*Stop Sacrificing America's Children on the Cold Altar of Convenience for Divorcing Spouses.*"[221]

But where some see an abandonment of moral values in the divorce-friendly culture, others perceive a "new morality"[222] in the reshaping of family structure.[223] These critics maintain that moral discourse about the family has shifted ground from a focus on "fault, sexuality, and patriarchal privileges"[224] within families comprising of two married parents of opposite sex and their biological offspring to a

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218. Bauer, *supra* note 17, at 10A.

219. *Id.* Maggie Gallagher quoted the similar viewpoint of a clinical psychologist, "[M]illions of parents have purchased their own relief from marital conflict with a divorce that forces their children to pay the price in unhappiness, stress, and adjustment problems that could persist for a lifetime. Victimless divorce is either rare or nonexistent when children are present." MAGGIE GALLAGHER, ENEMIES OF EROS: HOW THE SEXUAL REVOLUTION IS KILLING FAMILY, MARRIAGE, AND SEX AND WHAT WE CAN DO ABOUT IT 199-200 (1989).

220. Gordon, *supra* note 214, at 1439. *See generally* MICHIGAN FAMILY FORUM, *supra* note 19, at 6-8 (summarizing the harms to children of divorce).

221. Katherine Shaw Spaht, *Q: Would Louisiana's 'Covenant Marriage' Law Be a Good Idea for America? Yes: Stop Sacrificing America's Children on the Cold Altar of Convenience for Divorcing Spouses*, INSIGHT ON THE NEWS, Oct. 6-13, 1997, at 24, 24.

222. Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225, 228 (1997) (reviewing NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES (1997), and BARBRA D. WHITEHEAD, THE DIVORCE CULTURE (1997)).

223. *See id.*; DOWD, *supra* note 222; MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES (1995); JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE (1996); Franklin, *supra* note 189, at 1048-50 (supporting recognition of pluralistic family definitions); Margaret Talbot, *Love, American Style: What the Alarmists About Divorce Don't Get About Idealism in America*, NEW REPUBLIC, Apr. 14, 1997, at 30. Barbara A. Babb critiqued the traditional moral determination as elevating theory over practice: "Historically, judges have attempted to fashion morality in the determination of family legal issues rather than to devise legal remedies that accommodate how families live." Barbara A. Babb, *An Interdisciplinary Approach to Family Law Jurisprudence: Application of an Ecological and Therapeutic Perspective*, 72 IND. L.J. 775, 775-76 (1997). One critic hostile toward the "new morality" located the "libertarian" and "responsibility" positions in the culture war over the family:

> In the "libertarian" camp are those who think the family is not disintegrating but merely changing into a kinder, gentler rainbow of relationships which form and dissolve and re-form. In the "responsibility" camp are those who think family breakdown—and in particular mass fatherlessness—threaten not just the wellbeing of children and women but the social stability that underpins liberal democracy itself.

Phillips, *supra* note 194, at 19.

224. Cahn, *supra* note 222, at 228. Herma Hill Kay suggests that we must "move from treating divorce as a shameful event to seeing in it a necessary and appropriate corrective for an unwise or undesired marital choice." Herma Hill Kay, *Beyond No-Fault: New Directions in Divorce Reform*, *in* DIVORCE REFORM AT THE CROSSROADS 6, 28-29 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

consideration of "fairness, equity, and caregiving"[225] within "kinships of responsibility."[226] This position maintains that the yielding of control over divorce from the government to the divorcing partners is both a proper step in the maturing of a democracy and consistent with the development of a moral community.[227] A recent letter to the editor in a state contemplating the passage of a covenant marriage statute bluntly advocated this moral democratic imperative:

> Is the divorce rate a government issue? No. Divorce is symptomatic of relationship problems between people. Government was never intended to solve such problems. . . .
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> . . . .
>
> . . . Recognizing the marriage covenant may encourage greater resolve in a couple to save the marriage. But that resolve can only come from within; it cannot be externally forced by government. . . .
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> . . . .
>
> . . . Solutions by "we the people" are always better than laws from the government.[228]

B. A Comeback for Culpability?

The campaign to reverse the perceived evils of the no-fault revolution has yielded a wide variety of counter-reform measures in legislatures, the academy, and the popular press. These proposals to eliminate or raise the threshold of no-fault divorce range from rewriting the constitution[229] to enforcing pre-commitment restrictions on divorce,[230] and include a variety of counseling and educational requirements, both mandatory and hortatory.[231] The once-unthinkable return of a culpability hurdle for

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225. Cahn, *supra* note 222, at 229.

226. Barbara Bennett Woodhouse, *"It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family*, 1996 UTAH L. REV. 569, 587; *see also* Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 816 (1998) (favoring "respect or moral accommodation for a broad range of family forms that are capable of providing nurturing environments to its members").

227. The characterization of this philosophical position as the "new morality," while apt, blurs the historiographical record. *See* WILLIAM L. O'NEILL, DIVORCE IN THE PROGRESSIVE ERA 89-167 (1967) (discussing the "new morality" of divorce which emerged at the end of the nineteenth century). Further, the ubiquity of the trope lessens its analytical utility. *See, e.g.*, *Dear Dawn*, THE DOMINION (Wellington), Nov. 16, 1998, at 10 ("In the age of the new morality, it is in to have bikini lines."); Pravin Gordhan, *Pay Your Tax, It's the Patriotic Thing To Do*, FINANCIAL MAIL (South Africa), Jan. 8, 1999, at 14 (discussing "new morality" in South African governmental concerns); Margaret Scott, *Indonesia Reborn?*, N.Y. REV. BOOKS, Aug. 13, 1998, at 43, 46 (discussing need for a "new morality" in Indonesia after fall of Suharto); David Walsh, *Sweet and Sour*, SUNDAY TIMES (London), Dec. 27, 1998, at 5G (terming corruption in British sports the "new morality").

228. Marty Dickerson & Annette Dickerson, *A Covenant*, INDIANAPOLIS STAR, Oct. 2, 1998, at A19. On Indiana's proposed covenant marriage statute, see *infra* text accompanying note 448.

229. *See infra* text accompanying notes 235, 248-52, 257-60.

230. *See infra* text accompanying notes 386-418.

231. *See infra* text accompanying notes 294, 298-99, 340, 465-70, 487.

divorce has not only been thought,[232] it has appeared in state house bills attempting to undo the no-fault revolution root and branch.[233]

In 1991, social critic Christopher Lasch proposed the "most draconian proposal of the burgeoning divorce-buster movement,"[234] a constitutional amendment banning divorce for married couples with minor children:

> Marriage should be undertaken only by those who view it as a lifelong commitment and are prepared to accept the consequences, foreseeable and unforeseeable, of such a commitment. No state shall pass laws authorizing divorce for any but the weightiest reasons. In the case of couples with children under the age of twenty-one, divorce is hereby forbidden.[235]

Although only in South Carolina have constitutional strictures on divorce been legislatively debated as part of the no-fault counterrevolution,[236] Lasch's proposal provides a fit template for a discussion of several of these themes. Moreover, the struggle over constitutional amendments and uniform bills aimed at limiting access to divorce has been a staple of our richly textured history of regulating marital dissolution.[237]

South Carolina's history has demonstrated the potential interplay between constitutional sanction and statutory provision in the area of divorce. With the exception of ten years during the Reconstruction Era, South Carolina courts allowed no divorces until 1949.[238] In 1868, the state constitution was amended to permit the legislature to sanction divorces.[239] In 1872, South Carolina's first divorce statute

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232. *See infra* text accompanying notes 266, 292, 303, 452, 456.

233. *See, e.g.*, A711, 208th Leg. (N.J. 1998) (proposing the elimination of New Jersey's only no-fault divorce provision, which currently permits a divorce if the spouses have lived separately for eighteen months); H.R. 1168, 181st Gen. Court (Mass. 1997) (prohibiting unilateral no-fault divorce for irretrievable breakdown).

234. Paul Taylor, *Therapists Rethink Attitudes on Divorce: New Movement To Save Marriages Focuses on Impact on Children*, WASH. POST, Jan. 29, 1991, at A6.

235. Symposium, *Who Owes What to Whom? Drafting a Constitutional Bill of Duties*, HARPER'S, Feb. 1991, at 48 [hereinafter *Who Owes What to Whom?*]. The language quoted in the text constituted Lasch's proposed Article II. His draft Article I read: "Fathers have the responsibility to marry the mothers of their children and to contribute a fair share to their children's support unless the mothers *release* them from these obligations." *Id.* (emphasis in original). Judith Younger had earlier proposed a similar marriage for couples with minor children, which could not be dissolved until the children were emancipated. *See* Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 90 (1981) [hereinafter Younger, *Marital Regimes*]; Judith T. Younger, *Marriage, Divorce, and the Family: A Cautionary Tale*, 21 HOFSTRA L. REV. 1367, 1380 (1993).

236. *See infra* text accompanying notes 238-48, 257.

237. The plethora of nineteenth-century state constitutional amendments prohibiting *legislative* divorce are beyond the scope of this Article.

238. *See* J. Nelson Frierson, *Divorce in South Carolina*, 9 N.C. L. REV. 265 (1931); J.D. Sumner, Jr., *The South Carolina Divorce Act of 1949*, 3 S.C. L.Q. 253, 254-59 (1951). The state legislature may have granted several divorces in 1869-70. *See* 3 HOWARD, *supra* note 45, at 38.

239. *See* S.C. CONST. of 1868, art. IV, § 15 (granting courts of common pleas exclusive

provided for marital dissolution upon proof of adultery or desertion for two years.[240] The window of divorce was short-lived, however, as the enabling legislation was repealed in 1878.[241] Without legislative authorization, South Carolina divorce lay dormant until 1895, when the newly-adopted state constitution included a flat prohibition: "Divorces from the bonds of matrimony shall not be allowed in this State."[242] Over a half-century passed before the state constitution was amended in 1949 to allow divorce on the grounds of adultery, desertion, physical cruelty, and habitual drunkenness.[243] The legislature passed an enabling statute the same year.[244] In 1969, in order to pass a no-fault statute providing for divorce after a three-year separation of the parties,[245] South Carolina again amended its constitution.[246] Ten years later, the state Constitution was again amended to reduce the waiting period for no-fault divorce from three years to one.[247] In 1997 and 1998, proposals to amend the constitution once again were introduced in the South Carolina legislature, in order to change the structure of divorce by creating a "covenant marriage" option.[248]

Amendments to the U.S. Constitution aiming to turn the business of divorce legislation over to the federal government in the hope that congressional control[249] would slow the rise in divorce rates were frequently introduced between 1884 and

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jurisdiction in divorce cases); *id.* art. XIV, § 5 ("Divorces . . . shall not be allowed but by the judgment of a Court as shall be prescribed by law.").

240. *See* 15 S.C. Stat. 30 (1872). The legislature limited the desertion ground by requiriug proof that the desertion was "caused by the extreme cruelty of the other party, or that the desertion by the wife was caused by the gross or wanton and cruel neglect of the husband to provide suitable maintenance for her, he being of sufficient ability to do so." *Id.*

241. *See* 16 S.C. Stat. 719 (1878). Only one reported case was brought under the 1872 Act, and the opinion affirmed the dismissal of the divorce suit on the ground that the enabling legislation had been repealed by the time the suit was decided. *See* Grant v. Grant, 12 S.C. 29 (1879); *see also* Frierson, *supra* note 238, at 266; Sumner, *supra* note 238, at 257.

242. S.C. CONST. of 1895, art. XVII, § 3.

243. *See* 1949 S.C. Stat. 97; *see also* Leroy M. Want & W.D. Workman, Jr., *Divorce—A South Carolina Problem*, S.C. MAG., Mar. 1949, at 10, 21, 33-34 (describing passage of the amendment though the state legislature and victory at the polls).

244. See 1949 S.C. Stat. 216. *See generally* Sumner, *supra* note 238, at 259-302.

245. *See* 1969 S.C. Acts 170.

246. *See* 1969 S.C. Acts 77.

247. *See* 1979 S.C. Acts 2. The state constitutional provision now reads: "Divorces from the bonds of matrimony shall be allowed on the grounds of adultery, desertion, physical cruelty, continuous separation for a period of at least one year or habitual drunkenness." S.C. CONST. art. XVII, § 3 (amended 1932).

248. S. 961, 112th Leg. (S.C. 1997); S. 305, 113th Leg. (S.C. 1999). On covenant marriage, see *infra* text accompanying notes 450-91, 494-507.

249. A federal constitutional amendment was widely seen as a prerequisite for congressional legislation on the subject of marriage and divorce. The Deputy Attorney General of Indiana remarked on the "almost unanimous opinion of lawyers who have considered the question that an amendment to the Constitution is necessary to enable Congress to pass such a law." Mrs. Edward Franklin White, *America's Need of a Federal Marriage and Divorce Law*, 18 CURRENT HIST. MAG. 246-50 (1923), *reprinted in* SELECTED ARTICLES ON MARRIAGE AND DIVORCE 117, 126 (Julia E. Johnsen ed., 1925).

1947.[250] Despite substantial support for the notion of federally-enforced divorce uniformity,[251] the proposals never succeeded. Constitutional amendments and uniform divorce bills both fell prey to "the inveterate tenacity of local opinion,"[252] one expression of which may be found in *The New York Tribune*'s expostulation on a uniform divorce law which would nationalize the Empire State's ban on all divorce grounds but adultery.[253] Home cooking was similarly praised in a South Carolina Congressional Representative's boast to his Judiciary Committee colleagues that his state's total ban on divorce gave it "a higher standard than California or Nevada."[254]

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250. *See* BLAKE, *supra* note 76, at 145-48; HALEM, *supra* note 173, at 36-40; O'NEILL, *supra* note 227, at 238-53; RILEY, *supra* note 10, at 134-35. For example, in 1924 Senator Arthur Capper introduced a constitutional amendment providing that "Congress shall have the power to make laws, which shall be uniform throughout the United States, on marriage and divorce, the legitimation of children, and the care and custody of children affected by annulment of marriage or by divorce." S.J. Res. 5, 68th Cong. (1924). As the statutory correlate to his constitutional amendment, Senator Capper introduced a bill limiting divorce grounds to adultery, physical or mental cruelty, abandonment or failure to provide for one year or more, incurable insanity, or the commission of a felony. Service of divorce suits by publication in lieu of personal service was prohibited, and the parties to a divorce were prohibited from remarrying for a year after the issuance of the decree. Testifying in support of his proposals in 1924, Senator Capper complained of the "high divorce rate which, if it continues, will in time disintegrate the family life of the nation." *Marriage and Divorce—Proposed Amendment to the Constitution of the United States: Hearing Before a Subcomm. of the Senate Comm. on the Judiciary*, 68th Cong. 2 (1924) (statement of Sen. Arthur Capper).

251. *See, e.g.*, Robert Grant, *Marriage and Divorce*, 14 YALE L.J. 223-38 (1925) (supporting both Sen. Capper's proposed constitutional amendment and uniform divorce bill); Jennings C. Wise, *Shall Congress Be Given Power To Establish Uniform Laws upon the Subject of Divorce Among States of the Union?*, 70 CENT. L.J. 93 (1910), *reprinted in* SELECTED ARTICLES ON MARRIAGE AND DIVORCE, *supra* note 249, at 253, 253-65 (supporting congressionally imposed divorce law uniformity); *For Easier Divorce*, LITERARY DIG., July 29, 1933, at 18-19 (quoting *New York World Telegram*'s attack on collusive divorce actions: "'[I]t is time to eradicate this deeply harmful hypocrisy by the establishment of a rational and uniform system of divorce laws based upon the beliefs and practises [sic] of the vast majority of the American people seeking or contemplating divorce actions'").

252. Robert Grant, *A Call to a New Crusade*, GOOD HOUSEKEEPING, Sept. 1921, at 42, 143 (1921). Judge Grant elaborated on this species of territorial jealousy:

> [E]ach body of people dwelling in the separate states of our country [is reluctant] to brook proposals to alter their domestic institutions to conform with those of any other constituency which regards its own as superior. "What! model our marriage and divorce laws, the safeguards of the 'home,' to suit the idiosyncrasies of 'highbrows' or 'visionaries' in New York, Massachusetts, or elsewhere?"

Id.; *see also* George B. Young, *Uniform State Laws*, 8 A.B.A. J. 181, 181-83 (1922) (supporting uniform divorce legislation adopted by the states in lieu of expanding federal power).

253. *See Marriage and Divorce*, PUB. OPINION, Nov. 9, 1889, at 103.

254. *Uniform Laws as to Marriage and Divorce, Hearings on H.R. Res. 48 Before the House Comm. on the Judiciary*, 64th Cong., 1st Sess. (1916) (statement of Rep. Richard S. Whaley). Whaley opined that South Carolina maintained the "sanctity of the home . . . better than . . . any State in the United States." *Id.* at 8.

The Palmetto State's Representative then voiced the plaint which doomed uniformity in divorce until the modern era: "Why should we be forced to lower our standard of morality because you want to raise yours?"[255]

Absolute prohibitions of divorce will almost certainly not emerge within federal or state constitutional texts during the no-fault counterrevolution. South Carolina's once-vaunted claim that its divorce ban was a "wise policy to shut the door to domestic discord, and to gross immorality in that community"[256] rings archaic to modern ears in both its rhetorical timbre and its substantive sway. But the past serves as prologue here in perhaps three senses. Initially, the failure over two generations to agree on a federal constitutional approach to divorce, as well as the necessity for frequent revisions of South Carolina's constitution to accommodate changes in its divorce rules, suggests that regulation of the domestic relations arena is too subject to the variable winds of popular demand to be a fit subject for the more lapidary requirements of the fundamental frame of government.[257] More broadly read, this brief story of unhappy constitutional experimentation intimates the danger of engraving our current sentiments on proper divorce behavior too deeply in an area in which we have frequently changed our minds, and have often seen yesterday's parasite become today's paragon, or at least hail-fellow-well-met.

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255. *Id.* at 19. Rep. Whaley's paean to his state as a moral haven because of its ban on divorce did not, of course, go unchallenged. A New York attorney criticized South Carolina's legal system as hypocritical:

> The choice lies between divorce and something worse. In South Carolina the marital tie is indissoluble, but . . . [s]tatistics would seem to indicate that South Carolina with its denial of divorce, makes for loose morals in that concubinage and left handed marriage with all its attendant evils are very prevalent and there are more illegitimate children born in that state in proportion to its population than in any other state . . . [South Carolina] has never made adultery indictable, and actually found it necessary to enact a statute regulating how much of his property a married man might be allowed to give to his concubine!

Milton Ives Livy, *Marriage and Divorce, in* SELECTED ARTICLES ON MARRIAGE AND DIVORCE, *supra* note 249, at 165, 166-67. Divorce reformer Samuel Dike understood that uniform action would most likely expand the grounds for divorce in some states and increase the divorce rate, and "many would think this too dear a price to pay for uniformity." *See* Samuel W. Dike, *Uniform Marriage and Divorce Laws*, 2 ARENA 401 (1890). Citing another example of regional bias, Katherine L. Caldwell ascribed the defeat of the constitutional amendments and uniform divorce bills in part to the fear by Southern Democrats that federal action on divorce might result in congressional legalization of interracial marriage. *See* Caldwell, *supra* note 203, at 39 n.57; *see, e.g.*, *February 1913: Uniform Laws as to Marriage and Divorce: Hearings on H.R.J. Res. 187 Before the House Comm. on the Judiciary*, 65th Cong. 83 (1918) (First Report of Illinois Comm'n on Marriage and Divorce by Judge Hugo Pam) (stating that "side by side with the uniform divorce law must be a uniform marriage law. . . . based on an amendment to the Federal Constitution, and valid everywhere").

256. Vaigneur v. Kirk, 2 S.C. Eq. (2 Des.) 640, 643 (1808).

257. Of course, concerns of federalism constituted an abiding objection to the constitutionalization of divorce on the federal level. *See* O'NEILL, *supra* note 227, at 252 ("The constitutional amendment approach was out of the question because it was an invasion of states' rights, and thus would meet with general hostility.").

A second lesson also appears from Lasch's proposed constitutional rendering. His draft begins by proclaiming marriage a "lifelong commitment"[258] restricted to those "prepared to accept the consequences, foreseeable and unforeseeable."[259] Consistent with this understanding of the grave nature of marriage, divorce should be unavailable except for the "weightiest reasons."[260] Although these incantations are phrased as would-be alterations of our constitutional frame, they serve a more pragmatic role as shots fired across the bow of the "divorce culture."[261] As an effort to restore the traditional parameters of marriage, Lasch's amendment supplied a rhetorical thrust in the service of the no-fault counterrevolution. For example, it anticipated the "lifelong relationship"[262] language of the covenant marriage statutes,[263] which require the parties to swear that "marriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live."[264] For Lasch's demand that only the "weightiest reasons"[265] justify divorce, the covenant marriage statutes declare that "[o]nly when there has been a complete and total breach of the marital covenant commitment may the non-breaching party seek a declaration that the marriage is no longer legally recognized."[266]

Third, in articulating a difference between marriages based on the presence of children, Lasch anticipated another wing of counter-revolutionary thought. Grounded in the belief that divorce harms children, who are the innocent victims of their parents' quest for individualized happiness, reformers have called for treating marriages with children significantly different than those without.[267] Many proposals to change our legal structure assert society's interest in preserving intact nuclear families and aim at deterring or delaying divorces in families with children.

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258. *Who Owes What to Whom?*, *supra* note 235, at 48.

259. *Id.*

260. *Id.*

261. WHITEHEAD, *supra* note 13. A similar purpose may be divined in Lasch's demand that fathers "contribute a fair share toward their children's support," *Who Owes What to Whom?*, *supra* note 235, at 48, and his more controversial call for fathers to "marry the mothers of their children," *id.*

262. LA. REV. STAT. ANN. § 9:272(A) (West 1999).

263. For a full discussion of the covenant marriage statutes, see *infra* text accompanying notes 450-91.

264. LA. REV. STAT. ANN. § 9:273 (West 1999).

265. *Who Owes What to Whom?*, *supra* note 235, at 48.

266. LA. CIV. CODE ANN. art. 103 (West 1999).

267. *See supra* text accompanying notes 235. In an earlier review, Lasch had identified the "emergence of a distinguishable concept of childhood" as likely the "decisive event in the evolution of the modern family." Lasch, *supra* note 9, at 4. "[O]nce children came to be seen not as miniature adults but as a special category of peculiarly impressionable and vulnerable persons, it was not long before the painstaking nurture and protection of children became the central purpose of the family." *Id.*

C. "Children First"

Divorce was not always seen as the enemy of childhood. In the 1950s and 1960s, studies routinely asserted that "children adjusted to divorce within a few years."[268] William Goode's famous 1956 study, *After Divorce*, noted that almost all the 425 divorced mothers interviewed believed "that their children had better lives as divorced children than they would have had as children in marital conflict."[269] This sunny attitude about the consequences of divorce for children continued in the 1970s.[270] One text at the beginning of that decade advised that "the child living with unhappily married parents more often gets into psychiatric difficulties than the one whose mismatched parents have been healthy and strong enough to sever their troubled relationship."[271] Another 1970s volume reported that divorce can be liberating to children, gifting them with "greater insight and freedom as adults in deciding whether and when to marry" and relief from "excessive dependency on their biological parents."[272] Finally, a marriage-and-family text at the end of the 1970s

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268. RILEY, *supra* note 10, at 160; *see* HALEM, *supra* note 173, at 177-81. These early studies which stressed the relatively benign impact of divorce on children include J. LOUISE DESPERT, CHILDREN OF DIVORCE at viii, 115 (1953) ("[D]ivorce is not automatically destructive to children .... It may even [be] a maturing and clarifying experience."); Lee G. Burchinal, *Characteristics of Adolescents from Unbroken, Broken, and Reconstituted Families*, 26 J. MARRIAGE & FAM. 44, 50 (1964) (noting no cause-and-effect relationship between childhood psychopathology and divorce or separation); F. Ivan Nye, *Child Adjustment in Broken and Unhappy Unbroken Homes*, 19 J. MARRIAGE & FAM. 356-61 (1957) (arguing that in certain circumstances children benefit from divorce's stabilizing effect, and concluding that children of divorce fared better than their cohorts in unbroken high-conflict homes "in the areas of psychosomatic illness, delinquent behavior and parent-child adjustment").

269. WILLIAM GOODE, AFTER DIVORCE 329-30 (1956).

270. *See generally* WHITEHEAD, *supra* note 13, at 81-90.

271. RICHARD A. GARDNER, THE BOYS AND GIRLS BOOK ABOUT DIVORCE at xix (1970). The contrast between the disparagement of "unhappily married parents" who stay together and the kudos to "mismatched" parents "healthy and strong enough" to divorce clearly reflects the rhetorical milieu in which dissolution was seen as a potentially family-enhancing option. In Canada, divorce in this era was often viewed as an "opportunity to leave behind a flawed relationship and try again," with a 1975 Law Reform Commission suggesting that the frequency with which divorcees remarry meant that divorce "sometimes offer[ed] a constructive solution to marital conflict through the provision of new and more viable homes for spouses and children." SPECIAL JOINT COMM'N ON CHILD CUSTODY AND ACCESS, FOR THE SAKE OF THE CHILDREN 4 (1998) (citation omitted), *available in* (visited Feb. 28, 2000) <http://www.parl.gc.ca/InfoComDoc/36/1/SJCA/Studies/Reports/sjcarp02-e.htm>. Currently, 60% of remarriages are likely to end in divorce. *See* Marilyn Gardner, *Putting Kids First After Parents Split*, CHRISTIAN SCI. MONITOR, June 6, 1997, at 1, 12.

272. SUSAN GETTLEMAN & JANET MARKOWITZ, THE COURAGE TO DIVORCE 86-87 (1974); *see also* MEL KRANTZLER, CREATIVE DIVORCE: A NEW OPPORTUNITY FOR PERSONAL GROWTH 211 (1975) (divorce can result in "more opportunity for children to grow into the unique individuals they are capable of becoming"); GILBERT D. NASS, MARRIAGE AND THE FAMILY 524 (1978) ("Children whose parents have divorced and perhaps remarried may find their lives less stressful."). Gettleman and Markowitz wrote of the munificent yield divorce can provide women and children: "[D]ivorce often impels a nonworking wife into gainful employment, while child-support payments (and often even alimony) continue. This may mean

criticized as "[d]ivorce prejudice"[273] the implication that divorce was undesirable, and assessed the social science evidence to conclude that the "chances of psychological damage to children resulting from the divorce of their parents is no greater than that for children in unbroken homes marked by continual marital tension."[274]

One aspect of these early studies had a telling effect on the course of no-fault reform. F. Ivan Nye coujectured that the psychopathological symptoms that children manifested following divorce were a reaction to the divorce process rather than any long-term maladjustment. In historian Lynne Halem's explanation, Nye's supposition that "clinical aberrations were only temporary incidences of disequilibrium ... meant that divorce might not be so destructive as we customarily assumed."[275] Consequently, no-fault reform's emphasis on transforming divorce into a more amicable, non-adversarial process was presented as substantially lessening the pain suffered by children of divorce. As the title of an article by Judge Paul W. Alexander put it, in order to rescue both divorcing parents and their children, "*Let's Get the Embattled Spouses out of the Trenches.*"[276]

Beginning in the 1980s, however, investigators began to acknowledge the traumatic nature of divorce for children.[277] Today, the view on one end of the spectrum sees a

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augmented income for the wife and children." GETTLEMAN & MARKOWITZ, *supra*, at 56.

273. ROBERT R. BELL, MARRIAGE AND FAMILY INTERACTION 557 (5th ed. 1979).

274. *Id.* at 567. Other expressions of the benevolence of the divorce process for children may be found in MORTON HUNT & BERNICE HUNT, THE DIVORCE EXPERIENCE (1977), and DR. LEE SALK, WHAT EVERY CHILD WOULD LIKE PARENTS TO KNOW ABOUT DIVORCE (1978).

275. HALEM, *supra* note 173, at 177. John F. McDermott's 1968 study came to a similar conclusion. *See* John F. McDermott, *Parental Divorce in Early Childhood*, 124 AM. J. PSYCHIATRY 1424, 1431 (1968) (childhood disturbances may be temporary effects of trauma of the divorce process).

276. Paul W. Alexander, *Let's Get the Embattled Spouses out of the Trenches*, 18 LAW & CONTEMP. PROBS. 98, 101 (1953); *see also* John S. Bradway, *The Myth of the Innocent Spouse*, 11 TUL. L. REV. 377, 389-90 (1937).

> Litigation, a substitute for trial by battle, provides an arena in which contending parties can settle claims of right and wrong. To employ this crude device, which in a proper case will lead to family dissolution at the request of one of the parties, as a means toward the rehabilitation of a domestic unit already shaken by dissension, is somewhat like taking a watch to be repaired by a blacksmith. A more sensitive institution is needed to deal with what are now legal imponderables.

Id. (citation omitted).

277. *See, e.g.*, WILLIAM F. HODGES, INTERVENTIONS FOR CHILDREN OF DIVORCE: CUSTODY, ACCESS, AND PSYCHOTHERAPY 36 (2d ed. 1991) (reporting that in the face of divorce, "[y]oung children are likely to demonstrate aggression and other acting-out behavior" and "[t]eenagers may show more withdrawal and depression"); Lawrence A. Kurdek, *Siblings' Reactions to Parental Divorce*, 12 J. DIVORCE 203, 204, 207-14 (1988-89) (agreeing that "divorce . . . [is] described as a powerful set of events . . . that might affect all siblings negatively" but conducting a study to determine if all siblings are similarly affected); Jolene Oppawasky, *Family Dysfunctional Patterns During Divorce—From the View of the Children*, 12 J. DIVORCE 139, 139, 152 (1988-89) (noting the "hefty impact divorce has on a large number of children" and concluding "that all divorcing families need psychological counseling"). *See generally* HALEM, *supra* note 173, at 161; WHITEHEAD, *supra* note 13, at

direct linkage between all divorce and harm to children: "The evidence is overwhelming that [divorce] has maimed an entire generation of children."[278] But the other, midrange, position distinguishes between divorces "involving physical abuse or extreme emotional cruelty" and those on the heels of "lower-intensity conflict."[279] New studies suggest that "if parents are experiencing not violence but unhappiness in their marriages, their children would be better off if they stayed married than if they divorced."[280] Social researchers Frank Furstenberg and Andrew Cherlin articulate this perspective as follows:

91-106.

278. Gurwitt, *supra* note 15, at 37 (quoting David Blankenhorn, president of the Institute for American Values); *see, e.g.*, GALLAGHER, *supra* note 5, at 13-29 (describing adverse effects on children of a "good" divorce); Scott, *supra* note 135, at 29-33 (detailing social science findings demonstrating that divorce is psychologically costly for most children); Dora Sybella Vivaz, Note, *Balancing Children's Rights into the Divorce Decision*, 13 VT. L. REV. 531, 537-39 (1989) (recounting data demonstrating the severe effect of divorce on children's psycho-social well-being); Younger, *Marital Regimes*, *supra* note 235, at 90 (citing evidence that "children's post-divorce living arrangements, to the extent that they are in one-parent or reconstituted families, may be worse than continued life with two parents in a strained marriage").

279. Galston, *supra* note 22, at 15. Perhaps the prototypical description of a "lower-intensity conflict" marriage with a child which led to dissolution was provided by John Taylor, *Divorce Is Good for You*, ESQUIRE, May 1997, at 52, 53 (affirming the positive virtue of his intended divorce from Maureen Sherwood following a marriage that "wasn't hellish; it was simply dispiriting, a mechanism so encrusted with small disappointments and petty grudges that its parts no longer fit together"). For a contrary perspective on the same domestic situation, see Maureen Sherwood, *No, It's Not*, ESQUIRE, May 1997, at 60-61. One domestic relations judge criticized the legal system for aggravating lower-conflict marriage cases and converting them into bitter divorce battles:

> "We encourage people to go out and put together their diaries of every petty offense they can think of . . . . I hear trials on diaper counts: Who changes more diapers, who gets up for midnight feedings. We make them catalogue these inadequacies and then keep poking and keep poking. We fuel their anger and animosity."

Gurwitt, *supra* note 15, at 34 (quoting Judge Barry Schneider, presiding domestic relations judge, Maricopa County Superior Court, Arizona).

280. Wade E. Horn, *Strong Case for Staying Together Despite Discord*, WASH. TIMES, Jan. 6, 1998, at E2 (summarizing three new studies). Relying on the work of researchers Sara McLanahan and Gary Sandefur, William Galston highlighted three principal harms to children of divorce:

> diminished income—roughly a 30 percent drop for children and the custodial parent;
>
> diminished parenting time from the non-custodial parent (usually the father) who detaches himself from his children and from the custodial parent (usually the mother) who has to combine work inside and outside the home; [and]
>
> disruption of [the children's] established ties—to friends, neighborhoods and communities, and educational institutions.

Galston, *supra* note 22, at 23.

> It is probably true that most children who live in a household filled with continual conflict between angry, embittered spouses would be better off if their parents split up—assuming that the level of conflict is lowered by the separation. And there is no doubt that the rise in divorce has liberated some children (and their custodial parents) from families marked by physical abuse, alcoholism, drugs, and violence. But we doubt that such clearly pathological descriptions apply to most families that disrupt. Rather, we think there are many more cases in which there is little open conflict, but one or both partners find the marriage personally unsatisfying.... Under these circumstances, divorce may well make one or both spouses happier; but we strongly doubt that it improves the psychological well-being of the children.[281]

By far the most influential study showing the psychological damage suffered by children of divorce has been conducted by clinical psychologist Judith Wallerstein and her associates. Wallerstein began the California Children of Divorce Study in 1971, and has been issuing periodic follow-up reports. In the oft-cited *Second Chances: Men, Women and Children a Decade After Divorce*, Wallerstein and Sandra Blakeslee conclude that "almost half of the children [studied] entered adulthood as worried, underachieving, self-deprecating, and sometimes angry young men and women."[282] Wallerstein's reports are generally viewed as demolishing the notion of a "good divorce" in families with children,[283] and have helped spur the covenant

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281. FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, DIVIDED FAMILIES 71-72 (1991); *see also* PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL 237 (1997) (noting children exposed to "low conflict divorces experience adverse effects that last far into adulthood"); GLENN T. STANTON, WHY MARRIAGE MATTERS: REASONS TO BELIEVE IN MARRIAGE IN POSTMODERN SOCIETY 123-58 (1997); WALLERSTEIN & BLAKESLEE, SECOND CHANCES, *supra* note 26, at 11 ("Divorce is a different experience for children and adults because the children lose something that is fundamental to their development—the family structure."); Spaht, *supra* note 13, at 1552-58 (summarizing social science data on harm caused by divorce); Mary Lynne Vellinga, *Opinions Split on Restoring Blame in Divorce Law*, L.A. DAILY NEWS, Nov. 16, 1997, *available in* WL 4059891 (quoting Barbara Dafoe Whitehead on children's different standard for happiness: "'It's not: Do Mommy and Daddy love each other? It's: Are Mommy and Daddy in the same house and available to me?'").

282. WALLERSTEIN & BLAKESLEE, SECOND CHANCES, *supra* note 26, at 299; *see also* WALLERSTEIN & KELLY, *supra* note 26; Judith S. Wallerstein, *Children of Divorce: Preliminary Report of a Ten-Year Follow-up of Older Children and Adolescents*, 24 J. AM. ACAD. CHILD PSYCHIATRY 545 (1985).

283. *See* Claudia Miller, *Divorce Doesn't Go Away: The New Wallerstein-Lewis Study Traces 25 Years of the Effects of Divorce on Children* (visited Feb. 12, 2000) <http://www.4children.org/news/198divo.htm>; Barbara Vobedja, *Children of Divorce Heal Slowly, Study Finds: Scholar's Latest Evidence in Influential Series*, WASH. POST, June 3, 1997, at E1 (describing Wallerstein's 25-year follow-up report). Critics who have relied on the Wallerstein longitudinal study include DIANE FASSEL, GROWING UP DIVORCED: A ROAD TO HEALING FOR ADULT CHILDREN OF DIVORCE 5 (1991); Allen M. Parkman, *Reform of the Divorce Provisions of the Marriage Contract*, 8 BYU J. PUB. L. 91, 104 n.59 (1993); Vivaz, *supra* note 278, at 579. The popular press has often utilized the Wallerstein study as a cudgel. Stephanie Coontz reported that, in the wake of Wallerstein's June 1997 follow-up report which merely confirmed the conclusions of the earlier reports, she located 200 media articles "trumpeting the 'new' finding that divorce was 'worse than we thought,' a 'catastrophe' for

marriage movement.[284]

But there are deep concerns with the reliability of Wallerstein's work. It has been severely criticized for its small sample and lack of a control group,[285] with one critic asserting that her work "represents an oversimplified notion of cause and effect repudiated by most social scientists and contradicted by her own evidence."[286] Other researchers are concerned that she might be "over-generalizing" and that her findings are "not nationally representative."[287] The central point on which Wallerstein and her critics disagree is "whether the effects she studied flowed from the divorce itself or from the *conflict* that caused the divorce."[288]

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kids." Stephanie Coontz, *Divorcing Reality*, NATION, Nov. 17, 1997, at 21. For illustrations, see T. Barry Brazelton, *Children's Needs Suffer in Divorce*, CIN. ENQUIRER, Mar. 1, 1998, at G11 (noting that the negative symptoms identified by Wallerstein "are present in nearly all children of divorce"); *Divorce's Effect on Children*, INDIANAPOLIS NEWS, June 9, 1997, at A6 (arguing that Indiana lawmakers who propose reforms to the no-fault divorce scheme "ought to get more serious attention as a result of [Wallerstein's studies]").

284. *See* Nichols, *supra* note 28, at 944-45 (reporting reliance on Wallerstein's work by Prof. Katherine Shaw Spaht, co-drafter of Louisiana's covenant marriage law); *see also* Spaht, *supra* note 221, at 24 (discussing Wallerstein's studies in connection with Louisiana's covenant marriage law). On covenant marriage laws, see *infra* text accompanying notes 448-507.

285. *See, e.g.*, Sarah H. Ramsey & Robert F. Kelly, *Using Social Science Research in Family Law Analysis and Formation: Problems and Prospects*, 3 S. CAL. INTERDISC. L. J. 631, 652-53 (1994) ("Without a control group, Wallerstein and Kelly were simply unable to substantiate scientifically that the problems of adjustment that the children in their sample encountered were the result of marital dissolution, rather than some other process such as adjustment to adolescence that most children experience, independent of divorce."); Scott, *supra* note 135, at 30 n.64 (arguing the absence of a control group in Wallerstein's study is a "serious limitation").

286. Coontz, *supra* note 283, at 21.

287. Elizabeth Mehren, *But Who Is Looking out for the Children?*, L.A. TIMES, June 3, 1997, at E1 (quoting Kathleen Molley-Morrison and Donald J. Hernandez). Andrew Cherlin has commented that Wallerstein "'is without peer in giving us clinical insights about children and their parents from troubled families, but we have to remember these are not representative of the American family.'" *Bad Breakups: For Children, Time May Not Heal the Wounds of Divorce*, SALT LAKE TRIB., June 3, 1997, at A1, *available in* 1997 WL 3409163 [hereinafter *Bad Breakups*].

288. Lee Borden, *Judith Wallerstein: Limitations of Wallerstein's Research* (last modified May 22, 1999) <http://www.divorceinfo.com/judithwallerstein.htm#Limitations> (emphasis in original) (arguing that Wallerstein's research is anecdotal, lacking scientific sampling or double-blind methodologies; that her subjects are not representative of the general population as they are largely white, upper-middle class and well-educated; and that her research could not determine the appropriate causative agency, the divorce or the preceding conflict). For an argument acknowledging the sociological evidence but suggesting that a return to the fault standard would harm children, see Gordon, *supra* note 214, at 1446-61. In sharp contradistinction to her extreme adherents, Wallerstein herself contends that "divorce is often the only rational solution to a bad marriage," and she opposes a couple's staying together for the children's sake. She believes that a divorce "undertaken thoughtfully and realistically can teach children how to confront serious life problems with compassion, wisdom, and appropriate action." WALLERSTEIN & BLAKESLEE, SECOND CHANCES, *supra* note 26, at 305.

The 1990s have seen a growing legislative effort to focus on children of divorce. In the most widely discussed bid, Michigan State Representative Jessie F. Dalman introduced in 1995 an eleven-bill package heralded as "the state of the art on divorce policy."[289] Dalman's proposals would have established a two-tier divorce system.[290] In families without children, or in which the children were all emancipated, the couple could obtain a divorce upon mutual consent.[291] But in families with minor children, or where one spouse objected to the dissolution, the divorce-seeking spouse would have to prove the marital fault of the other.[292] The reinvigorated fault grounds were the historically familiar ones of adultery, desertion, and extreme cruelty, which would have to be established by a "preponderance of the evidence."[293] Additionally, parents seeking divorce would be required to undergo counseling about the potential effects of divorce.[294]

Other states have attempted similar measures. A 1997 Texas bill would have allowed divorce "without regard to fault" when the marriage becomes "insupportable because of discord or conflict of personalities that destroys the legitimate ends of the marriage relationship and prevents any reasonable expectation of reconciliation."[295] But divorce on this ground would be available only to childless couples who had passed their first wedding anniversary.[296] A measure introduced in Virginia in 1998 would have prohibited no-fault divorce if the parties have a minor child and either party files a written objection to the initial pleading within 21 days of service.[297] A Hawaii bill would have required a one-year waiting period and mandatory counseling after a divorce filing in cases with minor children.[298] Counseling sessions specifically including all children aged six to sixteen would have been mandated by a

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Wallerstein remains a supporter of no-fault divorce. *See Bad Breakups*, *supra* note 287, at A1; Marilyn Gardner, *Putting Kids First After Parents Split*, CHRISTIAN SCI. MONITOR, June 6, 1997, at 12.

289. Gurwitt, *supra* note 15, at 37. *See also* Charmaine Crouse Yoest, *State Groups That Fight for Mom and Dad*, POL'Y REV., Nov.-Dec. 1996, at 17, 17-18 (describing widespread publicity for the Michigan divorce reform proposals); Milbank, *supra* note 19, at A1.

290. *See* H.R. 4432, 88th Leg., 1st Sess. (Mich. 1995).

291. *See id.*

292. *See id.*

293. *Id.* A similar bill reinjecting fault requirements into divorces in cases involving children was introduced in the Kentucky Senate in 1998. *See* S. 195, Reg. Sess. (Ky. 1998); *see also* WHITEHEAD, *supra* note 13, at 71 (suggesting both a two-tier divorce system predicated on the presence or absence of minor children, and the revival of fault notions, at least in dividing the marital estate and awarding maintenance).

294. *See* H.R. 4432, 88th Leg., 1st Sess. (Mich. 1995). The couple would also have to submit a satisfactory post-divorce parenting plan to the court. On parenting plans, see *infra* text accompanying notes 319-32.

295. H.R. 323, 75th Leg., Reg. Sess. (Tex. 1997).

296. *See id.*

297. *See* H.R. 1163, Reg. Sess. (Va. 1998). Another Virginia proposal would have limited the availability of divorce on the ground of separation (the only no-fault alternative in Virginia) to couples who had been separated for one year, filed jointly for the divorce, and had no minor children. *See* H.R. 1188, Reg. Sess. (Va. 1996).

298. *See* H.R. 3751, 18th Leg., 1st Sess. (Haw. 1996).

Pennsylvania measure.[299] An Illinois bill would have limited no-fault divorce actions to couples who experienced a separation period, and—if the couple had a dependent child, the marriage were of ten or more years' duration, or the wife was pregnant—mutual consent.[300] These laws were broadly aimed at authorizing courts "'to consider what's best for the entire family, instead of being required to grant the desire of only one spouse who wants out.'"[301]

Scholarly critics have kept pace with their legislative counterparts, and have often inspired or helped shape the reform proposals. William Galston has called for the elimination of unilateral no-fault divorce in marriages with minor children.[302] Parents who seek divorce would, in Galston's scheme, either have to establish a fault ground against their spouse, or wait to get divorced until they had been separated for five years.[303] Mary Ann Glendon has championed the "children-first principle" for division of assets in divorce.[304] In her view, property settlements would be divided three ways rather than two. The largest share would be dedicated to ensuring the economic well-being of the children, and would be managed by the custodial parent until the children reach the age of majority. Only the remaining assets would be divided between the father and the mother.[305]

While no state has adopted Professor Glendon's "children-first" principle for the division of the parents' assets at divorce, current state laws frequently provide for greater judicial oversight over the dissolution of families with children than over divorces among their childless counterparts. For example, a Virginia couple with minor children cannot take advantage of that state's six-month separation period for

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299. *See* S. 958, 179th Leg., Reg. Sess. (Pa. 1995) (conditioning a divorce upon proof that all children aged 6 to 16 had attended at least three counseling sessions between the time of separation and the granting of the decree).

300. *See* S. 1842, 89th Leg., Reg. Sess. (Ill. 1996). Similarly, a Kansas measure would have limited no-fault divorces to cases of mutual consent and no dependent children. *See* S. 608, 76th Leg., Reg. Sess. (Kan. 1996).

301. MICHIGAN FAMILY FORUM, *supra* note 19, at 15 (quoting a press release from former Oklahoma State Representative Ernest Istook).

302. *See* William Galston, *Braking Divorce for the Sake of Children*, AM. ENTERPRISE, May-June 1996, at 36; Galston, *supra* note 22, at 22-23.

303. *See* Galston, *supra* note 302, at 36; Galston, *supra* note 22, at 22. Even in cases where both parents consent to divorce, Galston has called for "suitable braking mechanisms: a mandatory pause of at least a year for reflection, counseling, and mediation." *Id.*

304. *See* Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553, 1559 (1984).

305. *See id.* at 1559-60. Writing in support of Glendon's notion, Amitai Etzioni observed that since "fathers often initiate divorces on the assumption that they will gain control of many of the assets while the mother will assume custody of the children, the children-first principle would not only protect the children of divorced couples, but cool quite a few fathers' interest in divorce." Amitai Etzioni, *Give Couples Tools To Make Marriages Last*, USA TODAY, Nov. 18, 1996, at 25A. The "children-first" proposal is best seen in the context of the Communitarian critique which argues that children are best raised by a two-parent family in which one of the parents serves as the home-centered caretaker for the children during their first years. Communitarians "see the two-parent family as the cornerstone of a moral society." Marilyn Gardner, *Family in the '90s—A New Commitment*, CHRISTIAN SCI. MONITOR, Nov. 24, 1992, at 13.

no-fault divorce.[306] Such couples must have lived separately for one year and have signed a separation agreement in order to file for no-fault divorce.[307] Additionally, the couple's separation agreement will not be ratified by the court until the parties have complied with detailed rules aimed at facilitating the collection of child support payments and the provision of health care coverage for dependent children.[308] Delinquencies in payments of child support for a period of at least ninety days or for an amount of at least $5,000 may result in the suspension of the professional, trade, business or occupational licenses of the person responsible for support.[309] Massachusetts law requires a court to apply the child support guidelines in all cases, whether the amount of child support obligation is contested or agreed to by the parties.[310] A court departing from those guidelines must make "specific written findings"[311] demonstrating "that such departure is consistent with the best interests of the child."[312] Such oversight provisions are common.[313] States are increasingly empowering divorce courts to award post-majority support for higher education (or at least for the completion of high school) in view of the reality that "children from divided homes face greater obstacles pursuing higher education than children from intact homes."[314] In England, a divorce decree will not be granted until the court is satisfied that the arrangements for the minor children are either satisfactory or the best available under the circumstances.[315]

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306. *See* VA. CODE ANN. § 20-91(A)(9)(a) (Michie 1999), which reads in pertinent part:

> A divorce from the bond of matrimony may be decreed . . . [o]n the application of either party if and when the husband and wife have lived separate and apart without any cohabitation and without interruption for one year. In any case where the parties have entered into a separation agreement and there are no minor children either born of the parties, born of either party and adopted by the other or adopted by both parties, a divorce may be decreed on application if and when the husband and wife have lived separately and apart without cohabitation and without interruption for six months.

Id.

307. *See id.*

308. *See id.* § 20-60.3.

309. *See id.* Other examples of license revocation statutes include COLO. REV. STAT. § 26-13-123 (1995); LA. REV. STAT. ANN. §§ 9:315.30-.35, 32:432, 37:2952, 56:647 (West 1995); TEX. FAM. CODE ANN. § 232.001 (West 1995).

310. *See* MASS. GEN. LAWS ANN. ch 208, § 28 (West Supp. 1999).

311. *Id.*

312. *Id.* The statutory presumption requiring the court to rely on the statutory child support guidelines even in cases of party agreement was enacted in MASS. GEN. LAWS ch. 208, § 28 (1998), apparently reversing *Wheeler v. Wheeler*, 672 N.E.2d 1000, 1003 (Mass. App. Ct. 1996) (holding that a court is required to order amount of child support stipulated by the parties, absent valid reason).

313. *See, e.g.*, D.C. CODE ANN. § 16-916.1(l) (1981) ("Departures shall be set forth and explained in writing."); FLA. STAT. ANN. § 61.30(1)(a) (West 1997 & Supp. 1999) (requiring deviations of more than five percent to be justified in writing); IDAHO CODE § 32-706A(c) (1996 & Supp. 1999) (requiring a "written or specific finding" to justify a departure).

314. Elrod & Spector, *supra* note 21, at 760.

315. *See* Matrimonial Causes Act, 1973, ch. 18, § 41 (Eng.). *But see* LAW COMMISSION, *supra* note 166, at 39-40 (suggesting serious difficulties with this provision in practice).

Two state houses recently considered bills which would have enacted some more specific components of Glendon's children-first principle. A New Hampshire proposal would have directed the court to retain divorce jurisdiction throughout the minority of any children involved, and not fully to divide the marital property until the children are all emancipated.[316] Montana legislators considered a measure which would have directed courts to "consider the best interest of the child of the marriage as the primary consideration in making a determination" of the "irretrievable breakdown" of the marriage.[317] This bill would also have authorized Montana courts to set aside a portion of the marital estate in a separate fund for the benefit of children of the marriage.[318] Both these failed measures would have required continued judicial supervision of marriages for many years after divorce. A 1997 "Parenting Plan Act" introduced by State Representative Jessie F. Dalman in Michigan would have required parents to cooperate in proposing a parenting plan, or to submit to an "alternative dispute resolution process" to devise a joint plan.[319] Failure to successfully devise such a plan would lead to a "mandatory settlement conference" if one is provided by court rule,[320] to be followed by a court hearing if the matter remains in dispute.[321] The Parenting Plan Act deliberately turns away from the concept of awarding one or both parents custody of the child, emphasizing instead the objective of having "the child reared by both the child's father and the child's mother unless it is not in the best interests of the child."[322] Accordingly, in lieu of "child custody" the bill speaks of "allocation of decision making authority" and "the child's residential schedule."[323] Similarly, "visitation" has been replaced by "parenting time."[324] Whatever parenting plan is adopted "shall contain provisions governing resolution of future disputes between the parents, allocation of decision making authority, parenting time, and the child's residential schedule."[325] The plan will specify whether one or both parents has authority over the child's education, health care, and religious upbringing.[326] Residential and parenting time provisions shall be based on the best interests of the child "that encourage each parent to maintain a loving, stable, and nurturing relationship with the child."[327]

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316. *See* H.R. 1116, 155th Leg., 2d Sess. (N.H. 1997).

317. H.R. 573, 55th Leg., Reg. Sess. (Mont. 1997).

318. *See id.*

319. H.R. 4399, 89th Leg., Reg. Sess. §§ 4-5 (Mich. 1997). The requirement to participate in an alternative resolution process is waived if "either parent has committed domestic violence." *Id.* § 5(2).

320. *Id.* § 5(3). There is no domestic violence exception to this requirement. *See id.*

321. *See id.* § 5(4).

322. *Id.* § 6(1)(a).

323. *Id.* § 6(2); *see id.* § 25 (allowing the court to designate a child's legal or physical custodian "[s]olely for the purposes of . . . legal requirements . . . such as . . . tax exemptions or health care benefits"). The bill reiterated the meaninglessness of any custodial designation by specifying that it "does not affect either parent's rights and responsibilities under the parenting plan." *Id.*

324. *Id.* § 6(2).

325. *Id.*

326. *See id.* § 8(1).

327. *Id.* § 12(1).

Ironically, this proposed parenting plan act declares a goal of encouraging parents "to meet their responsibilities to their minor children through agreements in the parenting plan, rather than by relying on judicial intervention,"[328] but the act contains almost two dozen sections of detailed regulations that require judicial elaboration and enforcement.[329] Such legislation impossibly seeks to monitor every detail of a divorced child's upbringing. In their suffocative level of enforceable oversight, the parenting plans prescribed by these laws resemble the precommitment restrictions favored by advocates of covenant marriage and expanded prenuptial contracts.[330] Both parenting plans and premarital covenants involve richly elaborated rules for governing the future, and both feature the paradox of inviting continued judicial intervention as they ostensibly rely on the privatizing principles of contract.

Parenting plan acts are better seen as rhetorical broadsides to remind couples in the "divorce culture" of their parental responsibilities. Iowa Governor Terry Branstad illustrated this phenomenon in his recent promise to promote divorce reform legislation which would replace "visitation" and "custody" with "parenting plans." Branstad observed that "'[v]isitation is something that happens at funeral homes and jails,'" while "'[c]ustody is a term that is appropriate for chattel, not children. These terms demean parents and the children who are the most unfortunate victims of divorce.'"[331] Branstad emphasized the significance of the discursive shift to "'parenting plans'" in predicting that in place of the "'win-lose atmosphere of who gets the kids, mediation and the courts will focus on who is parenting them.'"[332]

Creating sharp legal distinctions among marriages based on the presence of children aims to undermine the perceived present fluidity of marital arrangements by shoring up at least those unions which have produced children.[333] What has gone unrecognized in the present debate, however, is the unorthodox genesis of a distinction among conjugal unions based on procreation. The present counterrevolutionary impulse would have childbirth alter the legal status of a

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328. *Id.* § 6(g). Even this ostensibly simple directive to foster cooperation is conditioned on its consonance with eight other sections of the statute, which include minutely scripted regulations specifying under which circumstances parental cooperation is *not* to be expected. *See id.* §§ 6(g), 10-17.

329. *See id.* § 23. The bill specifies the differing threshold standards to be applied in motions to modify parenting plans. It prescribes a lower standard in adjudicating a request "[b]ased on a change of residence or an involuntary change in work schedule by a parent that makes the residential schedule in the parenting plan impractical to follow," or for "[m]inor modification" in the child's residential schedule, which it further defines as not exceeding "24 full days in a calendar year or 5 full days in a calendar month." *Id.*

330. *See infra* text accompanying notes 352-85.

331. Nancy Hicks, *Kids and Divorce: Can the Sting Be Eased?*, OMAHA WORLD-HERALD, Jan. 2, 1998, at 1, *available in* 1998 WL 5490084 (quoting Terry Branstad).

332. *Id.* The ideology of parenting plans thus posits that the divorce process can *improve* parenting. Governor Branstad expressed his belief that the mind-set change reflected in parenting plans should "'move the divorce process away from a fight over the children to a collaborative effort to parent those kids.'" *Id.* In literary terms, this assumption of enhanced parental commitment surfacing after marital dissolution is reminiscent of Henry James's description of Maisie's parents, who "after being perfectly insignificant together . . . would be decidedly striking apart." HENRY JAMES, WHAT MAISIE KNEW 1-2 (1897).

333. *See* Etzioni, *supra* note 32, at 76; Galston, *supra* note 22, at 22-23.

marriage. But this distinction's progenitor was surprisingly rooted in a radical assault on the conservative mores of American family life early in the twentieth century. This original view espoused greater divorce freedom for couples prior to the birth of their first child, as an exception to the prevailing death-do-us-part ideology.[334] The most famous advocate of this distinction was Judge Ben B. Lindsey, who proposed "companionate marriage" in the 1920s in two well-known—indeed, notorious—books, *The Revolt of Modern Youth* and *The Companionate Marriage*.[335] Lindsey defined companionate marriage as "legal marriage, with legalized Birth Control, and with the right to divorce by mutual consent for childless couples, usually without payment of alimony."[336] Lindsey insisted that companionate marriage was not

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334. *See, e.g.*, Melvin M. Knight, *The Companionate and the Family: The Unobserved Division of an Historical Institution*, 10 J. SOC. HYGIENE 257-67 (1924) (stating that traditional family structure has sprouted a companionate branch, due to industrialization and the proliferation of birth control); Rebecca West, *Divorce*, FORUM, Aug. 1926, at 161-70 (stating that in the absence of minor children, divorce is a private matter of no social importance).

335. BEN B. LINDSEY, THE COMPANIONATE MARRIAGE (1927) [hereinafter LINDSEY, THE COMPANIONATE MARRIAGE]; BEN B. LINDSEY, THE REVOLT OF MODERN YOUTH (1925) [hereinafter LINDSEY, THE REVOLT OF MODERN YOUTH]. The latter text became the "leading literary symbol of the American sexual revolution of the twenties." CHARLES LARSEN, THE GOOD FIGHT: THE LIFE AND TIMES OF BEN B. LINDSEY 173 (1972). Judge Lindsey's attacks on the moral ethos provoked a lively public discussion. As his biographer noted, "[p]opular magazines and Sunday supplements found the temptation to ballyhoo companionate marriage irresistible." *Id.* at 174. *See, e.g.*, *Are Changing Conventions Menacing the Marriage Institution?*, 74 CURRENT OPINION 338-40 (1923) [hereinafter *Changing Conventions*]; M.G.L. Black, *A Business Woman on Companionate Marriage*, 148 OUTLOOK 286-87 (1928); Joseph Collins, *The Doctor Looks at Companionate Marriage*, 147 OUTLOOK 492-94, 503 (1927); *Companionate Pair Just Like All Newlyweds*, L.A. EXAMINER, May 13, 1928, at 18; Charlotte Perkins Gilman, *Divorce and Birth Control*, 148 OUTLOOK 130-31, 153 (1928); *Is Marriage Breaking down?*, LITERARY DIG., Feb. 17, 1923, at 36; *Lindsey's Trial Marriage Idea Bolshevistic, Says Divorce Judge*, ST. LOUIS STAR, Mar. 20, 1928, at 3; Edward S. Martin, *Race Wars and Marriage*, 155 HARPER'S 653, 656 (1927); Fulton Oursler, *A Critic of Companionate Marriage*, 148 OUTLOOK 648 (1928); I.M. Rubinow, *Marriage Rate Increasing Despite Divorces*, 29 CURRENT HIST. 289-94 (1928).

336. LINDSEY, THE COMPANIONATE MARRIAGE, *supra* note 335, at v. Knight had earlier defined the companionate state as "lawful wedlock, entered into solely for companionship, and not contributing children to society." Knight, *supra* note 334, at 258. An echo of Knight's and Lindsey's concept appears, without acknowledgment, in Whaling, *supra* note 160, at 970-71 (stating that marriage could be contracted for a trial period, and could be terminated by consent; the couple would agree not to have children during the trial period, and the birth of a child would automatically convert the contract into a permanent marriage).

Judge Lindsey also believed it ironic that the law afforded relief in divorce court to an aggrieved wife or husband, but denied the decree when *both* spouses desired it. *See* LINDSEY, THE COMPANIONATE MARRIAGE, *supra* note 335, at 376. On this score, Lindsey's opinion was widely shared. *See, e.g.*, Anne Shannon Monroe, *When Shall a Woman Divorce Her Husband*, GOOD HOUSEKEEPING, Oct. 1921, at 74, 96 (stating that the "very thing that will positively defeat an attempt to obtain a divorce—the agreement of the two that it is the wisest course—is the one absolute reason why a decree should be granted"). Katharine Fullerton Gerould similarly ridiculed the rule that spouses were forbidden to agree on divorce:

> [W]hy do your best to prevent people's divorcing when both of them want to?

trial marriage, but rather a permanent union which was, temporarily, childless.[337]

Lindsey's ready dispensation of divorce for such couples ended abruptly, however, upon the birth of children. "The duty of the state to try to save marriages, especially when children were involved, was one of Lindsey's most fervent convictions."[338] Indeed, Lindsey viewed companionate marriage as a necessity precisely because of the failure of the marital mores of the time, which he believed harmed children, who—because of custom and the lack of birth control information—were frequently born into families who did not want them.[339] Lindsey favored mandatory pre-divorce counseling and questioned the appropriateness of allowing divorce on proof of a single instance of adultery.[340] He once reprimanded a divorce-minded couple that his court was "concerned with the right of your children to you, rather than your right to your children."[341] The special concern for children in families thus has a long pedigree.

But some critics today argue that the public policy that uplifts families with children does a disservice to childless marriages. The protection afforded to couples who procreate "turns the having of children into the real solemnization of the marriage."[342] But endowing the marriages of childless couples with a lower status, according to this view, could lead to marginally higher divorce rates among such unions.[343] Critics have similarly attacked covenant marriage laws for elevating one vision of the marital state at the cost of denigrating another, which by implication becomes "marriage lite."[344]

> The cry against divorce on the score that in most divorces one person is sacrificed becomes absurd enough when you realize that only on the basis of one person's wanting it and the other person's not wanting it is a divorce obtainable at all.

Katherine Fullerton Gerould, *Divorce*, ATLANTIC MONTHLY, Oct. 1923, at 460, 463.

337. *See* LINDSEY, THE COMPANIONATE MARRIAGE, *supra* note 335, at 139-41; LINDSEY, THE REVOLT OF MODERN YOUTH, *supra* note 335, at 175-76. Companionate marriage received a rabid treatment, both pro and con, in the popular periodicals, which also—and sometimes misleadingly—referred to it as "pal marriage," "contract marriage," "jazz marriage," "free love," and "trial marriage." Charles E. Larsen, *Ben Lindsey: Symbol of Radicalism in the 1920's*, *in* FREEDOM AND REFORM: ESSAYS IN HONOR OF HENRY STEELE COMMAGER 255, 265 (Harold M. Hyman & Leonard W. Levy eds., 1967). Noted preacher Billy Sunday referred to companionate marriage as "'barnyard marriage,'" to which Lindsey responded that Sunday "'would be burning witches and heretics if he had his way.'" LARSEN, *supra* note 335, at 175.

338. LARSEN, *supra* note 335, at 281 n.14.

339. *See Changing Conventions*, *supra* note 335, at 338-39 (paraphrasing Lindsey).

340. *See* Larsen, *supra* note 337, at 263.

341. Frank J. Taylor, *A Court To Prevent Divorce*, 103 NEW REPUBLIC 239-40 (1940), *condensed in* Frank J. Taylor, *The You Don't-Want-A-Divorce Court*, READER'S DIG., Sept. 1940, at 85-88.

342. David M. Wagner, *Divorce Reform: An Emerging Issue Laps at Legislative Shores*, WORLD & I, Jan. 1998, at 9, *available in* (visited Apr. 19, 2000) <http://www.worldandi.com/archive/mtjan98.htm.>.

343. *See id.* at 10-11.

344. Nichols, *supra* note 28, at 956 (quoting Katha Pollitt). Joel Nichols defends covenant marriage laws against these criticisms by essentially conceding their central point, that the divorce counterrevolution *aims* to demean ordinary marriages. The new statutes are designed to show couples a better marital alternative, and couples "can remedy any inferiority complex

Companionate marriage was bitterly criticized for its supposed tendency to destroy the marital institution. Yet two generations later, *all* marriages have become companionate. The present effort to solidify those marriages which are raising children bears the standard minted by the liberal Judge Lindsey, but waives it now in defense of conservative family values. At bottom, both these child-centered legal remedies rely on the power of law to influence culture. Two of the most respected social researchers on the consequences of divorce, Frank Furstenberg and Andrew Cherlin, decry the effects of divorce on children but are skeptical of legal reforms to provide relief: "'Although we would support public efforts to strengthen marriage, we are inclined to accept the irreversibility of high levels of divorce as our starting point for thinking about changes in public policy.'"[345] But more optimistic critics point to the effect that lowering the barriers to divorce had on raising the rate of divorce.[346] Since no-fault laws effectively created a right to unilateral divorce, they argue, surely raising the bar will force some dissolution-minded wives and husbands (i.e., especially those in lower-conflict relationships) to rethink their goal. For some reformers, the proposition is self-evident: "When you change the laws to make divorce quick and easy, you don't need a Ph.D. to know what will happen,"[347] states David Blankenhorn. "You'll erode the American family . . . . To me, this is like debating whether the earth is round."[348]

One approach devised to stop family erosion and slow the divorce rate consists of allowing couples to agree on a more restrictive legal framework for their marriage. Viewing marriage as a "relational contract,"[349] this view points to the prime paradox of modern divorce law: enhanced contractual liberty placed in the service of lessening individual freedom.

III. OF COVENANTS AND SUPERVOWS: CONTRACTS AT THE ALTAR

The debate about divorce policy and legislative options to strengthen marriage has fired across a landscape in which an increasing number of couples have taken marital law literally into their own hands by drafting prenuptial agreements to fix their legal rights and obligations vis-à-vis each other and the state. This Part focuses on the prospects and perils of privatizing the marriage contract. Both the theory of precommitment restrictions and its odd outcropping, the incipient Covenant Marriage movement, represent a paradigmatic shift in the divorce counterrevolution. Both seek

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. . . by opting-in to covenant marriages." *Id.* at 957. On covenant marriage, see *infra* text accompanying notes 459-68.

345. Galston, *supra* note 22, at 19 (quoting Furstenburg & Cherlin).

346. As suggested in *supra* note 11, the proposition that modern no-fault divorce laws, *independent of the cultural changes of the 1960s and 1970s*, yielded the present divorce rate is problematical. William Galston, a staunch proponent of this proposition, admits that "full scholarly returns are not yet in" and claims only that "evidence is accumulating that once instituted, no-fault laws further accelerated the pace of divorce." Galston, *supra* note 22, at 17.

347. Hanna Rosin, *Separation Anxiety*, NEW REPUBLIC, May 6, 1996, at 14.

348. *Id.*

349. Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1225 (1998).

to foster stronger marriages through alternative state-sanctioned prenuptial contracts.

This variability in the marriage contract is new. Courts have to date only infrequently considered—and generally declined to enforce—prenuptial agreements regulating the parties' behavior during marriage or the exit grounds at its end. But this judicial recalcitrance both at intervening in marital affairs and at allowing private alteration of the statutory parameters for divorce may now be overcome by an emerging legal and cultural dynamic evidenced by the rise of variegated prenuptials, the covenant marriage bills, and the Uniform Premarital Agreement Act. In short, the markers in the field of public policy for marriage and divorce are now again under construction.

A paradox looms behind the outlines of this new view of prenuptial contracting, however. Flying the banner of contractual liberty, the advocates of customized marriage seek to *limit* marital choice. Precommitment theory is grounded on voluntary agreements to restrict future freedom, and it is harnessed here in an effort to replicate the lost world of "traditional" marriages. This backward-looking campaign seeks to restore lifelong marriage, dissolvable only on proof of the commission of marital fault. But its most disturbing aspect may be the effort to reinvigorate traditional gender roles within marriage. The new paternalists criticize "selfish career building at the expense of family"[350] and call for "idiosyncratic specialization within household production"[351] in pursuit of an agenda seeking to revive an older gendered division of labor. While many continue to seek the goal of an egalitarian marriage in which roles and duties are freely and fairly negotiated, precommitment theory has yet adequately to defend itself from the charge that it is willing to sacrifice autonomy as the price of supposed greater marital stability.

Prenuptial contracts sound the drumbeat of marriage privatization. In addition to the scholarly and popular attention which prenuptial agreements have attracted,[352]

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350. Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 467 (1998).

351. *Id.*

352. *See* UNIF. PREMARITAL AGREEMENT ACT commissioners' prefatory note, 9B U.L.A. 369, 369 (1987) ("[I]t is becoming more and more common for persons contemplating marriage to seek to resolve by agreement certain issues presented by the forthcoming marriage."); Alexander, *supra* note 23, at 503 ("More and more American couples are executing premarital contracts that expressly define various legal aspects of their marriage, including their obligations to each other during marriage and upon divorce."); Baker, *supra* note 189, at 161 ("Prenuptial agreements, traditionally a tool for the rich and famous, or for widowed people remarrying late in life, now are being considered by younger couples embarking on marriage for the first time."); Bix, *supra* note 37, at 146 (noting recent popularity of prenuptial contracts and linking their rise to popular press accounts); Nancy Blodgett, *Put It in Writing: Marital Pacts on the Rise*, A.B.A. J., Oct. 1985, at 28; Elizabeth Barker Brandt, *The Uniform Premarital Agreements Act and the Reality of Premarital Agreements in Idaho*, 33 IDAHO L. REV. 539, 541 n.16 (1997); Laura P. Graham, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 WAKE FOREST L. REV. 1037, 1037 (1993) ("Premarital agreements are gaining in popularity."); Ira H. Lurvey, *Love Letters: Premarital Agreements Help Smooth Divorces—Or Do They?*, A.B.A. J., Jan. 1993, at 85; Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887, 891 (1997) (citing indications that "the number of prenuptial agreements tripled between 1978

and 1988 and has steadily increased ever since" and that the signing of a premarital contract precedes approximately 5% of all marriages and 20% of all remarriages); Lynne Reaves, *I Do . . . You Must . . . : Prenuptial Pacts Gain Favor*, 69 A.B.A. J. 1210 (1983); Cecile C. Weich, *Love on the Dotted Line: Craft a Prenuptial Agreement Carefully To Withstand Any Future Challenges*, A.B.A. J., Oct. 1994, at 50; Gary Belsky, *Living by the Rules*, MONEY, May 1996, at 100; Andre Brooks, *Wedding Bells, Dotted Lines*, N.Y. TIMES, Dec. 19, 1992, at 35; Laura Castaneda, *Inside Story About Prenuptial Agreements: Even If You're Not Rich, or Famous, It Can Pay To Have One*, S.F. CHRON., Nov. 4, 1996, at E1; Stephanie H. Dahl, *Prenuptial Agreement: Is It for You?*, MOD. BRIDE, Dec. 1990-Jan. 1991, at 326; Claudia H. Deutsch, *More Couples Are Taking No Chances on Love*, N.Y. TIMES, Aug. 13, 1995, at C10; Lisa W. Foderaro, *Prenuptial Contracts Find New Popularity*, N.Y. TIMES, Aug. 21, 1997, at B5; Sean Hargrove, *To Have and To Hold on To*, TIMES (London), Feb. 21, 2000, Features (describing Britain's first online prenuptial agreement service); *In Praise of Prenuptial Contracts*, INV. DAILY, June 7, 1991, at 8; Liz Kavanagh, *Independent Yet Committed*, TIMES (London), Feb. 29, 2000, Features ("Prenuptial agreements are gaining in popularity."); Charles Laurence, *Couple Find Fame in Fine Print*, CHI. SUN-TIMES, Feb. 18, 1996, at 32; Andrew Leckey, *Married or Divorced: Watch Finances*, ST. LOUIS POST-DISPATCH, May 17, 1996, at 5C (describing benefits of a prenuptial agreement); Noreen Marcus, *For Love and Money Prenups; Marriage Contracts—No Longer Just for the Rich*, FORT LAUDERDALE SUN-SENTINEL, Sept. 28, 1997, at 1A, *available in* 1997 WL 11404515; Lisa J. Moore, *The Art of the (Marriage) Deal*, U.S. NEWS & WORLD REP., Mar. 5, 1990, at 68 ("With nearly half of marriages ending in divorce and second unions on the rise among dual-career couples, contracts spelling out who gets what in a split are now being exchanged both before and after the vows."); Caryn Eve Murray, *Bridal Planner*, NEWSDAY, Mar. 10, 2000, at H39 (listing prenuptial agreements among routine pre-wedding tasks); Kathleen Murray, *Odd Couples and Their Odder Divorce Settlements*, COSMOPOLITAN, May 1996, at 222; *Orthodox Rabbis Working To Prevent 'Chained' Wives*, CHI. SUN-TIMES, Mar. 3, 2000, at 25 (noting that, in the most recent effort to prevent an increase of "agunah"—women caught in unhappy marriages whose husbands refuse to grant them religious divorces—eleven influential Orthodox New York rabbis have advoeated greater use of prenuptial agreements in which the wife and husband pledge—at the risk of having to pay fines—to seek arbitration from a religious court when the question of divorce arises); Karen S. Peterson, *Money Sense from Start Is Important in Marriage*, CHI. SUN-TIMES, Feb. 23, 1995, § 2, at 39 (stating that prenuptials "help you figure out the way you will go"); Judith Rehak, *Prenuptial Accords: Walking Down the Aisle and Reading Fine Print*, INT'L HERALD TRIB., Feb. 25, 1995, at 14; Julie Salamon, *Popping the Prenup Question*, NEW YORKER, Aug. 25-Sept. 1, 1997, at 70-79; Bonnie Siverd, *Til Death or Divorce Do Us Part*, BUS. WK., Apr. 9, 1990, at 87; Anita Sharpe, *Prenuptial Pacts Shield Businesses from an Heir's Ex*, WALL ST. J., June 19, 1996, at B1; Tracy Young, *Great Expectations*, VOGUE, June 1990, at 274 ("Today prenuptial agreements, like shotgun weddings, are regarded without so much as a slightly elevated eyebrow.").

Prenuptial agreements are not only more widespread but also more detailed, as one article observes:

> [P]renuptial agreements are increasingly in vogue among the middle and upwardly mobile classes. Such contracts are recognized in all 50 states, and matrimonial lawyers report that they are preparing two to five times as many as they did just five years ago . . . .
>
> . . . .
>
> No matter seems too small—Who takes out the garbage? Who does the dishes?—or too weird.

a cottage industry has emerged to assist the interested couple in drafting and negotiating these contracts. The popularity of premarital accords may be gleaned from the number of published guides for drafting them.[353] Nor is the cost prohibitive, at least for couples of middle and above-average means.[354] A prenuptial agreement form is also available on a popular computer software program aimed at the public.[355]

Although in disfavor for many years, prenuptial contracts covering a broad range of issues have increasingly achieved general broad approval. While antenuptial bargains were once condemned as facilitative of divorce,[356] that rationale has been turned on its head. The premarital contracting process is now often viewed as promoting marriage and providing a buttress to a stable union: "with the proper legal safeguards and sufficient trust between spouses, [prenuptial contracts] can be useful, even relationship enhancing, documents."[357] On the other hand, substantial concerns have surfaced that private bargains often "violate societal norms against gender discrimination,"[358] and "overwhelmingly hurt women by virtue of their inferior bargaining position."[359]

Prenuptial agreements have a lengthy history.[360] Until relatively recently, however,

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Jill Smolowe, *What Price Love? Read Carefully*, TIME, Oct. 15, 1990, at 94-95.

353. *See* Brandt, *supra* note 352, at 564 n.122 (listing such guides).

354. *See* Marston, *supra* note 352, at 893 (citing media reports quoting costs for drafting a prenuptial contract in the range of $1000 to $5000). Complex agreements will, of course, be far more expensive. *See id.*

355. *See Desktop Lawyer* (visited Apr. 6, 2000) <http://www.desktoplawyer.net/browser/index.cfm> (online prenuptial agreement service available from Desktop Lawyer); *Quicken Family Lawyer '99* (visited Apr. 6, 2000) <http://www.parsonstech.com/software/famlaw.html> (computer software supplying prenuptial agreement form).

356. *See* RESTATEMENT (SECOND) OF CONTRACTS § 190 (1981); *see also* Norris v. Norris, 174 N.W.2d 368, 369-70 (Iowa 1970) (noting unenforceability of prenuptial contracts, citing cases); RESTATEMENT (FIRST) OF CONTRACTS § 584 (1932); 24 AM. JUR. 2D. *Divorce and Separation* §§ 12, 942, 943 (1998); M.L. Cross, *Annotation: Validity, Construction, and Effect of Provision in Antenuptial Contract Forfeiting Property Rights of Innocent Spouse on Separation or Filing of Divorce or Other Matrimonial Action*, 57 A.L.R. 2D 942 (1958).

357. Marston, *supra* note 352, at 888; *see also* Brooks v. Brooks, 733 P.2d 1044, 1050 (Alaska 1987) (upholding a premarital contract and asserting that "people with previous 'bad luck' with domestic life may not be willing to risk marriage again without the ability to safeguard their financial interests"); Gant v. Gant, 329 S.E.2d 106, 112-13 (W. Va. 1985) (judicial recognition of prenuptial agreements most likely "encourage[s] rather than discourage[s] marriage"); Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 207, 207-11, 216-23, 285-86, 288-91, 328-34 (1982) (writing approvingly of the private ordering of marriage via premarital agreements). *But see* John F. Schaefer, *Why Michigan Should Divorce Antenuptial Agreements from Divorce Cases*, 76 MICH. B.J. 1076 (1997) ("[A]ll antenuptial agreements in contemplation of divorce promote and facilitate divorce . . . .").

358. Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 279 (1994); *see also* Linda J. Lacey, *Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott*, 66 TUL. L. REV. 1435, 1440-42 (critiquing precommitment restrictions from a feminist perspective).

359. Marston, *supra* note 352, at 894.

360. *See* 5 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 310-12 (3d ed. 1945). Judith T. Younger notes that by the mid-seventeenth century, prenuptial agreements were of

their use was limited largely to older widowed or divorced individuals who were about to remarry but wished to shelter wealth from their first marriages.[361] Prenuptial contracts regulating transfers of property upon the *death* of one of the spouses have long been upheld.[362] But agreements attempting to dispose of property or regulate spousal support upon *divorce* were "almost universally considered void *ab initio* as contrary to public policy."[363] The sea change in judicial review of these contracts was signaled by *Posner v. Posner*,[364] a 1970 Florida decision which held that with divorce now "such a commonplace fact of life,"[365] reasonable fiances might properly wish to agree on the disposition of property rights, including support obligations, should their prospective marriage fail.[366]

When such agreements determine the financial aspects of a marriage, they have been praised for their ability to enhance private ordering in an area of law where the official state regime has failed so many so often. By "empowering couples to commit themselves reliably,"[367] court enforcement of premarital contracts "allows the parties to structure the economic consequences of future behaviors and, by doing so, to manipulate the incentives they will face in the future."[368] The Pennsylvania Supreme Court has gone so far as to withdraw from the "business of policing the reasonableness of premarital bargains,"[369] thus expressing a vibrant—if somewhat naive—faith in the capacity of prospective spouses to be fair and reasonable with

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sufficient concern to be incorporated into the original Statute of Frauds, 29 Car. II, ch. 3 (1677). *See* Judith T. Younger, *Perspectives on Antenuptial Agreements: An Update*, 8 J. AM. ACAD. MATRIM. LAW. 1, 2 (1992).

361. *See* GREGORY ET AL., *supra* note 41, at 80.

362. *See, e.g.*, Buettner v. Buettner, 505 P.2d 600, 603 (Nev. 1973); Gross v. Gross, 464 N.E.2d 500, 504 (Ohio 1984); *Gant*, 329 S.E.2d at 112.

363. Brooks v. Brooks, 733 P.2d 1044, 1048-49 (Alaska 1987). For illustrative cases, see generally Fincham v. Fincham, 165 P.2d 209 (Kan. 1946), *modified on other grounds*, 173 P.2d 244 (Kan. 1946); Mengal v. Mengal, 103 N.Y.S.2d 992 (Dom. Rel. Ct. 1951); Motley v. Motley, 120 S.E.2d 422 (N.C. 1961); Ritchie v. White, 35 S.E.2d 414 (N.C. 1945).

364. 233 So. 2d 381 (Fla. 1970), *rev'd on other grounds*, 257 So. 2d 530 (Fla. 1972); *see also* Bix, *supra* note 37, at 151 n.20 (citing popular view of *Posner* as the "turning point for states' treatment of premarital contracts," but noting the existence of an earlier and little-noticed case upholding a prenuptial bargain with an alimony waiver in Hudson v. Hudson, 350 P.2d 596 (Okla. 1960)).

365. *Posner*, 233 So. 2d at 384.

366. While courts clearly uphold prenuptial agreements dividing real and personal property upon divorce, the status of agreements waiving spousal support is more clouded. *See* Younger, *supra* note 360, at 13.

367. Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 415 (1992).

368. *Id.* at 415-16; *see also* Marston, *supra* note 352, at 889. In the words of Mary Ann Glendon, the contractual matrix emphasizes "[i]ndividual liberty and the relative independence and equality of family members." MARY ANN GLENDON, THE NEW FAMILY AND THE NEW PROPERTY 41 (1981).

369. Recent Developments, 104 HARV. L. REV. 1399, 1400 (1991); *see also* Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 140-41 (1993). The Pennsylvania Supreme Court deemed the remedies of fraud, duress, and misrepresentation "perfectly adequate" to assure the integrity of premarital contracts. Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990).

each other.[370] Providing impetus for further acceptance of these contracts is the Uniform Premarital Agreement Act ("UPAA"), promulgated in 1983 and adopted (as of 1998) in twenty-five states and the District of Columbia.[371] The UPAA supplies a potential keyhole for unlocking the door to judicial acceptance of a far broader range of behaviorally oriented and divorce grounds-specifying agreements in its provision that spouses-to-be may enter into enforceable contracts about "any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty."[372]

Although the vast majority of premarital agreements to date have involved purely financial considerations, contemporary couples are also including behavioral terms into their premarital bargains.[373] Such contracts have generally failed to win judicial approval in the past,[374] but the rapid changes in contemporary family law may prompt a reevaluation of this form of contractual liberty.[375] This new generation of prenuptial contracts poses concerns which both extend prior analysis and branch the controlling legal principles in new directions. The weaving of contractarian discourse into the traditionalist empire of domestic relations cuts across the two conflicting trends in contemporary family law which Naomi Cahn has identified.[376] One trend, associated

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370. Most courts do review prenuptial bargains for procedural and substantive fairness, but the threshold for judicial ratification has lowered considerably in recent years. *See* Marston, *supra* note 352, at 897-99; *see also* Brod, *supra* note 358, at 294 ("Premarital agreements have a disparate impact on women—and thereby discriminate against them.").

371. UNIF. PREMARITAL AGREEMENT ACT, 9B U.L.A. 369 (1987 & Supp. 1999) (listing 25 states plus the District of Columbia in the "Table of Jurisdictions Wherein Act has Been Adopted").

372. *Id.* § 3, 9B U.L.A. 373. On the potential impact of the UPAA on prenuptial contracts seeking to regulate marital behavior and to specify the grounds for divorce applicable to a particular marriage, see *infra* text accompanying notes 373-75.

373. On premarital bargaining of behavioral issues, see generally Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879 (1988); Suzanne Reynolds, *Premarital Agreements*, 13 CAMPBELL L. REV. 343, 357-58 (1991); Shultz, *supra* note 357; Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777; Laura P. Graham, Comment, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 WAKE FOREST L. REV. 1037 (1993). Lenore J. Weitzman included many variants on "intimate contracts" in LENORE J. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW 225-333 (1981). *See also* RALPH WARNER & TONY IHARA, CALIFORNIA MARRIAGE AND DIVORCE LAW 36-39 (7th ed. 1985) (including, as possible topics for premarital contracts, decisions as to surname, birth control, children, housework, domicile, religion, a blueprint for dispute resolution, and a provision for the end of the marriage); RICKARD, *supra* note 33, at 104 (similarly mentioning "[l]ocation of marital home," "[c]areers/sources of income," and "[t]ravel").

374. *See, e.g.*, *In re* Marriage of Higgason, 516 P.2d 289, 297 (Cal. 1973) (concerning medical care); Favrot v. Barnes, 332 So. 2d 873, 875 (La. Ct. App.) (addressing sexual intercourse), *rev'd on other grounds*, 339 So. 2d 843 (La. 1976).

375. *See infra* text accompanying notes 503, 508-10.

376. *See* Cahn, *supra*, note 222; *see also supra* text accompanying notes 202-28.

with communitarians such as Mary Aun Glendon,[377] William Galston[378] and Carl Schneider,[379] focuses on the quantum of moral discourse surrounding family issues. These thinkers concludes that the no-fault divorce revolution overextended itself in reducing family exchanges into neutral commercial exchanges, with the corrosive effects of devaluing the intact family and risking the degradation of a large percentage of the new generation of children.[380] A second trend, which Cahn labels the "new morality,"[381] seeks to support the cornucopia of contemporary family arrangements, recognizing that the "private negotiation of roles"[382] appears, ironically, to have become a permanent feature of the ever-changing family matrix.[383]

Prenuptial agreements regulating the behavior of the spouses during the marriage also constitute a revival of the moral discourse which communitarians fear is fading from the American scene. At the same time, the intensely private nature of these bargains accelerates the privatization of family law which many communitarians oppose as a continuous ebbing away of culturally shared values. The tension between these two aspects of prenuptial agreements may serve as a useful dialectic in evaluating the divorce counterrevolution.

A. Save Us from Our (Later) Selves: Ulysses and the Sirens

In a landmark 1990 article, Professor Elizabeth S. Scott advanced "precommitment theory"[384] as a "framework for legal transformation of the conception of marriage from a 'nonbinding' and transitory bond to a more enduring relationship."[385] By adopting precommitment restrictions, a couple could set out in a prenuptial agreement the particularized dissolution grounds for their marriage.[386] These options might range

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377. *See* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW (1989); GLENDON, *supra* note 167.

378. *See* William Galston, *A Liberal-Democratic Case for the Two-Parent Family*, RESPONSIVE COMMUNITY, Winter 1990-91, at 14.

379. *See* Schneider, *supra* note 203. Schneider has observed that "the people the law seeks to affect themselves think in moral terms. A law which tries to eliminate those terms from its language will both misunderstand the people it is regulating and be misunderstood by them." Schneider, *supra* note 206, at 243.

380. Ellman and Lohr have aptly summarized this position: "Respectful of the limits of legal rules, and keenly aware that the law is a reflection of cultural mores as much as a source of them, this thread of thought seems sometimes to lament more than condemn no-fault, treating it as a symptom of broader social ills." Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 733.

381. Cahn, *supra* note 222, at 228.

382. *Id.* at 240.

383. For an evocative history of this contractarian trend, see generally Singer, *supra* note 203.

384. Scott, *supra* note 135, at 38.

385. *Id.*

386. *See id.* at 43-44, 79-91; *see also* Massar v. Massar, 652 A.2d 219, 223 (N.J. Super. Ct. App. Div. 1995) (affirming dismissal of wife's petition for divorce on ground of extreme cruelty in light of couple's prenuptial agreement which prohibited either party from filing for

from a legally enforceable commitment "till death do us part"[387] to milder obstacles to divorce, such as conditioning a decree on economic penalties[388] or mandating a delay prior to the award of any divorce.[389] Under Scott's rationale, for example, prospective spouses could decide that only marital fault—as they defined it—would render their marriage amenable to divorce proceedings.[390] But the fulcrum of Scott's analysis is that the couple could only adopt measures to *limit* future options, never to expand them. Thus, precommitment strategies are a major theoretical prop of the divorce counterrevolution, "represent[ing] a conscious attempt to reduce one's future options because subsequent preferences may be impulsive or contrary to one's long-term interests."[391] In Scott's scheme, these long-term interests always encompass the continuation of the marriage.[392]

The literary device often used to illustrate precommitment restrictions is Ulysses' instruction to his crew to lash him to the mast as they navigated past the Sirens, temptresses whose voices brought doom upon all who heard their song.[393] Ulysses directed the sailors to plug their own ears, and he abjured them to ignore any pleas he might make to release him from his self-imposed captivity when their vessel neared the Sirens. His crew complied, and—despite Ulysses' frantic imprecations for release upon hearing the powerfully seductive song of the Sirens—refused to loosen the ropes restraining Ulysses.[394] In adapting this episode to adumbrate her precommitment analysis, Scott casts our contemporary legal and popular culture as

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divorce on any basis other than New Jersey's no-fault ground of eighteen months separation).

387. *See* Haas, *supra* note 373 (advocating the rationality and enforceability of contracts not to divorce).

388. *See, e.g.*, Penhallow v. Penhallow, 649 A.2d 1016 (R.I. 1994) (affirming prenuptial accord allocating a substantial economic penalty to the spouse who initiated divorce proceedings).

389. *See* Scott, *supra* note 135, at 44. The prenuptial agreement at issue in *Massar*, 652 A.2d 219, effectively provided for a mandatory delay in divorce in barring either spouse from initiating divorce proceedings on the more speedily obtained fault grounds and allowed for a divoree filing only under the eighteen-month separation provision. A prenuptial contract with exactly the opposite terms has also been proposed. *See* Haas, *supra* note 373, at 924, 930 (proposing model agreement by which a couple could pledge *not* to seek a divorce on the ground of separation, but *only* to file for divorce on fault grounds, unless the entire agreement were rescinded by mutual consent).

390. *See* Scott, *supra* note 135, at 81-82.

391. *Id.* at 41.

392. *See* Alexander, *supra* note 23, at 504 ("[T]he advocates of covenant marriage want to use freedom of contract to enhance security of contract in the context of marriage... they want to throw off the traditional limits of private ordering in marriage as a means of returning to traditional marriage.").

393. *See* Deborah Hellman, *The Importance of Appearing Principled*, 37 ARIZ. L. REV. 1107, 1145 (1995) (referring to Ulysses' binding himself to the mast of his ship to avoid the temptation of the Sirens as the "classic example of self-paternalism"); *see also* Richard W. Garnett, *Why Informed Consent? Human Experimentation and the Ethics of Autonomy*, 36 CATH. LAW. 455, 499 (1996) (stating the same). *See generally* JON ELSTER, ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY (rev. ed. 1984).

394. *See* HOMER, THE ODYSSEY, bk. XII, ll. 39-54, at 177-79 (Richmond Lattimore trans., Perennial Classics, 1999) (n.d.).

the Sirenic villain, intent on eroding marital stability. Conversely, the spousal bargain represents Ulysses' self-shackling instructions, to which couples must resort because of the failure of willpower to resist the destructive allure of our cultural primacy of the alienated soul.[395] Scott advanced her proposal because of the paucity of "*legal* incentives to remain married, or even to consider thoughtfully the decision to end the marriage."[396] The scheme's key component, which constitutes a fundamental alteration of traditional matrimonial jurisprudence, is the contractual enforceability of the divorce-restraining promises jointly made by the intended spouses. Precommitment restrictions "enable the individual to adhere to the initial utility-maximizing plan,"[397] which Scott asserts will "reinforce self-control."[398] But this injection of contractual fluid into the veins of domestic relations is particularly problematic, as it insists that the goal requiring self-control is defined forever at the time of premarital contracting.[399] Although Scott addresses the "problem of 'later

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395. *See* Scott, *supra* note 135, at 40. Professor Haas made a similarly reasoned proposal, in which he postulated a couple's reflections in deciding to bind themselves to a specific marital contract:

> We are contemplating entering into a cooperative venture—marriage. That venture has various risks. Better opportunities may become available for one or both of us. The venture may not produce the return we now expect. Perhaps, for example, children are going to be more costly in time and money and less satisfying than we now think. We are only willing to enter into such a momentous venture on the condition that it can be terminated only by mutual consent—in other words, each of us can veto termination—or by a serious breach of proper spousal behavior, such as abandonment, adultery or cruelty. We recognize that either of us may want to end the marriage, and that a rule of mutual consent or marital fault may frustrate that person's pursuit of utility maximization. However, we are more concerned about the loss of children, or being left without a career (or with an etiolated one), about weakness of will, overestimation of competing opportunities, and the failure to invest adequately in the partnership because of these other concerns. We do not feel that a nonbinding commitment is sufficient protection for these risks inherent to the marital partnership under modern law. Therefore, we wish to bind ourselves to a rule that says just as entry into marriage is only by mutual consent, so, too, exit from it is only by mutual consent, excepting of course, where there is marital fault.

Haas, *supra* note 373, at 890.

396. Scott, *supra* note 135, at 9 (emphasis in original).

397. *Id.* at 42.

398. *Id.*

399. Scott accurately observes that "[w]ithdrawal, boredom, pursuit of other relationships, immersion in career, and conflict over finances, children, and other family may all weaken the resolve to sustain a lasting relationship." *Id.* at 42. But what can never be ascertained is whether the initial commitment to the success of a marriage expressed at the altar and by contract may wisely be later subordinated to some other goal *on an individual family basis*. All the psychological studies and statistical measures of divorce's impact on children deal with broad societal harms, even when case studies such as Wallerstein's detail injuries to specific families and individuals. Similarly, precommitment strategies have been feted because they will benefit—if they ultimately do—society as a whole. What is less noticed is that the fate of a particular hapless family is beyond the saving grace of any precommitment strategy.

selves,'"[400] her attempt to reconcile precommitment theory with the unpredictability of human development reveals a grave flaw in her construct, as well as providing a showcase for the danger in fully hooking marriage to the wheel of contract.

Scott begins by positing a couple whose decision to enter marriage was a "thoughtful, reflective choice."[401] With the best of intentions, however, in time this couple "may no longer share the same values, plans, and interests that supported the earlier commitment."[402] Their personal identities may have so altered that their "later selves"[403] are fundamentally different than the ones who kissed at the altar.[404] An absolute refusal to permit the later self to undo the promises made by the earlier one seriously impinges on individual autonomy. Scott acknowledges that, in the cases of individuals whose identities have substantially changed, "marital breakdown may reflect a change in long-term preferences, and divorce may be necessary to the pursuit of [their] life plan."[405] To bind such a centrally changed couple to their original contractual promises would not only prove unfair to these later selves, but would also undermine the purposes of precommitment theory itself, which is designed to supply guide rails for individual and marital long-term interests. Scott recognizes this major obstacle to her theory, but suggests that the enforceable commitments themselves will likely prevent the development of "an intolerable distance or incompatibility between spouses."[406]

Her rationale is not persuasive. Initially, note that, unlike her discussion of personal identity development,[407] Scott cites to no psychological or philosophical authorities in asserting that tighter bindings channel growth. She merely avers the sensible proposition that "[c]ooperative behavior may promote change or growth that results in compatible rather than alienated later selves."[408] But what if it does not? For couples in whom the best intentions have paved the road to conjugal hell, precommitment theory allows for no escape hatches not previously designated by the earlier, unsuspecting, selves.[409] The precommitment rationale amounts to a claim that living within the locked door of marriage will foster cozy comfort and never

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400. *Id.* at 62.

401. *Id.* at 58. Scott had earlier discussed the problem of applying precommitment theory to ill-formed or hasty decisions to marry, concluding that the costs of these permanent but doomed unions may be mitigated if precommitment mechanisms succeed in discouraging impulsive unions. *See id.* at 57-58.

402. *Id.* at 58.

403. *Id.*

404. *See id.* at 59.

405. *Id.* at 61. She thus recognizes that precommitment mechanisms "may not function correctly in cases in which one or both marital partners experience significant changes in personal identity over time." *Id.*

406. *Id.* at 62.

407. *See id.* at 59-60 nn.132-36.

408. *Id.* at 62.

409. Apparently recognizing the weakness of this part of her argument, Scott argues that not all precommitments would be improper for couples whose individual identities later fundamentally altered. She suggests that premarital contracts requiring an "extended period of delay" prior to divorce will aid such couples in assessing whether the desire for a conjugal exit is consonant with long-term or merely short-term goals. *Id.* On the problems with such extended waiting periods, see *infra* text accompanying notes 445-48.

claustrophobia. But the history of twentieth-century American divorce patterns demonstrates that even when the legal system constrained marriages by providing only fault-based exits, these formal bonds proved totally ineffective in cabining dissolution-minded spouses.[410] Scott's proposal thus aims at creating a legal scheme similar to, but more enforceable than, the old divorce fault regime.[411]

Moreover, precommitment restrictions are premised on the overly sunny assumptions about future identities made by the optimistic selves about to be wedded.[412] Indeed, employing precommitment theory to rebuild the failed fault model of dissolution harbors an ironic twist: during the hey-day of fault divorce, courts routinely refused to honor premarital contracts precisely because of the unforseeability of behavioral consequences. In the emblematic 1940 case of *Graham v. Graham*, for example, the court declined to enforce an agreement in which the husband had promised to accompany his spouse on her travels in exchange for a monthly stipend:

> There is no reason, of course, why the wife cannot voluntarily pay her husband a monthly sum or the husband by mutual understanding quit his job and travel with his wife. The objection is to putting such conduct into a binding contract, tying the parties' hands in the future and inviting controversy and litigation between them.[413]

While the worldview forbidding marital bargains has dramatically changed, the hesitation to allow couples to bind themselves to *unforseen* consequences represents a modicum of wisdom handed down by our judicious forbears. "At a minimum," Brian Bix has argued, "society should be skeptical about the ability of the earlier self to judge the interests and preferences of the later self."[414]

As we have seen, the *Odyssey* provided one image for precommitment

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410. *See* DIFONZO, *supra* note 5, *passim*.

411. *See* Lacey, *supra* note 358, at 1446-48 (criticizing Scott's "later selves" argument as particularly unfair to women).

412. Brian Bix has elaborated on the problem of applying contractual theories to parties on the brink of long-term commitments who are in the worst possible position to assess the likelihood of adverse consequences:

> Premarital agreements are good examples of contracts that illustrate problems with rational judgment, as they involve long-term planning and the consideration of possible negative outcomes at a time when the parties are most likely to be optimistic that no such negative outcome will occur. Parties need protection in this situation because they are unlikely to be able to think clearly for themselves regarding the consequences of divorce at any time, and certainly not immediately before marriage.

Bix, *supra* note 37, at 193; *see also id.* at 194 n.198 (quoting W. Somerset Maugham's dictum that "the essential element of love is a belief in its own eternity," W. SOMERSET MAUGHAM, *Red*, *in* 1 THE COMPLETE SHORT STORIES OF W. SOMERSET MAUGHAM 149, 161 (1952)); Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (reporting study results that the "*median* response of the marriage license applicants was *0%* when assessing the likelihood that they personally would divorce") (emphasis in original).

413. Graham v. Graham, 33 F. Supp. 936, 939 (E.D. Mich. 1940).

414. Bix, *supra* note 37, at 197.

restrictions.[415] But let me offer two retellings of the episode involving Ulysses and the Sirens, in a modest effort to render a different perspective on precommitments. The first version: In order to ensure that he successfully bypass the Sirens' temptation, Ulysses instructs his crew to plug their ears, fasten him to the mast, and not release him for any reason *until the vessel has made two hours' transport beyond the Sirens.* An hour after the ship has passed the Sirens, however, our hero sees on the horizon a horrible sea monster bearing down on them. Ulysses frantically attempts to have the sailors release him so he may navigate around the hazard. But the crew obeys his earlier instruction and all are swallowed by the sea serpent. A second story: Ulysses instructs the crew as in Homer's telling, but he has been *misinformed as to the nature of the threat posed by the Sirens.* As the ship proceeds, Ulysses sees Penelope and Telemachus held prisoner by the Sirens, and calling out to him to rescue them. Ulysses desperately attempts to countermand his earlier orders, telling his crew that he did not foresee this eventuality, but to no avail.

As these two brief retellings suggest, precommitment restrictions may backfire catastrophically. All precommitments involve a measure of fortune-telling, which can never safely be limned in lapidary form. In response to this point, advocates of contractual bargaining before marriage may point out that all precommitments are not created equal. For a couple to require that any divorce filing be preceded by a substantial waiting period is different than the parties' agreement that they may never divorce. Contracts to limit the grounds of divorce fall somewhere in between. But the law of unintended consequences holds sway over all precommitments.

B. Hitting the Pause Button on Divorce

Consider the extended waiting period, arguably the mildest restriction, and the one which Scott considers the "optimal precommitment."[416] The myth of impulsive divorce-seekers has resurfaced in the current counterrevolutionary rhetoric, with proposals ranging from Galston's five year delay[417] to Scott's two or three-year waiting period to "discourage impulsive divorce and provide sufficient opportunity

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415. *See supra* text accompanying note 395.

416. Elizabeth S. Scott, *Marriage as Precommitment, in* IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXTS, PROBLEMS 225 (3d ed. 1998) (excerpt of paper presented to the Communitarian Conference on Pro-Family Policies, 1996). Scott continues:

> First, a mandatory period of delay . . . creates a barrier to divorce that makes leaving the marriage more costly, and at the same time it defines the relationship as one that is not easily set aside, subtly influencing the spouses' attitudes and behavior. Beyond this, an extended waiting period promotes better decisionmaking. The spouse who is unhappy in the marriage can more accurately assess whether her decision reflects her long term interest or transitory intense preferences. In general, time is a good tool for making better decisions and avoiding cognitive errors. Finally, a waiting period undermines the ability of a spouse quickly to establish a new family, a step that dilutes interest in children of an earlier marriage.

Id. at 225-26.

417. *See* Galston, *supra* note 22, at 22.

for reconciliation."[418] But proponents of placing divorce filings on hold for an extended period "apparently think that many couples with children divorce casually . . . and that they will stop if we just make them think about it first."[419] We have, of course, heard these very arguments before. More than a generation ago, noted family law professor Monrad Paulsen observed:

> [It is] astonishing how a vision of the atypical case has dominated the discussion of divorce by consent. Debaters conjure up the vision of two insincere pleasure seekers ready for new adventures rather than the common case of a tragic, weary couple who have concluded at last that the pain should cease.[420]

There is a rich history of dealing with extended divorce waiting periods, one to which the contemporary advocates of this measure never refer. Consideration of this tapestry should answer many of the questions posed by the proponents of divorce delays, because the failure of waiting periods in the past may prove instructive to the present. Before the enactment of California no-fault divorce, twenty-three American jurisdictions had statutes allowing for divorce upon the passage of a specified time of separation.[421] The majority of these living-apart laws dated from the early years of the twentieth century. In most cases, they constituted no-fault divorce alternatives premised on the theory that dead marriages needed decent burial:

> When the marriage relationship has completely and finally broken down and the relations of the parties have reached an impasse where reconciliation is impossible and the family unit has ceased to exist, no rule or regulation promulgated by authority of the state can restore it. The object of the state's protection has ceased to exist.[422]

Accordingly, many state legislatures concluded that a prolonged period of separation would indicate the futility of all marriage-reviving measures. The initial wave of living-apart statutes required quite lengthy waiting periods. For example, North Carolina, Rhode Island, and Texas prescribed a ten-year wait in their initial legislation.[423] Washington's first such law required an eight-year separation,[424] while

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418. Scott, *supra* note 135, at 44. Scott has recently argued for a minimum "multi-year" commitment period for marriages, combined with a "notification requirement—such as a two year waiting period from the time of notification before divorce." Scott & Scott, *supra* note 349, at 1263 n.91, 1282.

419. Ellman & Lohr, *supra* note 380, at 727; *cf.* GWYNN DAVIS & MERVYN MURCH, GROUNDS FOR DIVORCE 155 (1988) ("[V]ery *few* decisions to divorce are taken impetuously . . . although our research does demonstrate that minds may change.") (emphasis in original).

420. Paulsen, *supra* note 54, at 96.

421. *See* DiFonzo, *supra* note 42, at 40-41 tbl.

422. Howay v. Howay, 264 P.2d 691, 697 (Idaho 1953); *see also* Barrington v. Barrington, 89 So. 512, 513 (Ala. 1921) (describing living-apart laws as focused not on marital fault but on the *fait accompli* of a broken marriage); Dever v. Dever, 146 A. 478, 479 (R.I. 1929) ("Any injury to the state from the dissolution of the family cannot now be cured by insisting on a continuance of a semblance of [a] marriage when the substance has long since disappeared.").

423. *See* 1907 N.C. Sess. Laws 89; 1893 R.I. Acts & Resolves 1187; 1925 Tex. Sess. Law Serv. 4629 (West).

424. *See* 1917 Wash. Laws 106.

Louisiana and Puerto Rico were satisfied with a seven-year wait.[425] These laws were not efforts to liberalize divorce grounds and smooth the path to the divorce court. On the contrary, they were legislative gambits aimed at arresting the widening use of fault grounds as entitlements to divorce.[426] But the measures failed to attract divorce-seekers, who preferred resort to readily provable fault grounds, especially mental cruelty, which would yield divorce far more rapidly than would the living-apart statutes. Legislatures responded to the paucity of living-apart petitioners by reducing the waiting periods, sometimes dramatically. Texas lowered the living-apart threshold from ten years in 1925 to seven years in 1953 to three years in 1967.[427] The pattern in Maryland commenced with a five-year pause prescribed in 1937, reduced in 1947 to three years and in 1961 to eighteen months.[428] As long as fault alternatives existed, however, the divorcing public largely ignored the living-apart statutes. In 1948, for example, only three percent of all American divorces were obtained under the living-apart laws, although such measures were in effect in seventeen states and the District of Columbia.[429]

Why did the waiting period statutes fail? The answer is suggested in a Maryland study, which found that the 6430 absolute divorces issued by that state in 1945 included 4733 on the ground of desertion, but only 319 pursuant to the living-apart law.[430] The reason for the disparity was disarmingly simple: the statute requiring a waiting period delayed divorces for five years, while a divorce on the ground of desertion was available after only eighteen months.[431] Maryland did not allow divorces for cruelty, so divorce filings gravitated into the desertion column. The study's conclusion was indisputable: divorce plaintiffs "shift the grounds alleged in order to use the more liberal . . . ones."[432] A more recent Ohio study confirmed this finding. When the state predicated a consensual, no-fault divorce upon proof of a two-year separation, only 12.6% of Ohio divorces in 1978 were granted on this ground, with the vast majority of couples choosing the speedier fault grounds.[433]

The English divorce reform experience similarly counsels against the effectiveness of waiting periods. The Divorce Reform Act of 1969[434] converted the English fault-only divorce system into one focused on irretrievable marital breakdown, which

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425. *See* 1916 La. Acts 269; 1933 P.R. Laws 46.

426. This history and argument is elaborated in DiFonzo, *supra* note 42, at 38-53.

427. *See* 1967 Tex. Sess. Law Serv. 288 (West); 1953 Tex. Sess. Law Serv. 91 (West); 1925 Tex. Sess. Law Serv. 4629 (West).

428. *See* 1961 Md. Laws 104; 1947 Md. Laws 240; 1937 Md. Laws 396.

429. *See* PAUL H. JACOBSON, AMERICAN MARRIAGE AND DIVORCE 125 (1959).

430. *See* CARL N. EVERSTINE, MARYLAND LEGISLATIVE COUNCIL, DIVORCE IN MARYLAND 17 (1946).

431. *See id.* at 19.

432. *Id.*

433. *See* Robert E. McGraw et al., *A Case Study in Divorce Law Reform and Its Aftermath*, 20 J. FAM. L. 443, 464 (1982); *see also* Alan H. Frank et al., *No-Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary*, 58 NEB. L. REV. 1, 47 n.180 (1979) (citing Wisconsin statistics that when the state reduced its required separation period from five years to one year, the percentage of couples choosing no-fault divorce rose from 3% or 4% to only 8% or 9%, with 86% still obtaining divorces on grounds of "cruel and inhuman treatment").

434. Divorce Reform Act, 1969, ch. 55 (Eng.).

could be shown in any of five ways: adultery, cruelty, desertion for two years, separation for two years upon mutual consent, and separation for five years otherwise.[435] Reform advocates believed that divorce rates would stabilize, and that the bulk of the divorces would fall into the two categories that premised a finding of irretrievable breakdown on the lapse of a waiting period. Instead, the reform resulted in a vast increase in the number of divorce suits,[436] and specifically a flood of petitions seeking divorce on the ground of cruelty.[437] After the no-fault reforms, the percentage of divorce petitions alleging cruelty rose from 17.7% in 1971 to 41.4% in 1986.[438] During that same period, the percentage of all fault-based petitions never fell below 61.4%, despite the presence of the two new no-fault divorce options.[439] The proliferation of divorce petitions alleging misbehavior represented the clear victory of ready divorce over any slower alternative. Waiting periods, even for as short a period as two years, have never significantly slowed divorce if fault or other alternatives remain available.

But under the new dispensation proposed by the advocates of premarital contracting, alternatives to waiting periods may *not* remain available. Scott argned that mandatory delay before divorce could be either legislatively imposed[440] or negotiated as part of a prenuptial agreement.[441] Professors Rasmusen and Stake have called for the enforcement of a wide range of private agreements regarding divorce grounds and the terms of an ongoing marriage.[442] Their proposal would certainly include the contractual enforceability of lengthy pauses before divorce. But *mandatory* waiting periods would likely result in preventing remarriage,[443] promoting cohabitation with the possibility of out-of-wedlock births,[444] enhancing the likelihood that the spouse most anxious for the divorce will bargain away financial considerations,[445] and delaying the rebuilding of lives after the break-up of a marriage that is now "legally intact but factually dead."[446] These considerations strongly

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435. *See id.*; *see also* MARY ANN GLENDON, STATE, LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE UNITED STATES AND WESTERN EUROPE 194-96 (1977); WILLIAM LATEY, THE TIDE OF DIVORCE 152-60 (1970); George G. Brown, *Divorce Reform Act 1969*, 120 NEW L.J. 74, 74-75 (1970).

436. *See* LAW COMMISSION, *supra* note 166, at 6.

437. *See id.* at app. b.

438. *See id.*

439. *See id.*

440. *See* Scott, *supra* note 135, at 87 n.199.

441. *See id.* at 44.

442. *See* Rasmusen & Stake, *supra* note 350, at 464-65.

443. Ellman and Lohr observe that remarriage of the parent with primary custody can be beneficial both to that parent and to the child. *See* Ellman & Lohr, *supra* note 380, at 727 & n.29; *see also* Lacey, *supra* note 358, at 1457 ("[D]ivorce almost always leaves the woman as the custodial parent financially worse off than the man. Mandatory delay would only exacerbate this situation.").

444. *See* Ellman & Lohr, *supra* note 380, at 730.

445. *See id.* at 731. "Fans of fault often make the mistake of thinking that fault laws protect the innocent. They do not. They protect the person who does not care about delaying the divorce, at the expense of the person who does—and who may have very good reasons for wanting out." *Id.*

446. *Id.* at 732.

counsel against mandatory separation periods. A period of reflection prior to divorcing would appear a highly prudential choice for a couple, both before and during a separation.[447] What is objectionable is compulsion, whether the strong-arm tactics are employed by the State or by the "earlier selves" now fundamentally changed.

C. Covenant Marriage Laws: Enacting the Freedom To Make a Binding Commitment

Bills introduced in various state houses in the 1990s proposed a version of Scott's contract marriage option for couples who desired to enter into connubial relationships impervious to unilateral no-fault divorce.[448] These bills aimed, in the words of an Illinois measure, at differentiating between two types of state-sanctioned unions, a "marriage of commitment" and a "marriage of compatibility."[449] Termed the "Marriage Contract Act," the Illinois bill would have allowed couples to enter into binding contracts providing that the "marriage of the parties shall not be dissolved or otherwise modified except by mutual consent of the parties or upon a showing by a preponderance of the evidence by one party of the fault of the other party."[450] While these measures did not purport to offer couples the broad contractual freedom encompassed by the precommitment rationale, they create an opening for a variable marriage contract.

Steven Nock, a University of Virginia sociology professor who will spend the next five years tracking the phenomenon for the National Science Foundation, observed that "we are on the front end of a covenant marriage boom that could sweep across the nation."[451] The first marriage contract bill to achieve passage was Louisiana's

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447. *See* Gordon, *supra* note 214, at 1464 (recommending specified "reflection" time in lieu of separation period). England has now moved to a position in between Gordon's reflection period and a traditional separation period. The Family Law Act of 1996 provides for divorce on the sole ground of irretrievable marital breakdown, but the decree may only be entered after a nine-month period for "reflection and consideration." Family Law Act, 1996, ch. 27, §§ 3(1)(a), 5(1)(c), 7(1)-(3) (Eng.). Given other built-in statutory delays, the English divorce process now imposes an overall delay of at least twelve months, which can be extended an additional six months by either party or if there are children six years of age or younger. *See id.* § 7(10), (11)(b); MARYLY LA FOLLETTE & ROBERT PURDIE, A GUIDE TO THE FAMILY LAW ACT 1996, at 16 (1996).

448. *See* H.R. 2095, 89th Leg., 1st Sess. (Ill. 1995); S. 5532, 54th Leg., 1st Sess. (Wa. 1995); S. 605, 142d Gen. Assembly, Reg. Sess. (Ga. 1994); H.R. 247, 162d Leg., Reg. Sess. (Miss. 1994); H.R. 1271, 162d Leg., Reg. Sess. (Miss. 1993); H.R. 1585, 11th Leg., Reg. Sess. (Fla. 1990). Indiana state representative Dennis Kruse discusses his bill providing a "covenant marriage" option in Dennis Kruse, *Covenant Vows*, INDIANAPOLIS STAR, Mar. 12, 1996, at A5. The debate over the introduction of new covenant marriage bills continues into the present decade. *See* H.J. Cummins, *Covenant Vows Would Make Parting Harder*, MINNEAPOLIS STAR TRIB., Jan. 5, 2000, at 1A (discussing introduction of new Minnesota covenant marriage bill); B.G. Gregg, *Lawmaker Wants Divorces Harder To Obtain*, DET. NEWS, Feb. 15, 2000, at D1 (discussing introduction of similar Michigan bill).

449. H.R. 2095, 89th Leg., 1st Sess. (Ill. 1995).

450. *Id.*

451. Cummins, *supra* note 448, at 1A.

"covenant marriage" law of 1997.[452] This statute created an entirely new class of marriage, defined as a union between "one male and one female who understand and agree that the marriage between them is a lifelong relationship."[453] The new law precludes couples who have chosen "covenant marriages" from access to the state's liberal living-apart divorce ground, which grants divorce after only a six-month separation.[454] The new law mandates counseling for parties seeking to choose this marital option, and it ostensibly seeks to reestablish the fault basis of divorce jurisprudence: "Only when there has been a complete and total breach of the marital covenant commitment may the non-breaching party seek a declaration that the marriage is no longer legally recognized."[455] In 1998, Arizona became the second state to adopt a covenant marriage option.[456] A bevy of covenant marriage bills have been proposed in states throughout the country.[457]

Covenant marriage laws represent the most recent thrust of the movement to undo the excesses of the no-fault revolution. The proponents of this marital alternative aim fundamentally to reshape the discourse of domestic relations. The new law not only defines covenant marriage as a "lifelong relationship,"[458] it explicitly requires the spouses making such a commitment to "solemnly declare that marriage is a covenant between a man and a woman who agree to live together as husband and wife for so long as they both may live."[459] The statute is awash with requirements for specific party acknowledgment of these refitted traditional terms of marital obligation. Not only must the prospective covenant partners declare their intention to pledge their everlasting troth on their marriage license application, they must each execute and file a separate "declaration of intent to contract a covenant marriage."[460] This recitation "to love, honor, and care for one another as husband and wife for the rest of our

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452. H.R. 756, 1997 Leg., 1st Sess. (La. 1997) (codified as LA. REV. STAT. ANN. §§ 9:272-275.1 (West 1997 & Supp. 2000)).

453. LA. REV. STAT. ANN. § 9:272(A) (West 1997). On its face, the statute thus seeks to prevent same-sex couples from obtaining the benefits of a covenant marriage. On same-sex marriage, see Baehr v. Lewin, 852 P.2d 44, 68 (Haw. 1993) (remanding to determine if state could offer a compelling justification, as required by state constitution, why same-sex marriage should be prohibited); WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE (1996); Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 96 (describing the constitutional arguments supporting same-sex marriage as "strained and diversionary"); Fenton Johnson, *Wedded to an Illusion: Do Gays and Lesbians Really Want the Right to Marry?*, HARPER'S, Nov. 1996, at 43-50 (suggesting that same-sex unions may support relationships both broader and deeper than traditional marriage).

454. LA. CIV. CODE ANN. art. 103 (West 1999).

455. LA. REV. STAT. ANN. § 9:272(A) (West Supp. 2000).

456. *See* ARIZ. REV. STAT. §§ 25-901 to -906 (Supp. 1998).

457. *See, e.g.*, Lynne Marie Kohm, *A Comparative Survey of Covenant Marriage Proposals in the United States*, 12 REGENT U. L. REV. 31, 41-51 (1999-2000) (discussing covenant marriage proposals of many states).

458. LA. REV. STAT. ANN. § 9:272(A) (West Supp. 2000). The implicit promise that the statute actually legislates a "lifelong relationship" is, however, misleading. *See infra* text accompanying notes 474-75.

459. LA. REV. STAT. ANN. § 9:273(A)(1) (West Supp. 2000).

460. *Id.* § 9:272(B).

lives"[461] contains statutorily-prescribed terms which resemble the full disclosure requirements of prenuptial contracting:[462]

> We have chosen each other carefully and disclosed to one another everything which could adversely affect the decision to enter into this marriage. We have received premarital counseling on the nature, purposes, and responsibilities of marriage. We have read the Covenant Marriage Act, and we understand that a Covenant Marriage is for life. If we experience marital difficulties, we commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling.[463]

The parties must also submit an affidavit affirming their completion of premarital counseling from a member of religious clergy[464] or from a marriage counselor.[465] The required counseling must include:

> a discussion of the seriousness of covenant marriage, communication of the fact that a covenant marriage is a commitment for life, a discussion of the obligation to seek marital counseling in times of marital difficulties, and a discussion of the exclusive grounds for legally terminating a covenant marriage by divorce or by divorce after a judgment of separation from bed and board.[466]

The parties must also submit a notarized attestation from the counselor specifying that the parties were counseled in the manner prescribed by the statute and that they received from the counselor the state attorney general's informational pamphlet which reiterates the terms of the Covenant Marriage Act.[467]

The statute thus imposes two different counseling requirements. Initially, the couple must have received premarital counseling focused on covenant marriage's emphasis on lifelong unions and on the provisions of the statute itself. Although the statute requires a "discussion" of these various aims, it prescribes no particular form for this pre-entry counseling. Thus, an informational session in which the key points of the statute are simply summarized would apparently comply with this unspecific "counseling" requirement.[468] The second mandatory counseling facet of the covenant marriage statute involves the couple's expressed commitment to avail themselves of counseling in the event of problems *during* marriage. The couple's declaration of

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461. *Id.* § 9:273(A)(1).

462. *See* Younger, *supra* note 360, at 18-28.

463. LA. REV. STAT. ANN. § 9:273(A)(I) (West Supp. 2000).

464. The sources for religious counseling are designated as "a priest, minister, rabbi, clerk of the Religious Society of Friends, and clergyman of any religious sect." *Id.* § 9:273(A)(2)(a).

465. *See id.*

466. *Id.*

467. *See id.* § 9:273(A)(2)(b). Couples already married may subject themselves to the new legislation by renewing their vows in covenant marriage terms, following a procedure virtually identical to that for unmarried couples. *See id.* § 9:275; *see also* Carriere, *supra* note 211, at 1705-10 (arguing that the counseling requirement mandated by the covenant marriage statute is superficial and misdirected).

468. *See* Carriere, *supra* note 211, at 1707-08 (contrasting effective premarital counseling programs with the minimal Covenant Marriage requirement, which "may be reduced to an empty formality").

intent states: "[W]e commit ourselves to take all reasonable efforts to preserve our marriage, including marital counseling."[469] Both the utility and enforceability of this "obligation"[470] are questionable.[471]

Louisiana divorce grounds available to parties *not* covered by covenant marriage include separation for six months, adultery, and the defendant spouse having been sentenced to death or imprisonment at hard labor following commission of a felony.[472] Ironically, the Covenant Marriage Act substantially expands the available grounds for divorce for its signatories. A spouse to a covenant marriage may obtain a divorce on these fault grounds: if the other spouse has committed adultery or a felony (and in the latter case sentenced to death or imprisonment for hard labor), abandoned the matrimonial home for one year, or physically or sexually abused the spouse seeking the divorce or a child of one of the spouses.[473] And either covenant spouse may obtain a divorce after a separation for two years.[474]

The appearance of a no-fault provision in the Covenant Marriage Act, after the quantum of traditional rhetoric employed by the drafters, seems surprising. The original House Bill (No. 756) did not contain the provision. In a contentious process, the two-year separation ground was added in the state senate, and ultimately agreed to after a conference committee report. In fact, not only is the existence of a no-fault, separation ground surprising in this type of legislation, but the brevity of the required separation—two years—takes Louisiana merely two steps back in its own history. Louisiana enacted its first living-apart statute in 1916, allowing for a no-fault divorce

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469. LA. REV. STAT. ANN. § 9:273(A)(1) (West Supp. 2000).

470. The affidavit attesting that the couple have received pre-entry counseling refers to the requirement to obtain counseling during marriage as an "obligation." *Id.* § 9:273(A)(2)(a).

471. *See* Carriere, *supra* note 211, at 1710-15. *See generally* Melissa Lawton, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471 (1998) (concluding that covenant marriage statutes are constitutional).

472. *See* LA. CIV. CODE arts. 102-103 (1972) (West 1999).

473. *See* LA. REV. STAT. ANN. § 9:307(A)(1)-(4) (West Supp. 2000).

474. *See id.* § 9:307(A)(5). Louisiana law provides another route to divorce for covenant spouses. They may also obtain a divorce if they have been separated for one year after a judgment of separation from bed and board. *See id.* § 9:307(A)(6)(a). Parties with such a judgment who have a minor child, however, must be separated for eighteen months before obtaining a divorce, unless the judgment of separation had been premised on the abuse of a child of one of the parties, in which case the separation need only last one year. *See id.* § 9:307(A)(6)(b). A judgment of separation from bed and board is available to covenant spouses upon proof of adultery, felony (with a sentence of death or imprisonment at hard labor), abandonment for one year, physical or sexual abuse of the spouse seeking the divorce or of a child of one of the spouses, two-year separation, or "habitual intemperance of the other spouse, or excesses, cruel treatment, or outrages of the other spouse, if such habitual intemperance, or such ill-treatment is of such a nature as to render their living together insupportable." *Id.* § 9:307(B). Note that the statutory scheme is designed to avoid the easy route to a divorce decree historically provided by the broad expansion of the ground of cruelty to encompass emotional components. Mental cruelty is thus defined in restrictive terms. More significantly, it may not serve as a divorce ground, but only as a ground for a judgment of separation from bed and board in covenant marriage. On the plasticity of the mental cruelty ground for divorce, see DIFONZO, *supra* note 5, at 51-54, 60-61, 105-06.

on the separation of the parties for seven years.[475] In 1932, the time period required before filing for a no-fault divorce was shortened to four years.[476] The legislature halved the waiting period in 1938, allowing a spouse to file a no-fault divorce after a separation of two years.[477] In 1979, the period was lessened to one year,[478] and in 1991 to six months.[479] Thus, for over forty years in recent history—from 1938 until 1979—the required living-apart time for Louisiana's only no-fault divorce ground was identical to the separation period prescribed now under the covenant marriage option.[480]

A flurry of covenant marriage bills were introduced in the states in 1997-98.[481] In general, the wording of the bills tracks the language of the Louisiana statute, but several interesting modifications appear. The Arizona bill, the only one to have passed to date, parallels its Louisiana predecessor, but adds the divorce ground of mutual consent.[482] In Missouri, a covenant marriage bill introduced in 1998 would have extended the living-apart requirement for covenant spouses seeking a no-fault divorce to three years.[483] A Minnesota senate bill provided that no petition requesting a dissolution of a covenant marriage could be filed unless both spouses had completed a "six-month marital counseling course which emphasized the principles of reconciliation, of no less than 60 hours of actual counseling time, consisting of three months of individual counseling and three months of counseling as a couple."[484] The bill also provided that covenant spouses seeking to obtain a no-fault divorce must wait out a separation period of five years.[485]

Some covenant marriage bills contain radical departures from the reigning no-fault jurisprudence. A recent Alabama proposal retains the separation period for covenant divorce at two years and requires the completion of a twenty-four week marital counseling program "emphasizing principles of reconciliation."[486] But the statute restricts the availability of this no-fault divorce option to covenant couples who have no minor children.[487] Thus, couples in a covenant marriage who desired to end their relationship in a no-fault manner would have to wait until their children reached the

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475. *See* 1916 La. Acts 269. On the history of living-apart divorce statutes, see DiFonzo, *supra* note 42, at 38-53; Bennett Wolff, Comment, *The Best Interest of the Divorcing Family—Mediation Not Litigation*, 29 LOY. L. REV. 55, 58-62 (1983).

476. *See* 1932 La. Acts 31.

477. *See* 1938 La. Acts 430.

478. *See* 1979 La. Acts 360.

479. *See* 1991 La. Acts 918.

480. The relatively minor disparity between the two-year living-apart period required for divorce under a covenant marriage and the six-month provision for a conventional divorce suggests that the vocal debate over covenant marriage has more to do with unease over this exercise of the hortatory function of government than with any specific restriction on divorce itself.

481. *See supra* note 457.

482. *See* ARIZ. REV. STAT. §§ 25-901 to -906 (Supp. 1998). The mutual consent ground is contained in § 25-903(8) ("The husband and wife both agree to a dissolution of marriage.").

483. *See* H.R. 1864, 89th Leg., 2d Sess. (Mo. 1998).

484. S. 2935, 80th Leg., Reg. Sess. (Minn. 1997).

485. *See id.*

486. S. 606, 1998 Leg., Reg. Sess. (Ala. 1998).

487. *See id.*

age of majority. A Mississippi proposal would allow a covenant divorce only upon proof of adultery.[488] Incredibly, the bill would specifically revive the hoary doctrines of recrimination and collusion in covenant divorce cases.[489] The application of these doctrines would thus deny a divorce in cases in which the petitioning spouse had also committed adultery, or in which both spouses agreed on falsely alleging that one of them committed adultery. No clearer illustration of the irony of the back-to-fault movement can be imagined than this bill, which would allow the dissolution of a covenant marriage when one spouse—despite the statutorily specified pledges of lifelong fidelity sworn to at the outset of the covenant relationship—violated the marital vows by committing adultery, but by refusing to divorce such a couple when *both* spouses had proven unfaithful.

Given the significant reintrusion of the state into the more intimate details of the marriage contract which the covenant marriage bills propose, it seems paradoxical to suggest that covenant marriage may prove a gateway for increased privatization of the marital institution. Yet covenant marriage crosses a new line in family law, one whose significance may not be properly appreciated amid the publicity surrounding the question whether covenant marriage will strengthen marriage and promote a decline in the divorce rate.[490] For the first time in American history, the nature of the marriage contract has been rendered variable by direct state action. In other words, before the advent of covenant marriage, the married couple in the basement apartment always had exactly the same marriage contract as the married couple upstairs. To this proposition, two exceptions might immediately occur: common law marriage and couples who have executed a prenuptial agreement.

Common law marriage does represent, in one sense, the apogee of privatization: no license, no approved minister, no formalities of any kind.[491] Yet official recognition of common law unions has markedly decreased, from a majority of approving jurisdictions in the nineteenth century, to only a dozen today.[492] But the most compelling reason to reject common law marriage as a model for privatization is that, even to the limited extent to which it has been recognized, common law marriage usually seeks to replicate the state-sanctioned marriage contract, not to replace it with one of the parties' own devising.

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488. *See* H.R. 1201, 1998 Leg., Reg. Sess. (Miss. 1998).

489. *See id.* Recrimination is the largely discredited doctrine that a divorce is only available to an *innocent* spouse and thus must be denied in any case in which *both* spouses have been guilty of violating their marital vows. Collusion, which has similarly fallen into disuse, bars a divorce in cases in which both spouses have falsely alleged a marital offense. *See* GREGORY ET AL., *supra* note 41, at 214-15.

490. *Compare* Lynne Marie Kohm, *Covenant Marriage Endorses Lifetime Vows*, VIRGINIAN-PILOT & LEDGER-STAR, Feb. 21, 1998, at B8, *available in* 1998 WL 5537348, *with* Linda Valdez, *Legislating Marriage an Insult to Human Relationships*, ARIZ. REPUBLIC, Feb. 20, 1998, at B4, *available in* 1998 WL 7752148.

491. *See generally* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 45-62 (2d ed. 1988); Hon. John B. Crawley, *Is the Honeymoon Over for Common-Law Marriage: A Consideration of the Continued Viability of the Common-Law Marriage Doctrine*, 29 CUMB. L. REV. 399 (1998-99).

492. *See* Cynthia Grant Bowman, *A Feminist Proposal To Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 715 (1996).

Prenuptial agreements have, on the other hand, anticipated covenant marriage's creation of an alternative marital contract. And the flip side of that proposition is equally true. Legislative sanction of covenant marriage serves to validate the heart of prenuptial bargaining, that the couple knows best. What covenant marriage adds to the already well-established movement favoring prenuptial agreements, however, is an emphasis on shifting divorce grounds and on regulating the behavior of the parties during the marriage. The terms of the "declaration of intent to contract a covenant marriage" specify the detailed commitments of the parties to each other, and provide the framework for satisfying the contractual prerequisites for enforceability. Indeed, the construction of a divorce scheme limited to covenant spouses delineates the state's method of enforcing this form of prenuptial agreement.

Intrepid couples have sporadically been expanding the boundaries of prenuptial contracts for half a century, with mixed results.[493] The passage of covenant marriage laws, as well as the broad discussion of marital contracts engendered, may be linked to another weapon in the quest for expanding marital options. The Uniform Premarital Agreement Act contains an unheralded but potentially explosive clause concerning the extension of prenuptial agreements to cover behavioral issues.[494] Section three of the UPAA relates to the permissible content of prenuptial bargains.[495] The first six paragraphs of section 3(a) relate to financial issues and the seventh to choice of law governing the construction of the agreement.[496] The eighth paragraph specifies that parties may contract about "any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty."[497] The official comment to this section indicates that the permissible matters listed in the demarcation of the boundaries "are intended to be illustrative, not exclusive."[498] This hint about the UPAA's expansive nature is made explicit in the specific comment for section 3(a)(8). Subject to the limitations of public policy and criminal statutes, a prenuptial agreement "may provide for such matters as the choice of abode, the freedom to pursue career opportunities, the upbringing of children, and so on."[499]

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493. See the cases cited in Graham, *supra* note 352, at 1043-49, and Younger, *supra* note 360, at 15 n.71. Courts have sometimes upheld rather substantial modifications of the traditional marriage contract. *See* Stadther v. Stadther, 526 So. 2d 598, 598-99 (Ala. Civ. App. 1988) (upholding provision that wife was to receive the marital home, a lump-sum payment, and periodic alimony if, after marriage, husband drank excessively or caused bodily injury or mental cruelty to the wife, and such actions led to a divorce); MacFarlane v. Rich, 567 A.2d 585, 589-90 (N.H. 1989) (validating a provision that if husband left wife for another woman and a petition for divorce was filed by either party as a result, the prenuptial agreement would become void and all matters relative to property division and spousal support would be determined by otherwise applicable state law).

494. *See* Graham, *supra* note 352, at 1038.

495. *See* UNIF. PREMARITAL AGREEMENT ACT § 3, 9B U.L.A. 373 (1987).

496. *See id.*

497. *Id.* § 3(b) provides that the "right of a child to support may not be adversely affected by a premarital agreement." *Id.*

498. *Id.* § 3 cmt., 9B U.L.A. 374.

499. *Id.*

Professor Younger has expressed skepticism that the UPAA's "personal rights and obligations"[500] language will expand the scope of prenuptial agreements, reasoning that since the judicially constructed contours of public policy remain unchanged, courts are unlikely to find that the UPAA "empowers them to enforce previously unenforceable provisions."[501] But the whirlwind of cultural and legal change which the divorce counterrevolution represents may well encourage courts to seek to re-examine the outer limits of public policy.[502] In short, an expansive reading of the UPAA more closely dovetails with the evolving social policy favoring private ordering.

Amitai Etzioni noted that covenant marriage "provides couples with a ready-made contract that, like all contracts, becomes enforceable by the state once it is entered into freely."[503] Etzioni perceived that the covenant marriage contract may be viewed as a "new form of prenuptial agreements, focused not on what happens to assets if the couple divorces, but on how to make divorce less likely."[504] The covenant marriage option thus supports the growth of more behaviorally oriented provisions in prenuptial agreements, as well as to different conceptions of marriage itself. Once the atom of marriage has been split, legal fission will be difficult to resist: "A legal system that recognizes both 'standard marriage' and 'covenant marriage,' with no basis in principle for preferring one over the other, may likewise have no basis in principle for refusing to create such categories as 'trial marriage,' 'plural marriage,' or 'same-sex marriage.'[505] We are in a transition to a new regime of variable marriage, whether the state designs the new marital tiers itself, or foments (and then seeks to funnel) the imagination of couples drafting their own covenants. Both the covenant marriage acts and the UPAA, as well as the rising tide of prenuptial variations, converge in the direction of wide-ranging marital choice. But customized marriage comes with a steep price.

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500. *Id.* § 3(a)(8), 9B U.L.A. 373.

501. Younger, *supra* note 360, at 16.

502. *See* Graham, *supra* note 352, at 1038-39.

503. Amitai Etzioni, *Marriage Covenant Allows Couples To Reject Too-Easy Divorce*, ST. LOUIS POST-DISPATCH, Aug. 20, 1997, 7B, *available in* 1997 WL 3361116.

504. *Id.* At least one covenant marriage bill, introduced in California, has recognized the connection between covenant marriage and other prenuptial accords. *See* S. 1377, 1997 Leg., Reg. Sess. (Ca. 1998). The bill provides that the covenant marriage declaration "shall not be deemed a premarital agreement . . . and shall not be subject to the provisions of the Uniform Premarital Agreement Act." *Id.* Denial of such recognition to covenant marriage declarations would only be necessary if these contracts were otherwise proper prenuptial agreements, subject to the UPAA. *See also* Heidi Graves, *Stronger Promises, Families*, MINNEAPOLIS STAR TRIB., Jan. 20, 2000, Letters (describing a covenant marriage as "the best prenuptial agreement on the planet").

505. Wagner, *supra* note 342, at 297.

D. The New Paternalism in the Guise of Free Bargaining

The case for supervows is strong. Particularly in the face of the damage suffered by the children of failed marriages,[506] it seems quite reasonable to "permit people to really *bind* themselves to a permanent and exclusive marriage, by reinforcing the personal commitment with the force of law."[507] Moreover, entirely apart from the societal interest in preserving and strengthening marriage, the attraction of permitting couples to bind themselves as tightly as they wish lies in the pull of contractual freedom.[508] Contract is, after all, a prime tool for channeling expectations to enhance planning in personal and structural terms. Why should contractual flexibility be excluded from the ambit of marital affairs, some argue, since "even intimate interaction can be predicted and explained by concepts such as reciprocity, cost/benefit analysis, outcome maximization, and interpersonal equity."[509] A supporter of supervows makes explicit the comparison to commercial contracts:

> One of the problems with protecting a law that allows people to make and break all important personal commitments is that it actually eliminates a right that many people want: the right to make a permanent commitment that the law will respect. If we imposed "unilateral no-fault breach of contract" on business law, allowing people to reject their commercial contracts because they no longer felt like being bound by them, commerce would collapse.[510]

Indeed, some proponents of premarital bargaining are so enamored of the freedom of contract that they would *require* couples to negotiate a prenuptial agreement:

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506. *See supra* text accompanying notes 277-81.

507. Christopher Wolfe, *The Marriage of Your Choice*, FIRST THINGS, Feb. 1995, at 37-38 (emphasis in original).

508. A full discussion of the many sided relationship between the family and contracts is beyond the scope of this Article. For an overview, see CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW 307-98 (1996); Margaret F. Brinig, *Economics, Law, and Covenant Marriage*, GENDER ISSUES, Winter-Spring 1998, at 4; June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change and Divorce Reform*, 65 TUL. L. REV. 953, 977-79 (1991); Schneider, *supra* note 181, at 1828-33; Scott, *supra* note 135, at 70-94; Scott & Scott, *supra* note 349, at 1237-63; Stake, *supra* note 367, at 415-53; Weisbrod, *supra* note 373, at 796-814. The majority of the scholarship in this area bears a law and economics orientation, focusing on "incentives in individual bargaining." *Id.* at 778 n.2.

509. Shultz, *supra* note 357, at 256. Scott and Scott observe that a "contractual framework . . . assumes explicitly that autonomous individuals frequently will pursue their own ends by voluntarily restricting their future freedom through enforceable legal commitments to others; indeed, often it will not be possible to pursue individual ends in any other way." Scott & Scott, *supra* note 349, at 1232.

510. Wagner, *supra* note 342, at 293. The comparison of commerce to marriage is, of course, flawed. The consequences of a sour business deal may be devastating financially, but do not rise to the emotional fire of a hurtful marriage's impact on both emotional and physical health. In the words of a critic of covenant marriage, "We are not talking about a business partner but about the person you wake up in bed with every morning, the person who in a thousand ways large and small shapes what your life and your children's lives can be." Katha Pollitt, *What's Right About Divorce*, N.Y. TIMES, June 27, 1997, at A29.

"Mandatory contracts will allow divorce law to move forward, recognizing the plurality of marriages that exists today and better providing for partners at dissolution."[511]

But supervows accentuate the paradox at the heart of contract. The individualist impulse collides with the desire to limit future individualism. Contractual understandings allow for greater individual scope of action, but still "[e]very contract reduces freedom."[512] When extended to family governance, the full panoply of judicially enforceable duties and consequences appropriate in a business setting distorts the fundamentals of family life, because commercial remedies are simply too blunt or ill-suited to the task of structuring intimacy.[513] What Carol Weisbrod termed the "skeptical position"[514] in this domestic dialogue asserts that "there are radical and finally insurmountable tensions between the ideas represented by contract and family."[515]

The promises made at the altar are better understood as moral obligations rather than contractual undertakings.[516] To insist on the business nature of marriage vows not only demeans their importance, but emphasizes enforcement at the cost of the very trust most beneficial to the fulfillment of those vows. It is in the nature of

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511. Kaylah Campos Zelig, *Putting Responsibility Back into Marriage: Making a Case for Mandatory Prenuptials*, 64 U. COLO. L. REV. 1223, 1224 (1993); *see also* Stake, *supra* note 367, at 400 ("[N]o change in the law could do more to facilitate private ordering of property and income after divorce than a requirement that couples choose their own futures.")

512. Rasmusen & Stake, *supra* note 350, at 466.

513. This discussion does not suggest that financial considerations are unimportant in family law, particularly in connection with the dissolution of a marriage. Judicially sanctionable obligations to divide property and pay child and spousal support will remain a fixture of domestic relations. *But see* David L. Chambers, Comment, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614 (1982) (arguing that the private contracting process provides an unsound jurisprudential basis for these obligations). Other commentators note:

> The law's tools are simply too crude to adjust conflicts in intimate ongoing relationships that are shaped by subtle and delicate dynamics. Rather than stabilizing a cooperative equilibrium, legal enforcement of intramarital performance is as likely to undermine the relational norms that stimulate mutual efforts and adjustment.

Scott & Scott, *supra* note 349, at 1294.

514. Weisbrod, *supra* note 373, at 778.

515. *Id.* at 779.

516. In their heuristic attempt to blend family and contract law, Scott and Scott acknowledge that classical contractual analysis does not square with enforcement of the marriage contract. Nonetheless, they argue for marriage as a relational contract, defining the legal obligations "in unusually general terms and . . . rely[ing] upon social and relational norms to specify and enforce most of the 'terms' of the bargain." Scott & Scott, *supra* note 349, at 1249. But the Scotts' stress on social norms, on party-monitoring of the innumerable transactions effected during a marriage, and their recognition that "individual failures to perform as promised often cannot be established with sufficient clarity to permit a sanction to be imposed by a court," *id.* at 1269, suggest that their use of the contractual model for marriage is largely metaphorical. This approach may be characterized as *contract lite*, and while it serves to downshift the unsavory connection between wedding vows and business contracts, it does so by debasing the currency of contractual enforcement.

contract to depend on remedies, but wedging this perspective too tightly into the family unfortunately converts marriage into an increasingly commercial undertaking, and ironically exacerbates the effacement of moral discourse from conjugal life. Entering into a contract, particularly one regulating an intimate association, has a catalyzing effect. The marriage whose terms are intended to be merely enshrined by the prenuptial bargain is itself altered by the process of reducing the marital obligations into enforceable provisions.[517] Contracting has a price, and "approaching marriage as a bargained-for relationship undermines the cooperative goals of marriage."[518] Prenuptial contracts may sabotage the "trust, hope, and faith the parties have in each other,"[519] and weaken the psychological underpinnings of marriage as reliance is thrust onto external provisions. A prenuptial contract may begin as a bilateral document,[520] but enforcement is always an individualistic enterprise: "A marriage contract may glorify independence and self-interest. This will undermine the sense of partnership and equality that is necessary in a successful marriage."[521]

Moreover, if the interjection of private contracts into marriage creates an ironic subtext, the demand that a couple be *forced* to freely negotiate these agreements is oxymoronic. Indeed, the argument for policing contractual freedom by depriving couples of the freedom *not* to contract suggests that at least some of these reformers nurse a paternalistic agenda with regard to the life course of American families. Initially, it should be clear that coercing someone to make a choice is as paternalistic as making the decision for that person.[522] Disrespecting autonomy in order to "help

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517. Consider in that light these observations, intended as advice for lawyers drafting prenuptial agreements:

> You are viewed as an impediment by individuals focused on one of life's strongest emotions: love. Your attempt to interject rational and logical problem solving to negotiate a complex contract is often unappreciated. Although your client may declare a need for the agreement and may have sought out your services, to a greater or lesser degree, *neither* party appreciates your intrusion into their idyllic expectations. No one wants to deal with a subject that is the antithesis of all of the other acts and thoughts at this moment in their lives. You have asked them to contemplate divorce and death.

Edward L. Winer, *Introduction* to PREMARITAL AND MARITAL CONTRACTS: A LAWYER'S GUIDE TO DRAFTING AND NEGOTIATING ENFORCEABLE MARITAL AND COHABITATION AGREEMENTS at xiii (Edward L. Winer & Lewis Becker eds., 1993) (emphasis in original) [hereinafter PREMARITAL AND MARITAL CONTRACTS].

518. WEITZMAN, *supra* note 373, at 243.

519. Ralph Underwager & Hollida Wakefield, *Psychological Considerations in Negotiating Premarital Contracts*, *in* PREMARITAL AND MARITAL CONTRACTS, *supra* note 517, at 217, 217-18.

520. Note, however, that many premarital accords are later contested on grounds of overreaching and undue influence. The all-too-frequently-recounted scenario of a bride handed a prenuptial drafted by her husband's attorney on the eve of her wedding should give pause to the partisans of private intimate contracts. *See, e.g.*, Simeone v. Simeone, 581 A.2d 162, 168 (Pa. 1990) (upholding a prenuptial contract signed the day before the wedding that gave the unemployed bride only $25,000 in support payments from her brain surgeon husband).

521. Underwager & Wakefield, *supra* note 519, at 218.

522. *See generally* Janet L. Dolgin, *The Morality of Choice: Estate Planning and the Client Who Chooses Not To Choose*, 22 SEATTLE U. L. REV. 31 (1998); Anthony T. Kronman,

people independently value their contributions in an atmosphere of respect"[523] constitutes an indefensible abrogation of autonomy. Professor Stake, a champion of limiting freedom in this fashion, advocates "compelling marrying parties to determine the economic consequences of their own divorce,"[524] maintaining that "[p]erhaps it is time to abandon the impossible task of telling people what to expect out of marriage and instead make them choose for themselves."[525] Stake does concede that his mandatory scheme "substitutes public ordering for private on the question of whether to choose."[526] Having encountered the contradiction in his argument, however, he evades it by concluding that compulsion "is the only way to assure meaningful choice on the more important question of what to choose."[527] A similar lack of respect for autonomy is shown by those who would deny couples who contractually pledge to wait a specific period of time prior to filing for divorce the right to mutually change their minds.[528] In both these circumstances, the passion to allow couples the freedom to contract carries these true believers into an argument past rationality, into one justifying a denial of autonomy in the name of autonomy. In fact, the motivating force appears to be a sense that couples at the outset of marriage are more susceptible to agreeing to divorce restrictions. Thus, these reformers would allow greater latitude for these provisions. Couples who later seek freedom from these self-imposed fetters may not expect the same approach to contractual liberality.

But the net effect of private contracting may be pressure to restore customary gender roles in marriage.[529] "[T]he advocates of covenant marriage want to use freedom of contract to enhance security of contract in the context of marriage. . . . they want to throw off the traditional limits of private ordering in marriage as a means of returning to traditional marriage."[530] Some of these new paternalists aim to reform marriage in ways which will result in the reinvigoration of traditional gender roles. Professors Rasmussen and Stake emphasize that no-fault divorce destabilized marital expectations, so that "[d]evoting time and energy to producing assets useful to the marriage became riskier. A career became a safer bet for either party."[531] Professor Brinig similarly promotes covenant marriage because it will result in "greater investment in the sorts of things that make marriages better but that are bad investments in the less permanent world of no-fault."[532] But what are those "assets useful to the marriage" and "sorts of things that make marriages better"? There is no

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Paternalism and the Law of Contracts, 92 YALE L.J. 763 (1983).

523. Zelig, *supra* note 511, at 1223.

524. Stake, *supra* note 367, at 399.

525. *Id.*

526. *Id.* at 400 n.10.

527. *Id.*

528. *See* Scott & Scott, *supra* note 349, at 1283; Rasmusen & Stake, *supra* note 350, at 476.

529. *See* Penelope Eileen Bryan, *Women's Freedom To Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1170-71 (1999) (arguing that divorce contracts disfavor wives).

530. Alexander, *supra* note 23, at 504.

531. Rasmusen & Stake, *supra* note 350, at 459 (footnote omitted).

532. Brinig, *supra* note 508, at 8; *see* GARY S. BECKER, A TREATISE ON THE FAMILY 30-53 (enl. ed. 1991); Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL STUD. 35 (1978).

mystery here. When the new paternalists criticize "selfish career building at the expense of family"[533] and call for "idiosyncratic specialization within household production,"[534] they aim, whether directly or indirectly, at recreating the gendered division of labor characterized by husbands in the labor force and wives specializing in domestic production. Although they make obeisance to nonsexist linguistic norms, they give pride of place to the "traditional roles" in family life.[535]

Their argument claims to repudiate sexism as it asserts the primacy of women as homemakers. For example, Professor Stake acknowledges his "own prejudices" in assuming that his daughters Laura and Allison

> would make better lawyers than whomever they will marry. I also assume that they would make much better nurturers and homemakers than whomever they will marry. The principle of comparative advantage teaches that because Laura is so much better at nurturing, she and her husband (not to mention her children) may be collectively better off if she stays home even though she could earn more than he could on the market. It is, therefore, not only from a sexist viewpoint that I might wish for her to stay home with her children until they are grown, and maybe beyond.[536]

Professor Brinig acknowledged the strength of the objection that these counterrevolutionary divorce reforms "will particularly support traditional marriages in which the man works in the paid labor force while his wife shuns labor force participation in favor of domesticity."[537] But she responded that the "social gains from movements toward covenant marriage (or any other regimes that increase marriage stability) will far outweigh the social costs."[538]

In sum, marriage stability is being purchased at a cost which is unacceptable, unnecessary, and unknowable. The cost is unacceptable because it seeks to burden both sexes with outdated role assumptions. It is unnecessary because our shift into a culture of divorce has ebbed; the lessons of harm to children and the punctured illusion of freedom in serial marriages have had their sizable impact. Ultimately, the cost of the grand venture into legally customized marriage is unknowable. This Article has detailed the ways in which counterrevolutionary reforms aimed at reincarnating the comfortable and nostalgic past may inadvertently sanction an uncontrollable future: *Ozzie and Harriet* transmogrified into *Who Wants to Marry A Multimillionaire?*[539] We need legislatures to withhold the legal imprimatur from

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533. Rasmusen & Stake, *supra* note 350, at 467.

534. *Id.*

535. *See id.* at 463, 481.

536. Stake, *supra* note 367, at 408-09. Notice that Professor Stake emphasized—lest the point be missed—that his daughters would make "better" lawyers than their husbands, but "much better" nurturers and homemakers. *Id.*

537. Brinig, *supra* note 508, at 12.

538. *Id. But cf.* Bryan, *supra* note 529, at 1273 (arguing for substantially restricting the freedom of divorcing parents to contract because of the "coercive context in which wives must negotiate and the dysfunctional results produced by a free-market approach to divorce").

539. The capacity of prenuptial contracting to adumbrate the extraordinary range of marital expectations was recently illustrated in the televised wedding of millionaire Rick Rockwell. The groom and the fifty women who desired his hand in marriage had not met prior to the event. Nonetheless, as a condition of their participation, all fifty women signed prenuptial

radical domestic experimentation, and we need courts to continue to monitor these agreements for reasonableness, particularly in the emerging area of prenuptial bargains that oh-so-confidently rely on romantic desire to deny future freedom. Couples always have and ever will customize their own marriages. The formal legal system should honor both the freedom of domestic partners to make good decisions and their legal capacity to unmake bad ones.

CONCLUSION: DO-IT-YOURSELF MARRIAGE AND DIVORCE?

It is difficult to make divorce more difficult to obtain. The past generation has witnessed two movements seeking to make divorce rarer: the no-fault revolution and now the divorce counterrevolution. Both movements combined legal and social elements with the aim of improving family life by dissuading dissolution-minded spouses. No-fault divorce failed. So will the counterrevolution. The attempt to restore culpability analysis to center stage in divorce proceedings will, if it passes substantial political hurdles, succeed only in rendering divorces more antagonistic.

Covenant marriage is the newest weapon of the divorce counterrevolution. Some couples will, indeed, agree to the more restrictive divorce provisions now available. Others may take counsel in the state's shredding of the unitary conception of marriage contracts and devise their own marriage schemes. But the cozy assumption that private marriage contracts will limit access to divorce court is untested and likely unfounded.[540] On the contrary, a far more likely reading of the evidence agrees with Katharine Fullerton Gerould's judgment, rendered three-quarters of a century ago, that "the perfect marriage is perhaps more worth fighting for than the imperfect marriage is worth protecting."[541]

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agreements with Mr. Rockwell which included waiving the right to claim against his estate if the marriage failed. *See* Caryn James, *Who Wants To be Retro? Multimillions*, N.Y. TIMES, Mar. 5, 2000, § 2, at 1 (describing television special "Who Wants to Marry a Multimillionaire"); Michelle Singletary, *Millionaire Show Reflects Sad Obsession with Money*, FT. LAUDERDALE SUN-SENTINEL, Feb. 28, 2000, Your Business, at 2 (same).

540. The Pandora's box of marriage contracting is suggested by George Bernard Shaw's reaction upon reading Annie Besant's contract proposal stipulating the terms of their relationship: "Good God! This is worse than all the vows of all the churches on earth. I had rather be legally married to you ten times over." ARTHUR H. NETHERCOT, THE FIRST FIVE LIVES OF ANNIE BESANT 240 (1961).

541. Gerould, *supra* note 336, at 470.