

Good Intentions Gone Awry

**No-Fault Divorce and the
American Family**

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Introduction

Thirty years ago, California adopted the first unequivocal no-fault divorce statute in the United States.¹ Over the following fifteen years, all the other states and the District of Columbia enacted similar statutes by establishing “irretrievable breakdown” or “incompatibility” as the only grounds for divorce or by adding them to the preexisting fault grounds.² The new laws were viewed as a major, and desirable, reform of the statutes in effect throughout most of the history of the United States, under which a divorce, when permitted at all, usually could only be obtained on fault grounds, such as adultery, cruelty, or desertion,³ with the assumption that one of the spouses was responsible for the failure of the marriage. Many no-fault divorce statutes also removed the consideration of marital fault from the grounds for divorce, the award of spousal support, and the division of property.

THE EFFECTS OF NO-FAULT

The no-fault divorce laws have had significant, but often subtle and unexpected, effects on individuals and families by dismantling a divorce system that had been based essentially on the mutual consent of the spouses and replacing it with a system that permits either spouse to dissolve a marriage unilaterally, subject often to limited compensation to the divorced spouse and any children. The earlier system had provided some protection to parties who had relied on their marriage continuing, but no-fault divorce reduced this protection because it eliminated much of the negotiating power of the spouse who did not want to dissolve the marriage.⁴ The loss of negotiating power has unfortunately reduced the incentive for spouses to make the commitment to their marriage that often was accompanied

by sacrifices that benefited their family. These sacrifices can take numerous forms—psychological and financial—and can be made potentially by either spouse. A typical sacrifice occurs when one spouse commits to a career that accommodates the other spouse and the children. Whereas married women frequently made this sacrifice in the past as homemakers and mothers, the expansion in the employment opportunities for married women has increased the inducement for some fathers to limit their careers to assume primary responsibility, for example, for childcare.⁵ However, because sacrifices like this are seldom the basis for adequate compensation at divorce, both spouses frequently have become reluctant to make them. As a result, people are focusing more on their own narrowly defined self-interest and less on the best interest of their family.

In this book, I argue that no-fault divorce has made many families worse off than they could be with different grounds for divorce. These alternative grounds for divorce—a combination of no-fault, mutual consent, and fault grounds—are also discussed in this book. Although researchers only slowly became aware of the adverse effects of no-fault divorce, they eventually recognized that the new laws resulted in a decline in the welfare of many divorced women and the children of divorced parents.⁶ Lenore Weitzman initially reported, for example, that divorced women and their children experience a 73 percent decline in their standard of living during the first year after a divorce.⁷ Elizabeth Peters showed that in 1979 women who were divorced in no-fault divorce states received less alimony and child support than in fault divorce states.⁸

Less obvious, but also substantial, has been the effect of no-fault divorce on divorced men and families in which the parents stay married. Most men marry with the expectation that they are going to have a successful marriage rather than a triumphant divorce. Although being divorced unilaterally is not usually the financial misfortune for men that it is for women, it still can be an emotional tragedy. More subtle is the effect of no-fault on families that do not experience a divorce. The fault grounds for divorce had the effect of providing some protection for a spouse who made a commitment to the family that often incorporated sacrifices for the family's benefit. Because much of this protection disappeared with no-fault divorce, both spouses have been forced to consider other forms of protection against the adverse effects of divorce. Many spouses feel compelled to make decisions based on their self-interest rather than on the best interest of their family. For example, there are reduced incentives for either spouse to work in the home and increased incentives for them to work outside the home and to seek additional education to maintain their human capital—their income-earning capacity, which probably has reduced the welfare of many families.⁹ With both parents making a substantial commitment to employment, the family may end up with more financial resources; but frequently the children are receiving less parental attention. Meanwhile, the parents might find that their leisure time has become severely restricted. Often, the adults' placing an emphasis on their per-

sonal goals results in a lost of intimacy and communication, which were part of the motivation for them to marry.

These are not the results expected by the proponents of no-fault divorce. Fault divorce was attacked by many reformers because of the hypocritical procedures used by many people to obtain a divorce.¹⁰ The fault divorce system was predicated on the belief that unless the breakdown of a marriage could be attributed solely to the wrongdoing of a single, identifiable spouse, divorce was not permitted. In most states, a divorce was not permitted if both spouses were equally at fault. The procedures used under fault divorce encouraged perjury and brought an adversarial process to situations often calling for conciliation. Normally, only the innocent spouse could ask for a divorce, so most spouses who wanted a divorce—but seldom could provide evidence of fault—found it very difficult to obtain a divorce without the cooperation of the other spouse. This cooperation—usually provided reluctantly—frequently required compensation to the cooperating spouse to encourage fabricated testimony that established the necessary fault grounds for the divorce. In addition, some people who had obtained a divorce argued that the result was not the protection of innocent spouses but the requirement that spouses had to buy their way out of marriage.¹¹ Although fault provided some protection for spouses who did not want a divorce, it made the poor choice of a mate very costly. If one spouse eventually decided that he or she wanted to dissolve the marriage, substantial compensation might be necessary to induce the cooperation of the other spouse. In some cases, the divorcing spouse could not engender the cooperation of the other spouse and was forced to continue a marriage that he or she would have preferred to dissolve. Last, some reformers felt that a reform of the divorce process could reverse the trend toward higher divorce rates that had been observed during most of this century.¹² For these reformers, the solution was obvious: remove the fault grounds from the requirements for a divorce.

The reasons why that solution did not produce desirable results is a focus of this book. My analysis includes an investigation of why no-fault divorce statutes were introduced and why they have had a detrimental effect on many adults and their families. The framework that I use is based on people responding to incentives, a perspective that is associated with economics.

AN ECONOMIC PERSPECTIVE

Marriage and divorce have long been active areas for analysis and discussion by sociologists and lawyers,¹³ but I believe the general absence of an economic perspective has obscured some problems. Economics is the study of choices:¹⁴ the choices that people make, or rationally should make, in an environment in which the array of goods and activities that individuals want exceeds their re-

sources of income and time. It is assumed that people, while making these choices, attempt to improve their welfare subject to the constraints that they face. Other disciplines have started to use the economic perspective to assist them in analyzing the topics that they explore. Public choice theory is being used in political science, and rational choice and exchange theories in sociology.¹⁵

Economic analysis, based on society's preference for efficient outcomes, provides an alternate explanation to the moralistic one given for the decline in the importance of the family in America by recognizing the role that no-fault divorce has played in changing the incentives that people face. We live in a world in which wants—financial and psychological—exceed the available resources. Choices have to be made. Efficient outcomes occur when choices are made for which the benefits exceed the costs, with these outcomes increasing social welfare. As the benefits and costs of activities change, the efficient choices change. Economists view the decision to marry and, sometimes, to divorce as based on the benefits and the costs associated with those choices. Although economists recognize the importance of love and sexual attraction as a basis for marriage, they have also identified pragmatic considerations based on simultaneous consumption of goods, specialization of labor, and insurance. Many of these benefits of marriage result from a desire for children, which in turn encourages a long-term commitment by the parents to their relationship.

Over time, the costs and the benefits of marriage and divorce can change, and then the incentives to marry and to stay married also change. Economists recognize that changes that have occurred since World War II, such as the expanded employment opportunities for women, the availability of improved forms of contraception, and the increase in labor-saving devices for the home, have reduced both the benefit of marriage and the cost of divorce for some people.¹⁶ Particularly important in this process has been a decline in the number and importance of children for some adults. Under those circumstances, we would expect to observe fewer marriages and more divorces.¹⁷ If the legal system conflicts with some people's new preferences, especially for more flexible grounds for divorce, those people will work to change that legal environment.¹⁸ Thus, social change created pressures to modify the fault grounds for divorce because in a changing society the grounds were no longer efficient for some—often vocal—individuals.

Ignored in this process was the fact that the existing divorce laws may still have been efficient for many less vocal people—many of whom still placed an important emphasis on parenthood. Divorce laws that make it difficult to obtain a divorce encourage people to take a longer-term perspective toward their marriage. If it is easy for a spouse to dissolve a marriage, then a minor controversy can result in the end of a marriage. Knowing that this can occur encourages both spouses to take protective measures. They may be tempted to refrain from making decisions—such as a deep emotional commitment or limiting a career—that would benefit their family but might be costly to them if the marriage ends. Most people marry with the expectation that their marriage is a long-term commitment,

and they do not want to face an incentive structure that discourages that commitment. They do not want to face incentives that encourage narrowly focused, self-interested choices that limit their opportunities to receive the rewards that come from a successful marriage, such as satisfying parenthood, improved health, higher income, and more contentment with their partner.¹⁹ The welfare of many families probably has been reduced by the incentives that followed from making divorce easier.

The Political Process

Whatever the acknowledged need for change, actual changes that occur are the result of the political process. Many political analysts assign a public interest motive to legislators. Economists and some political scientists, however, taking a more cynical view, see politicians basing their decisions on self-interest. The primary goal of politicians normally is to be elected and then reelected. With that goal, they are particularly sensitive to the preferences of vocal pressure groups who provide verbal and financial support.²⁰ In California, for example, the divorce reform process was dominated by men, although they had the support of many women's groups.²¹ Sometimes the self-interest of politicians can be more narrowly focused. The assemblyman primarily responsible for the passage of no-fault divorce in California was going through a divorce at the time. It did not take a conspiracy for a legislature dominated by men to enact no-fault divorce legislation that seemed appropriate from their perspective and that was based on the information with which they had been provided. This is especially true when few of the proponents of divorce reform, whether men or women, were arguing that no-fault divorce would be a misfortune, frequently for divorced women and their children, but also for many other adults and their children. The California Family Law Act of 1969,²² which began the no-fault divorce revolution and set the standard for the statutes enacted in the other states, was passed by a legislature dominated by men.²³

Much was made of the hypocrisy that occurred under the fault divorce laws, but the hypocrisy was evidence of the change in society's preferences, not the cause of those changes. There are many laws on the books, such as highway speed limits, that are hypocritical, and these laws can remain on the books for indefinite periods, especially if they are not enforced. It takes both new circumstances and undesirable enforcement of existing laws to change laws. Certainly, enforcement of the fault divorce laws was hypocritical, but an increase in the demand for simpler procedures for dissolving marriages by some people was an important impetus for no-fault divorce legislation. The male-dominated reform process, together with the absence of a clear understanding of the repercussions of the legislation, resulted in the enactment of the specific no-fault divorce laws now in existence.

Economics can provide insights into why no-fault divorce frequently resulted

in the deterioration of the financial situation of divorced women and the children of divorced parents.²⁴ Many of the reformers appear to have been so preoccupied with reducing the hypocrisy of the fault divorce system that few of them thought about the consequences of the new system—consequences that included a decline in the bargaining power of spouses who did not want a divorce. Particularly vulnerable were women in long-duration marriages whose financial condition frequently deteriorated after divorce.²⁵ The California Governor's Commission on the Family that initiated the fault divorce debate in that state did not include any economists or financial analysts. When marriage was a more stable institution and the laws determining the grounds for divorce were strictly enforced, there were only a few divorces, and the laws that controlled the financial repercussions at divorce were of secondary importance. As the demand for divorce by some spouses increased, these individuals found that the legal grounds for divorce were more restrictive than they wished. They also found that the financial repercussions of divorce prescribed by the law were unacceptable. The parties could fabricate evidence to establish the grounds for divorce, and then, in theory, the courts would decide on property settlements based on legal standards.²⁶ In fact, under the fault divorce laws, most divorcing couples with significant wealth chose to negotiate a settlement rather than to rely on the courts' allocation.²⁷

Often one party did not want a divorce, and a more generous financial settlement and custody of any children were necessary to induce that party to initiate the lawsuit and to provide the obligatory testimony.²⁸ The innocent party had to be the plaintiff, so a contested divorce was difficult under the fault divorce laws.²⁹ Even if both parties wanted a divorce, they had reasons to reject the legal financial arrangements as inequitable. Most women who had pursued the traditional roles as homemakers and mothers knew that short-term alimony, limited child support, and the property allocation provided by law would leave them in a precarious financial position, especially compared to the financial condition of their husbands. The negotiating power of a spouse who did not want a divorce was substantially reduced by no-fault divorce.

Interrelated Laws

Problems developed with no-fault divorce because the reformers did not recognize the interrelationship among laws concerning the grounds for divorce, parental rights, and the financial condition of the spouses. Changing one set of rules without changing the others destroyed a delicate balance. Under the fault divorce statutes, the custodial and financial settlements were commonly based on the negotiations of the parties, with the spouse who did not want to dissolve the marriage having substantial power over the outcome. With no-fault divorce eliminating negotiations to establish the grounds for divorce, the previously disregarded laws that governed the custodial and financial repercussions of divorce became

much more important. These laws usually provided for the divorced spouse to receive half of any marital property and limited child and spousal support, if they were appropriate. Not only were these transfers often modest, but support was often difficult to collect. As a result, the financial condition of divorced women and children of divorced parents frequently deteriorated.

In some states, eliminating the fault grounds for divorce was accompanied by the removal of fault as a factor in the other aspects of divorce, such as property settlements and alimony. No-fault divorce eliminated the presumption that couples had an obligation to remain married and removed any reason for the party seeking the divorce to compensate the other spouse. California, for example, required an equal division of marital property. Another problem arose from the legal definitions of *property* failing to conform to basic financial principles, thereby ignoring the effect of the marriage on the spouses' income-earning capacities. This discrepancy had little practical effect when most divorces were settled with only minimal reference to the applicable laws. But that all changed with the introduction of no-fault divorce.³⁰

Because marriage consists of two people coming together to participate in a collective action, economists view the financial aspects of the relationship much as a business partnership: If the marriage is dissolved, the parties should share the gains or losses of the partnership; but assets acquired outside marriage are not part of this distribution. Based on this framework, economic analysis would support a strict application of the principles of community property, in which each spouse has a half interest in property created during the marriage by their collective activities. From a statutory perspective, *marital property* is all property that is not defined as the separate property of either spouse, whereas *separate property* is property that the parties brought into the marriage and property that came to them during the marriage by will, bequest, or devise. Strict community property concepts are the basis of property divisions at the dissolution of marriages in only a minority of the states; but there has been a trend in all states to move toward an equal distribution of marital property at divorce.³¹ As we will see, the problem with this distribution of property at divorce is not the definitions of separate and marital property, but rather the underlying definition of *property* itself.

What Is Property?

The statutes that defined how property was to be allocated at divorce, under fault and no-fault, did not define the items that are property.³² That task has been left to the courts, which tend to recognize as property only items for which there is tangible evidence. These items include houses and cars as well as shares of stock or bonds. What the courts have historically called "property" should be just another name for the items that economists and financial analysts have identified as "assets." From a financial perspective, assets exist and have value because they

can provide a stream of future income or services; these items include houses and shares of common stock as well as individuals themselves. From a practical perspective, the actual property settlements under fault divorce had been part of the larger issue of financial settlements with the allocation between property and alimony often driven by tax considerations rather than definitions. With no-fault divorce, it became more likely than under fault divorce that statutes determined the allocation of property. Still, because the definition of property has been too restricted, the items considered in the financial allocations at divorce have also tended to be too restricted.

Human Capital

Financial allocations at divorce tend to ignore the most valuable asset of most people—their income-earning capacities, or human capital. Human capital exists because of prior investments, and its value is based on the expected future earnings of the individual. Depending on when critical investments occurred, human capital can be marital property or separate property. Human capital, which has not been recognized by the legal system in a systematic way as property subject to division at divorce,³³ represents a major difference in the assets identified by the legal system and economists.

Shortly after the introduction of no-fault divorce, state legislatures and the courts recognized that something was amiss with the finances of divorced women and the children of divorced parents. They groped for a way to increase financial awards to women. One way was making ad hoc adjustments to the definition of property, based not on the realization that the definition was conceptually wrong, but instead on a desire to expand the funds available to women and children.³⁴ The definition of property has been expanded in some jurisdictions to include such obvious assets as pensions and business goodwill.³⁵ Courts and legislatures also have considered whether intangible items such as degrees, licenses, and the goodwill of professionals should be included in the list of property. Still, the definition of property has not been expanded systematically to cover human capital, and I argue that the failure to incorporate the effects of marriage on the human capital of the spouses into the financial arrangements at divorce in any systematic way is a major cause for some divorced women suffering a substantial reduction in their welfare.³⁶

The incorporation of an adjustment for the effect of a divorce on the human capital of the parties would compensate a spouse in the often-cited situation in which one spouse has provided financial support while the other spouse was in graduate school. The recognition of human capital is, however, probably even more important in the situation in which the husband and the wife have decided that the family would benefit from one spouse, frequently the wife, pursuing activi-

ties that accommodate the career of the other, usually the husband.³⁷ This decision often reduces the wife's human capital compared to the position in which she would be if either she had never married or the marriage had accommodated her career rather than that of the husband.

Economic analysis of the spouses' human capital also requires an adjustment in child support awards. The cost of child custody is not just the direct outlays to maintain the children but also the reduction of income from the presence of children limiting the custodial parent's employment and remarrying opportunities. Children can be an encumbrance that reduces income and opportunities for those who rear them, translating into a reduced human capital at divorce. Economics can provide a framework for evaluating these effects, producing a more systematic and equitable outcome to divorce and correcting for the deteriorating financial condition of divorced women and the children of divorced parents.

The Subjective Costs of Divorce

The effect of marriage on the spouses' human capital can be estimated with reasonable accuracy, but other costs of divorce are more difficult to measure. These costs, which can be financial as well as psychological, can include the loss of the companionship of his or her spouse and children, the search for a new mate or social situation, and the impact on the children. The spouse being divorced will often still care about the divorcing spouse and their family, and the loss of this companionship due to the dissolution of the marriage imposes a cost on the divorced spouse. To begin with, the marriage resulted from a search process by the parties. At divorce, the divorcing spouse has decided that he or she is willing to incur the costs, if any, of a new search for another living situation, which often will result in a new mate—and also, unilaterally, imposes search costs on the divorced spouse. If the divorced spouse wants a new mate, this cost can be very high, because many divorced people, especially older women, never remarry.³⁸ Even if the divorced spouse has no desire to remarry, he or she incurs costs in establishing a new social situation. Last, the divorce can impose costs on the children of the couple. Often these costs are ignored by the divorcing spouse; the failure of no-fault divorce to require the parties to consider these costs directly when considering divorce contributes to the unsatisfactory outcomes of present-day divorce.

THE REFORM OF THE DIVORCE LAWS

Although a number of states have discussed divorce reform,³⁹ the only two that have changed their divorce grounds to make divorce more difficult have been

Louisiana, which passed its covenant marriage act in 1997,⁴⁰ and Arizona, which passed its act in 1998.⁴¹ The Louisiana Act, for example, gives couples planning on marrying in that state a choice between two options: a standard marriage with the potential for a no-fault divorce and a covenant marriage, which requires counseling before marriage and then only permits divorce based on fault grounds or on a lengthy separation. It would seem that couples have not found covenant marriage to be an attractive alternative to no-fault, because only one percent of Louisiana newlyweds have chosen it.⁴²

It would be unfair to criticize no-fault divorce without providing an alternative, so in chapter 6 I present a detailed reform proposal. It is unfortunate that the current divorce laws are described as no-fault, when the primary reason that they have had an undesirable impact on society is due to their permitting unilateral divorce. If no-fault divorce is unattractive, people might conclude that we should return to fault divorce. However, if the problem is recognized to be the unilateral basis of divorce, then it is more appropriate to consider mutual consent as the normal ground for divorce. Still, marriage is a more vulnerable institution for many adults than it has been in the past, and it requires a new approach to divorce. Therefore, I propose a program in which the grounds for divorce would change based on the conditions in the marriage.⁴³

A combination of no-fault, mutual consent, and fault grounds for divorce would be a substantial improvement over the no-fault divorce laws that are common in the United States. At the beginning of a marriage, most couples are still evaluating each other to determine if they really feel comfortable making a long-term commitment. In many cases, neither spouse has made any major sacrifices based on the expectation that the marriage is going to last. The costs that they might incur due to divorce are less than they will be later. During this period, unilateral, no-fault divorce would appear to be a reasonable basis for divorce.

Eventually, in most marriages, at least one spouse makes personal sacrifices based on his or her marriage being a long-term relationship. These sacrifices are an important source of the gains that couples anticipate from marriage. The most obvious of these sacrifices occurs when spouses become parents, which usually requires at least one of them to alter his or her career to assume child care responsibilities; but a career can also be the basis of a concession because some spouses limit their careers to give their mates the flexibility to pursue more attractive career alternatives. Then, the costs of divorce will probably increase significantly. At this point, the grounds for divorce should change to mutual consent. Mutual consent divorce forces the spouses to consider the full benefits and costs of divorce—psychological as well as financial—with a divorce being more likely only when the collective benefits exceed the costs. A divorce is most likely to occur when the benefit of the change to one spouse exceeds the cost to the other, with a compensation from one to the other creating the incentive for their mutual agreement.

Mutual consent can be unacceptably onerous if one spouse is forced out of a

marriage due to the behavior of the other spouse. Therefore, fault grounds for divorce can still be appropriate. Fault as a basis for divorce should not be treated lightly with it only being permitted when there is substantial evidence of socially unacceptable behavior, such as spousal or child abuse. This program for divorce reform would recognize the marital stages, while creating incentives for adults to address the best interests of their family in contrast to the emphasis on their own self-interest, which is encouraged by no-fault divorce.

A problem with covenant marriage laws and my proposal is that divorce is governed not by the state in which a couple marries, but by the state in which either spouse is domiciled—even if for a fairly brief period. This occurs because the U.S. Supreme Court has held that marriage is a status that accompanies spouses, thereby giving their state of domicile—even if only recently acquired—jurisdiction over their marriage.⁴⁴ A divorce in one state usually has to be honored in all other states under the “Full Faith and Credit Clause” of the U.S. Constitution.⁴⁵ Therefore, as long as there are a substantial number of no-fault divorce states, spouses are forced to recognize the potential for a no-fault divorce even though they were married in a state with different grounds for divorce. On the other hand, if marriage was recognized as a contract entered into at the time of the marriage, the grounds for divorce would be those of that state or, if permitted, the state that the parties chose. Then, the provisions of that agreement probably would continue to be enforceable even if either spouse moved to another state. Therefore, the proposal in chapter 6 also recommends that the U.S. Supreme Court or Congress act to confirm that marriage is based on a contract rather than being a status. Of course, any agreement reached by the spouses would be subject to state regulations protecting the interests of any children.

It would be unrealistic to expect a rapid change in the no-fault divorce laws and their perverse incentives, so I also discuss strategies that couples can use to overcome the adverse effects of no-fault divorce. The most important lesson that this book attempts to teach is that no-fault divorce has subtly warped incentives to induce adults often to make decisions that are against their best interest and the best interest of those that they love the most. A recognition of these incentives is the first step toward learning how to live with no-fault divorce. Even then, the outcome of any marriage is uncertain, and it is reasonable for adults to take steps to minimize the adverse effects of a marriage dissolution due to either death or divorce. Some of these steps are more likely to benefit a person’s family than others are.

THE BOOK

In this book, I investigate why no-fault divorce has not lived up to the expectations of its proponents. Even though the criticism of no-fault divorce has grown,

no one has presented a satisfactory explanation for why it has not fulfilled its expectations and for how it can be reformed to encourage adults to make better decisions about the welfare of their families and themselves. Those are the goals of this book. First, in the next chapter, the evolution of the marriage and divorce laws that ultimately resulted in no-fault divorce will be presented. In chapter 3, I introduce the economic perspective as it applies to marriage, divorce, and property. This material on the economic framework is followed by a chapter that traces the development of the California no-fault divorce statute, with an emphasis on the economic reasons why the statute was introduced. Economic analysis then is used in the next chapter to evaluate the impact of no-fault divorce on individual decisions. It will be observed that the introduction of no-fault divorce has influenced numerous trends, including changes in the divorce rate and the financial situation of the parties as well as in other areas of human behavior, such as when people marry and whether married women work outside the home. A particular concern is the impact of no-fault divorce on the quality of life for all family members. I conclude with a chapter in which economic analysis particularizes the reforms that could lessen the social and the individual costs of no-fault divorce by making mutual consent the divorce ground for established marriages. Because I do not expect a speedy change in the divorce laws, the book concludes with a discussion of steps that couples can take to minimize the adverse effect of no-fault divorce.

NOTES

1. Family Law Act, ch. 1608, §§ 1-32, 1969 Cal. Stat. 3312. The first "pure" no-fault statute was enacted in California in 1969. The California statute has been described as "pure" because it based divorce exclusively on the factual breakdown of the marriage. See Herma Hill Kay, "Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath," *University of Cincinnati Law Review* 56 (1987): 1-90. Prior to 1969, some states included no-fault grounds with their fault grounds for divorce. For example, incompatibility as a ground for divorce was introduced into the United States when it acquired the Virgin Islands from Denmark in 1917, with incompatibility subsequently being adopted by a few states. See Graham Kirkpatrick, "Incompatibility as a Ground for Divorce," *Marquette Law Review* 47 (1964): 453-64. Some states had no-fault grounds for divorce, such as voluntary separation for a period of time or incurable insanity, by the mid-1960s, with eighteen states, Puerto Rico, and the District of Columbia permitting a divorce based on the parties living apart. See Glenda Riley, *Divorce: An American Tradition* (New York: Oxford University Press, 1991), 162. By 1985, all the states had some form of no-fault divorce, either exclusively no-fault grounds or with no-fault grounds added to the fault grounds. For data on the current status of divorce laws, see Linda D. Elrod and Robert G. Spector, "A Review of the Year in Family Law: A Search for Definitions and Policy," *Family Law Quarterly* 31, no. 4 (Winter 1998): 613-65.

2. No-fault divorce statutes were enacted rapidly by the states. Iowa passed its no-fault divorce statute in 1971. By August 1977, only three states retained essentially fault grounds for divorce. See Doris J. Freed and Henry H. Foster, Jr., "Divorce in the Fifty States: An Overview," *Family Law Quarterly* 11, no. 3 (Fall 1977): 297–313. More than changing the divorce grounds, the important characteristic of the new laws was that they permitted one spouse to obtain a divorce even when the other spouse opposed it. Today only four states (Mississippi, New York, Ohio, and Tennessee) require mutual consent for a no-fault divorce. See Ira Mark Ellman and Stephen D. Sugarman, "Spousal Emotional Abuse as a Tort?" *Maryland Law Review* 55 (1996): 1277, n. 24.

3. Lawrence M. Friedman, *A History of American Law* (New York: Simon & Schuster, 1973), 179–84, 434–40.

4. Mary Ann Glendon noted, "The fault-oriented divorce law of the recent past furnished opportunities for one spouse (usually the wife) to obtain a settlement more generous than a court might have awarded in exchange for cooperation in obtaining or expediting the divorce or as the price of avoiding the embarrassing publicity of a contested divorce." Mary Ann Glendon, *The New Family and the New Property* (Toronto: Butterworths, 1981), 61.

The spouse who benefited from these negotiations frequently had been viewed as the wife. No-fault divorce statutes reduced the bargaining power of the spouse who did not want to dissolve the marriage. Because women frequently are adversely affected by divorce, it has been commonly accepted that they are reluctant to seek a divorce. However, there is evidence that often that is not the case. Under fault divorce, most negotiated divorce actions were filed by women because the defendant had to be the party who was at fault; so it was not clear who had initiated the divorce. See B. G. Gunter and Doyle Johnson, "Divorce Filing as Role Behavior: Effect of No-Fault Law on Divorce Filing Patterns," *Journal of Marriage and the Family* 40 (August 1978): 571–74. After the introduction of no-fault divorce, it appears that women often were the spouse who wanted a divorce. See Sanford L. Braver, Marnie Whitley, and Christine Ng, "Who Divorced Whom? Methodological and Theoretical Issues," *Journal of Divorce and Remarriage* 20, nos. 1 and 2 (1993): 1–19. In Margaret F. Brinig and Douglas W. Allen, "These Boots Are Made for Walking: Why Wives File for Divorce," which was presented at the 1998 Canadian Law and Economics Association meeting, Toronto, Ontario, September 27–28, 1998, the authors argued that one reason that married women file is to assure themselves of custody of the children and child support. Among the divorced couples interviewed in the National Survey of Families and Households, a majority of divorces were initiated by women. Allen M. Parkman, "Who Wants Out and Why," Anderson Schools of Management working paper, September 1999.

Still, the spouses who were the most in need of bargaining power at divorce frequently were wives in marriages of long duration. See Lenore J. Weitzman, *The Divorce Revolution* (New York: Free Press, 1985). The vulnerability of women after lengthy marriage has been explained by the timing of the contributions of men and women to marriage. The contributions of married women are often front-end loaded relative to married men: Married women have traditionally placed a special emphasis on child rearing that occurs early in a marriage, but the income earning contribution of the husband tends to increase over the duration of the marriage. When the children leave the home, the contri-

bution of the wife to the marriage can fall, although the contribution of the husband continues to grow. Without the protection of a long-term arrangement such as was provided to a certain extent by fault divorce, some husbands may conclude that they are better off divorced. This is especially true when the financial obligations incurred by the husband to the wife due to the divorce are modest. See Lloyd Cohen, "Marriage, Divorce, and Quasi Rents; or 'I Gave Him the Best Years of My Life,'" *Journal of Legal Studies* 16, no. 2 (June 1987): 267–304.

5. In 20 to 25 percent of dual-earner couples, wives earn more than their husbands. See Anne E. Winkler, "Earnings of Husbands and Wives in Dual-Earner Families," *Monthly Labor Review* 121, no. 4 (April 1998): 42–48, and Lynne M. Casper, "My Daddy Takes Care of Me! Fathers as Care Providers," *Current Population Reports*, P70–59, (Washington, DC: U.S. Bureau of the Census, 1997), 1–9. As women have more aggressively pursued a career, the likelihood has increased that the primary caregiver has been the father. In a celebrated case in Florida, an appeals court overruled a trial court that had awarded an attorney mother primary residential custody of a couple's children in lieu of the architect father, who was the primary caregiver. Not only did the court give the father primary residential custody, it also increased the alimony that he had been awarded. *Young v. Hector*, 1998 Fla. App. LEXIS 7517 (1998).

6. This conclusion is documented in Weitzman, *The Divorce Revolution*, and H. Elizabeth Peters, "Marriage and Divorce: Informational Constraints and Private Contracting," *American Economic Review* 76, no. 3 (June 1986): 437–54. The conclusions and methodology of Weitzman have been challenged by a number of authors, including Herbert Jacob, "Faulting No-Fault," in "Review Symposium on Weitzman's *Divorce Revolution*," ed. Howard S. Erlanger, *American Bar Foundation Research Journal* 1986, no. 4 (Fall 1986): 773–80; Herbert Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* (Chicago: University of Chicago Press, 1988); Herbert Jacob, "Another Look at No-Fault Divorce and the Post-Divorce Finances of Women," *Law and Society Review* 23, no. 1 (1989): 95–115; Marygold S. Melli, "Constructing a Social Problem: The Post-Divorce Plight of Women and Children," in "Review Symposium on Weitzman's *Divorce Revolution*," ed. Howard S. Erlanger, 759–72; Richard R. Peterson, "A Re-Evaluation of the Economic Consequences of Divorce," *American Sociological Review* 61 (June 1995): 528–36; Jana B. Singer, "Divorce Reform and Gender Justice," *North Carolina Law Review* 67 (1989): 1103–21; Marsha Garrison, "The Economics of Divorce: Changing Rules, Changing Results," in *Divorce Reform at the Crossroads*, ed. Stephen D. Sugarman and Herma Hill Kay, (New Haven, CT: Yale University Press, 1990), 75–101; and Stephen D. Sugarman, "Dividing Financial Interests in Divorce," in *Divorce Reform at the Crossroads*, ed. Sugarman and Kay, 130–65.

7. Weitzman, *The Divorce Revolution*, 323. Weitzman's results have been questioned by a number of authors (see note 6). Using the same sample and measures of economic well-being, Richard Peterson produced estimates of a 27 percent decline in women's standard of living and a 10 percent increase in men's standard of living after divorce. See Peterson, "Re-Evaluation."

8. Peters, "Marriage and Divorce," 449. Using a sample consisting of younger couples and a slightly later time period, Yoram Weiss and Robert Willis found that the divorce

settlements received by women were more generous in no-fault divorce states. See Yoram Weiss and Robert J. Willis, "Transfers Among Divorced Couples: Evidence and Interpretation," *Journal of Labor Economics* 11, no. 4 (October 1993): 629–79.

9. See Allen M. Parkman, "Unilateral Divorce and the Labor-Force Participation Rate of Married Women, Revisited," *American Economic Review* 82, no. 3 (June 1992): 67–78; and Allen M. Parkman, "Why Are Married Women Working So Hard?," *International Review of Law and Economics* 18, no. 1 (Winter 1998): 41–49.

10. Michael Wheeler, *No-Fault Divorce* (Boston: Beacon, 1974), 8; and Lynne Carol Halem, *Divorce Reform* (New York: Free Press, 1980), 238.

11. Wheeler, *No-Fault Divorce*, 15.

12. Weitzman, *The Divorce Revolution*, 16, cited Judge Roger Pfaff, who pioneered the use of conciliation courts in Los Angeles, arguing that the trend toward higher divorce rates could be reversed by California adopting premarital and predivorce conciliation procedures.

13. For example, see David Popenoe, Jean Bethke Elshtain, and David Blankenhorn, eds., *Promises to Keep: Decline and Renewal of Marriage in America* (Lanham, MD: Rowman & Littlefield, 1996); Andrew J. Cherlin, *Marriage, Divorce, Remarriage* (Cambridge, MA: Harvard University Press, 1992); Kingsley Davis, *Contemporary Marriage: Comparative Perspectives on a Changing Institution* (New York: Russell Sage Foundation, 1985); Mary Ann Glendon, *The Transformation of Family Law* (Chicago: University of Chicago Press, 1989); Halem, *Divorce Reform*; Max Rheinstein, *Marriage Stability, Divorce and the Law* (Chicago: University of Chicago Press, 1972); and Weitzman, *The Divorce Revolution*.

14. Paul A. Samuelson and William D. Nordhaus, *Economics*, 15th ed. (New York: McGraw-Hill, 1995), 4.

15. See Dennis C. Mueller, *Public Choice II* (Cambridge, UK: Cambridge University Press, 1989); and James S. Coleman, *Foundations of Social Theory* (Cambridge, MA: Belknap Press, 1990). Coleman has applied rational choice theory to the family. Coleman, *Foundations*, 579–609.

16. Gary S. Becker, *A Treatise of the Family*, enl. ed. (Cambridge, MA: Harvard University Press, 1991), 350, noted that between 1950 and 1977, the legitimate birth rate declined by about one-third, the divorce rate more than doubled, the labor force participation rate of married women with young children more than tripled, and the percentage of households headed by women with dependent children also almost tripled. Gary S. Becker, William Landes, and Robert Michael, "An Analysis of Marital Instability," *Journal of Political Economy* 85, no. 6 (1977): 1184, concluded that the divorce rate, which accelerated after 1960, can be explained in part by "the decline over time in the number of children, the growth in labor force participation and earnings power of women, the growth in the breadth of the remarriage market as more persons become divorced and perhaps also the growth in legal access to divorce, illegitimacy, and public transfer payments."

17. Between 1970 and 1997, the percentage of men and of women eighteen years old and older who were married fell from 75.3 percent and 61.5 percent to 65.8 percent and

57.9 percent, respectively. Meanwhile, the percentage of men and of women eighteen years old and older who were divorced rose from 2.5 percent and 8.7 percent to 6.1 percent and 11 percent, respectively. U.S. Bureau of the Census, *Statistical Abstract of the United States, 1998* (Washington, DC: U.S. Government Printing Office, 1998), Table 61, 57.

18. Victor R. Fuchs, *Women's Quest for Economic Equality* (Cambridge, MA: Harvard University Press, 1988), 29, noted that it is less likely that legislation alters behavior than that changes in behavior initiate changes in legislation—legislators tend to be attuned to basic socioeconomic forces and to respond to the legislative demands created by the new behavior.

19. Linda J. Waite, "Does Marriage Matter?" *Demography* 32, no. 4 (November 1995): 483–507.

20. Gary S. Becker, "A Theory of Competition Among Pressure Groups for Political Influence," *Quarterly Journal of Economics* 98 (1983): 371–400.

21. The California Governor's Commission on the Family consisted of individuals from professions dominated by men, including two state senators, one assemblyman, five judges, six attorneys, two law school professors, one social worker, four physicians, and one clergyman. See Halem, *Divorce Reform*, 240. Fourteen of the fifteen members of the public who testified before the commission were men, and ten men identified themselves as divorced. The California Commission on the Status of Women supported the removal of fault from divorce. "Report of the Advisory Commission on the Status of Women," *California Women* (1969): 79–80.

22. Family Law Act, ch. 1608, §§ 1-32, 1969 Cal. Stat. 3312.

23. In 1970, the Uniform Marriage and Divorce Act was approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL). The NCCUSL was strongly influenced by the same legal experts who had been influential in the California reform process. See Jacob, *Silent Revolution*, 67. The uniform act adopted as the sole ground for divorce was "that the marriage is irretrievably broken." *Uniform Laws Annotated 9A* (1979): 91. Homer H. Clark, Jr., *The Law of Domestic Relations in the United States*. 2d ed. (St. Paul, MN: West, 1988), 411.

24. Lenore J. Weitzman, "The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards," *UCLA Law Review* 28 (1981): 1181–1268; Weitzman, *The Divorce Revolution*; and Peters, "Marriage and Divorce."

25. Weitzman, *The Divorce Revolution*, 19.

26. Max Rheinstein noted that collusive practices and migratory divorce had been common in the United States under fault divorce. See Max Rheinstein, *Marriage Stability*, 247–60, and "A Survey of Mental Cruelty as a Ground for Divorce," *De Paul Law Review* 15 (1965): 159, 163.

27. Under fault divorce, approximately 90 percent of divorces were uncontested. This figure understates the percentage that probably were uncontested because those divorces in which the defendant filed an answer or offered any evidence in opposition to the divorce were counted as contested; see Rheinstein, *Marriage Stability*, 248. In California, it was estimated that 94 percent of divorce hearings were uncontested and that they were granted with pro forma testimony as to fault; see the "Report of the Governor's Commission on the Family," Sacramento, CA, December 1966, 30–31, and 119, n. 23.

28. This is supported by evidence that there was an increase in the proportion of men filing for divorce after the introduction of no-fault divorce. Gunter and Johnson, "Divorce Filing," 571-74.

29. Harry D. Krause, *Family Law*, 3d ed. (St. Paul, MN: West, 1995), 335.

30. The interpretation here differs from the one provided in Robert H. Mnookin and Lewis Kornhauser, "Bargaining in the Shadow of the Law: The Case of Divorce," *Yale Law Journal* 88 (April 1979): 950-97. They interpret no-fault divorce as permitting a substantial degree of private ordering. However, with no-fault divorce the spouses had little incentive to give up more than was prescribed by law. So although they might not use the court system, it is unlikely that their settlement would differ substantially from the one provided by law. However, under fault divorce the couple had much broader latitude to fashion their own agreement independent of the law. Otherwise, both spouses would have been unlikely to agree to the divorce.

31. Krause, *Family Law*, 122.

32. Clark, *Domestic Relations*, 595.

33. Mary Ann Glendon, "Family Law Reform in the 1980s," *Louisiana Law Review* 44, no. 6 (July 1984): 1559, expresses the commonly accepted view that the only significant property of a young couple was a house and its contents. She does not recognize that the spouses have their individual human capital that can be valuable and that may have been affected by the marriage. See Allen M. Parkman, "Human Capital as Property in Divorce Settlements," *Arkansas Law Review* 40, no. 3 (1987): 439-67, and Allen M. Parkman, "Bringing Consistency to the Financial Arrangements at Divorce," *Kentucky Law Journal* 87, no. 1 (1998-99): 51-93.

34. There are problems associated with a concept called "professional goodwill" that was one of the attempts by the courts to create property to allocate to wives. See Allen M. Parkman, "The Treatment of Professional Goodwill in Divorce Proceedings," *Family Law Quarterly* 18, no. 2 (summer 1984): 213-24.

35. J. Thomas Oldham, *Divorce, Separation and the Distribution of Property* (New York: Law Journal Seminars-Press, 1997), 7-1-7-153.

36. The principles developed here are relevant for both men and women. The situation that normally requires an adjustment in the property settlement to incorporate the effect of the marriage on the human capital of the spouses is one in which one spouse made major sacrifices in his or her employment opportunities to accommodate the other spouse. Generally, wives have been the spouses that make these adjustments; but as the economic opportunities of women increase, we would expect there to be pressure for more husbands making these sacrifices. Casper, "My Daddy."

37. Marriage tends to reduce women's earnings, and the reduction increases with the number of children. See Waite, "Marriage," 496.

38. While the remarriage rates in 1990 were similar for men and women ages twenty-five to twenty-nine, the rate for women compared to men fell as their ages increased. For example, by ages forty-five to forty-nine the remarriage rate was 88 per 1,000 for men, but 43 per 1,000 for women. See Sally C. Clarke, "Advance Report of Final Marriage Statis-

tics, 1989 and 1990," National Center for Health Statistics, *Monthly Vital Statistics Report* 43, no. 12 (July 14, 1995) Table 6, ii.

39. Laura Bradford, "The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws," *Stanford Law Review* 49 (February 1997): 607-36.

40. La. Rev. Stat. Ann. § 9:272(West Supp. 1998).

41. Ariz. Rev. Stat. § 25-901.

42. Christine B. Whelan, "No Honeymoon for Covenant Marriage," *Wall Street Journal*, August 17, 1998, A12. During the last six months of 1998, data collected by Steve Nock, a sociologist at the University of Virginia, indicated that the percentage of couples selecting a covenant marriage had increased to approximately 3 percent. He also determined that people in Louisiana were only gradually becoming aware of the covenant marriage alternative. Conversation with Steve Nock on February 22, 1999.

The newer act in Arizona has also gotten off to a slow start as only 16 out of more than 5,000 couples who married in Mariposa County during the first three months chose it. Associated Press, "Covenant Marriage Not Taking Couples by Storm," November 10, 1998.

43. Allen M. Parkman, "Reform of the Divorce Provisions of the Marriage Contract," *BYU Journal of Public Law* 8, no. 1 (1993): 91-106.

44. *Williams v. North Carolina*, 317 U.S. 287, 299 (1942).

45. U.S. Constitution art. IV, § 1.