

# Reforming Divorce Reform

by

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April 2000

## I. INTRODUCTION

For most of the history of the United States, it was difficult to dissolve a marriage because plaintiffs had to prove that their spouse had committed acts that constituted the fault grounds for divorce. These grounds usually consisted of adultery, desertion or cruelty. Frustration with these fault grounds for divorce after World War II led to a reform movement that eventually changed the grounds for divorce in all the states. Between 1970 and 1985, all the state either replaced the fault grounds with the no-fault grounds of irretrievable breakdown or incompatibility or added no-fault grounds to the existing statutes.

The optimism associated with the shift in the grounds for divorce has been moderated by the eventual recognition of their subtle, but perverse, repercussions. First, it was noted that many divorced women and their children were worse off due to the new legal environment.<sup>2</sup> More recently, concerns about the effect of no-fault divorce on other members of society, especially members of intact families, have arisen because no-fault divorce creates incentives for many adults to focus more on their own self interest and less on that of their family.<sup>3</sup> No-fault divorce has had

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<sup>2</sup> See Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169 (1974) (state policies imposing standardized rules on all marriages are outdated); Lenore J. Weitzman & Ruth B. Dixon, *The Alimony Myth: Does No-Fault Divorce Make A Difference?*, 14 FAM. L.Q. 141, 143-44 (1980) (finding that a small percentage of final California divorce decrees included alimony); Lenore J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. R. 1181 (1981) (the introduction of no-fault divorce in California led to a deterioration in the awards to women at divorce); Ruth B. Dixon and Lenore J. Weitzman, *When Husbands File for Divorce*, 44 J. OF MAR.& FAM. 103 (1982) (the percentage of divorces filed by husbands increased after California introduced no-fault divorce); and Lenore J. Weitzman, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985) (expands 1981 UCLA L.R. article).

<sup>3</sup> See Allen M. Parkman, *GOOD INTENTIONS GONE AWRY: NO-FAULT DIVORCE AND THE AMERICAN FAMILY* (2000). It has been argued that no-fault divorce created incentives for both spouses to work full time outside the home, even when those choices reduce the welfare of the family. See Allen M. Parkman, *Why Are Married Women Working So*

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this effect because it usually permits either spouse to obtain a divorce unilaterally seldom adequately compensating divorced spouses for their costs from the divorce and children for any deterioration in their quality of life. These costs can be financial as well as psychological. Financial costs occur when spouses' future income has been decreased because they have made sacrifices for their family's benefit during marriage such as assuming child care responsibilities or making career concessions.<sup>4</sup> The psychological costs follow from the realization that one's love is no longer being reciprocated. Faced with these higher costs from divorce, it is no surprise that spouses have responded by reducing their commitment to marriage frequently to the detriment of their families. Moreover, children are usually innocent bystanders to this process, but they are frequently worse off after divorce than they would have been if the marriage had continued.<sup>5</sup>

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*Hard?*, 18 INT. R. OF L. & ECON. 41 (1998) (no-fault divorce is shown to cause married women to work longer hours) and Allen M. Parkman, *Unilateral Divorce and the Labor-Force Participation Rate of Married Women, Revisited*, 82 AM. ECON. R. 671 (1992) (no-fault divorce causes married women to increase their work outside the home). Although not attributing the change to no-fault divorce, others have observed that married women have been working more hours at a job and in the home in the period since no-fault divorce was introduced. See Victor R. Fuchs, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* (1988) 78. Other commentators have criticized the current state of marriage noting that liberation and self-fulfillment has imposed a substantial cost on others, especially children. These authors frequently see the problem as being a shift in values and, therefore, they do not see no-fault divorce as being at the core of the problem. See Barbara Dafoe Whitehead, *THE DIVORCE CULTURE* (1997) (the nation's 30-year experiment with divorce has created a low-commitment culture full of broken families and shattered lives) and Maggie Gallagher, *THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE* (1996) (shows the devastating effects a broken marriage has on everyone it touches with the government contributing to its decline).

<sup>4</sup> See Allen M. Parkman, *Bringing Consistency to the Financial Arrangements at Divorce*, 87 KENT. L. J. 51 (1998-9) (these sacrifices should be viewed as crating debts for which compensation is appropriate at divorce).

<sup>5</sup> It is almost universally recognized that children are better off in a smoothly functioning two parent household, rather that with divorced parents. See, e.g., Eleanor E. Maccoby and Robert H. Mnookin, *DIVIDING THE CHILD: SOCIAL & LEGAL DILEMMAS OF CUSTODY* 294 (1992). Whether children on average are better off with two parents than one is controversial and often depends on how traumatic divorce is for the children. Some find the adjustment to be fairly smooth. *Id.* Others conclude that divorce has left numerous children worse off and the adverse effects continue for many years. See Judith S. Wallerstein and Sandra Blakelee, *SECOND CHANCE: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* xv (1990).

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Responding to these concerns, proposals for reforming the earlier divorce reforms have been made that would make it more difficult for a couple to divorce.<sup>6</sup> Any new reforms, however, will only have a limited effect on the perverse incentives created by no-fault divorce because spouses frequently have little control over the grounds for divorce that will be applied to their marriage, so they have to be concerned about a no-fault divorce even though they were either married in or are living in a state in which divorce is more difficult. The grounds for divorce are controlled by the domicile of either spouse at the time of a divorce rather than the state in which the couple was married or the one in which they may have lived during most of the marriage.<sup>7</sup> Consequently, a spouse who was married in and lived in a state in which divorce was difficult could be divorced by their spouse who established domicile in a state with no-fault grounds for divorce. A divorce can occur in a state in which a spouse has never lived because the courts treat marriage as a status giving the state in which either spouse is domiciled jurisdiction over a divorce.<sup>8</sup> These decisions have to be honored in the other states, including the domicile of the other spouse, under the Full Faith and Credit Clause of the U. S. Constitution.<sup>9</sup>

This article presents the case for reforming the earlier divorce reforms that resulted in no-fault divorce arguing that a combination of no-fault, mutual consent and fault grounds for divorce would improve the incentives that spouses face providing a substantial improvement for them and their children. While marriage has become less attractive for some adults,<sup>10</sup> for the preponderance

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<sup>6</sup> Elizabeth Schoenfeld, *Drumbeats for Divorce Reform*, 77 POL. REV. 8 (1996) (summarizes current proposals); David M. Wagner, *Divorce Reform: New Directions*, 400 CURRENT 7 (1998) (considers proposals including the complete privatization of marriage law); and Jenifer Warren, *No-fault Divorce Under Fire in State*, *Nation*, L. A. TIMES 1A (April 12, 1998) (three divorce options for California).

<sup>7</sup> In most states, residency and domicile are treated similarly. While a few states have no durational requirement for filing for divorce but require only a bona fide residency or domicile, most states additionally impose a durational requirement ranging from six weeks to one year. Six months is the most common durational requirement for a divorce. See John DeWitt Gregory, Peter N. Swisher, and Sheryl L. Scheible Wolf, UNDERSTANDING FAMILY LAW 193 (1993).

<sup>8</sup> While the state in which either spouse is domiciled has jurisdiction to grant a divorce, the financial aspects of marriage require personal jurisdiction over both spouses. See *id.* at 201.

<sup>9</sup> U.S. CONST. art. IV, 1. The full text of this section is “Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.”

<sup>10</sup> Economists argue that in addition to romance, love and sexual attraction, marriage also has a pragmatic foundation based on the gains that men and women have experienced from

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of adults who want to marry,<sup>11</sup> especially if they want children, there are benefits from a long term commitment that would be encouraged by the reforms proposed here. For these reforms to be effective, however, marriage can no longer be treated as a status, but instead should be recognized as a contract.<sup>12</sup> Subject to government regulations, especially to protect any children,

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additional specialization within a relationship. The convergence in the opportunities available to men and women has reduced the opportunities for these gains from specialization and, therefore, the gains from marriage. For example, see Gary S. Becker, *A TREATISE ON THE FAMILY*, ENL. ED. (1991).

<sup>11</sup> All the relevant data show that adults of all ages say that having a “happy marriage” is one of their most important life goals. For example, in 1992, when high school seniors were asked to rate life goals as part of the Monitoring the Future Project of the Institute for Social Research at the University of Michigan, “having a good family and family life” was the top ranked goal. See Norval D. Glenn, *Values, Attitudes, and the State of American Marriage*, in David Popenoe, Jean Bethke Elstain, and David Blankenhorn, eds., *PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA* 21 (1996).

<sup>12</sup> There is a long history of authors discussing marriage as a contract. See, e.g., Richard W. Bartke, *Marital Sharing-Why Not Do It by Contract?*, 67 GEO. L.J. 1131, 1134 (1979) (proposing model statutory framework that would permit couples to elect a community property arrangement for their marriage); Lloyd Cohen, *Marriage as Contract*, in Peter Newman, ed., *THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW* 618 (1998); Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879, 894 (1988) (proposing model antenuptial agreements that impose financial burdens for initiating divorce); Joan M. Krauskopf & Rhonda C. Thomas, *Partnership Marriage: The Solution to an Ineffective and Inequitable Law of Support*, 35 OHIO ST. L.J. 558 (1974) (discussing partnership agreements between husbands and wives); Allen M. Parkman, *Reform of the Divorce Provisions of the Marriage Contract*, 8 B.Y.U. J. OF PUB. L. 91 (1993) (arguing for mutual consent to be the normal ground for divorce); Eric Rasmusen and Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L. J. 453 (1998) (the current state laws do not fit all marriages); Marjorie Maguire Schultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 207 (1982) (arguing the utility of marriage contracts to govern human interactions); Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9 (1990) (discussing the use of precommitment strategies, including antenuptial contracts, to lower divorce rates); Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U.L. REV. 65 (1998) (the courts only enforce the monetary aspects of marriage contracts); Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777 (1994) (everything can be discussed in contract terms); and Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509 (1998)

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treating marriage as a contract that includes the grounds for a dissolution would base divorce on the agreement entered into at marriage rather than the domicile at a dissolution.<sup>13</sup> This agreement, like all contracts, would not change as either spouse moved from state to state or even abroad.

The next section discusses the impetus for and the impact of no-fault divorce. Section III presents the reform efforts to date, while Section IV cautions that these reforms will have only a limited effect. Section V then presents a reform program based on contract principles that would bring more predictability to marriage.

## II. DIVORCE REFORM

By making marriage terminable at will subject to often limited compensation to the divorced spouse and any children, no-fault divorce has had a perverse impact on many people. This was not the intent or the anticipated effect of the change in the grounds for divorce. In 1969, California adopted the first unequivocal no-fault divorce statute in the United States.<sup>13</sup> Over the following fifteen years, all the other states and the District of Columbia enacted similar

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(discussing the need for men and women to bargain as equals).

For a discussion of status and contract as applied to marriage, see Carl E. Schneider and Margaret F. Brinig, *AN INVITATION TO FAMILY LAW: PRINCIPLES, PROCESS AND PERSPECTIVES* 343-55 (1996).

<sup>13</sup> The importance of marriage being a contract to overcome the problems associate with it being a status has been noted in Rasmusen and Stake, *supra* note 12 at 500.

<sup>13</sup> Family Law Act, ch. 1608, §§ 1-32, 1969 CAL. STAT. 3312. The first "pure" no-fault statute was enacted in California in 1969. See Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CINCINNATI L. REV. 1 (1987) (The California statute has been described as "pure" because it based divorce exclusively on the factual breakdown of the marriage.). 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 it subsequently be adopted by some states. See Graham Kirkpatrick, *Incompatibility as a Ground for Divorce*, 47 MARQUETTE L. REV. 453 (1964) (incompatibility was used as a ground for divorce in New Mexico, Oklahoma, and Alaska). Other 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 permitted a divorce based on the parties living apart. See Glenda Riley, *DIVORCE: AN AMERICAN TRADITION* 162 (1991). 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, Robert G. Spector and Jeff Atkinson, *A Review of the Year in Family Law: Children's Issues Dominate*, 32 FAM. L.Q. 661 (Winter 1999).

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statutes establishing "irretrievable breakdown" or "incompatibility" as the only grounds for divorce or adding them to the preexisting fault grounds.<sup>14</sup> The new laws were viewed as a major, and desirable, reform of the statutes in effect through most of the history of the United States,<sup>15</sup> under which a divorce, when permitted at all, usually could only be obtained on fault grounds such as adultery, cruelty, or desertion.<sup>16</sup> Increasingly spouses had been perjuring themselves with fabricated testimony to establish these grounds, usually cruelty, when the marriage had failed for other reasons.<sup>17</sup> Many no-fault divorce statutes removed the consideration of marital fault from the grounds for divorce, the award of spousal support, and the division of property.<sup>18</sup>

### A. *Impetus for Change*

An initial question is why there was pressure for such a dramatic change in the divorce laws. The shift from fault to no-fault divorce was initially motivated by the change in

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<sup>14</sup> No-fault divorce statutes rapidly were enacted 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*, 11 FAM. L. Q. 297 (1977). More than no-fault, 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?*, 55 MARYLAND L. REV. 1268, at 1277, n. 24 (1996) (whether a tort action for spousal emotional abuse should be allowed).

<sup>15</sup> See Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CALIF. L. REV. 291, 297 (1987) (the fault divorce laws were in conflict with the reality that divorce was commonly permitted based on mutual consent) and Weitzman, *REVOLUTION* supra note 2 at 51 (the divorce reforms were embraced with a pioneering zeal).

<sup>16</sup> Although much of American law came almost directly from England, our history of divorce differs substantially from that in England. There were no judicial divorces in England until 1857, while many colonies and state courts could grant divorces from an early time. See Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW* 179, 434 (1973).

<sup>17</sup> See Kay, *Appraisal* supra note 15 at 299 (A major goal and an enduring achievement of the reforms was the elimination of hypocrisy and perjury from divorce proceedings).

<sup>18</sup> See Doris Jonas Freed and Henry H. Foster, *Family Law in the Fifty States: An Overview*, 17 FAM. L. Q. 365, 382 (1984) (the trend is to minimize the importance of marital misconduct as a factor in settlements). For a recent status of the law, see Elrod, Spector and Atkinson, supra note 13.

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circumstances facing some American adults that reduced the attraction and stability of marriage for them. While marriage has always had a romantic foundation in the United States,<sup>19</sup> it also has been encouraged by pragmatic considerations because couples, by living together, could improve their well-being compared with their being single. This occurred because of the gains from increased specialization that increased their welfare and that of their family.<sup>20</sup> This specialization, for example in child rearing, can have little market value, so marriage was a long term commitment to encourage those activities. In colonial days, this specialization generally occurred on farms. With the industrial revolution, the increase in employment opportunities for men resulted in their specializing in income earning while wives specialized in domestic activities.

Conditions changed reducing the gains from specialization as the opportunities available to men and women converged. Employment opportunities for women increased reducing their dependence on men for income.<sup>21</sup> Meanwhile, labor-saving devices became more readily available for the home reducing men's dependence on women.<sup>22</sup> Particularly important in this process was a decline in the attraction and, therefore, the number of children per family.<sup>23</sup> Children are an important source of the gains from specialization as they usually force at least one parent to increase their specialization in child care.<sup>24</sup> For much of history children were valuable to parents providing intangible pleasure as well as labor services and old age support. In the 20<sup>th</sup> Century, the value of their labor services and old age support declined, while increased employment opportunities for the parent who usually provided child care, the mother, increased their potential cost. Child care responsibilities required some combination of payments to providers or reduced

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<sup>19</sup> For a history of courtship and marriage in the United States, see Edward Shorter, *THE MAKING OF THE MODERN FAMILY* (1975).

<sup>20</sup> The seminal work on the economics of family has been done by Gary Becker. For example see Becker, *TREATISE*, supra note 10.

<sup>21</sup> The female labor force participation rate has been increasing for a long time in the United States, increasing from 15 percent of women aged 25-44 in 1890 to 60 percent by 1980. See Victor R. Fuchs, *HOW WE LIVE: AN ECONOMIC PERSPECTIVE ON AMERICANS FROM BIRTH TO DEATH* 127 (1983).

<sup>22</sup> *Id.* at 130.

<sup>23</sup> Between 1800 and 1910 the fertility rate, which is the number of births per thousand women aged 15-44, fell by more than half and it fell by half again during the ensuing 70 years. *Id.* at 17.

<sup>24</sup> *Id.* at 144 (After peaking in 1957, the fertility rate has declined dramatically.). The births per thousand population declined from 24.1 in 1950 to 14.8 in 1996. U.S. Bureau of the Census, *STATISTICAL ABSTRACT OF THE UNITED STATES*, 1998, Table 92 at 76 (1998).

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earnings for a parent. Overall, the benefit that adults anticipated from children fell while their cost increased with the result that people elected to have fewer children and, in some cases, they decided to have none.<sup>25</sup>

With fewer opportunities for specialization during marriage, the gains from marriage were reduced and the likelihood increased that a marriage that had been entered into optimistically turned out to be unsuccessful. In the process of dissolving their marriage, many people concluded that there were obvious problems with the existing fault grounds for divorce because they were perceived to be hypocritical and unfair. If the divorce was amiable, the couple had to fabricate testimony to establish the fault grounds of adultery, desertion or cruelty. Essentially, they had to commit perjury to obtain their divorce. If the divorce was not amiable, the divorcing spouse had a bigger problem since the “innocent” party had to initiate the divorce. The result could often be a much more generous compensation and custodial package than the divorcing spouse preferred.

Some people looked for easier methods for dissolving unsuccessful marriages and unilateral, no-fault divorce was the result. Unfortunately, we moved from a “one law fits everyone” environment based on fault grounds for divorce to one based almost exclusively on no-fault grounds. Many adults still wanted to make a long-term commitment to their spouse, especially if they wanted children, which frequently was frustrated by the new grounds for divorce. No matter the sincerity of promises made to a spouse, there was no way to escape the fact that the states had preempted the grounds for divorce and in most cases statutes permitted unilateral divorce. It was reasonable for many adults to respond to the statutes rather than the promises. The need for divorce laws that could accommodate a variety of preferences was not appreciated. In an unfortunate leap of logic, the conclusion was that if fault divorce was bad then no-fault divorce has to be good.

### *B. The Impact of No Fault Divorce*

Gradually, the initial optimism toward no-fault divorce was tempered by the recognition of its negative repercussions.<sup>26</sup> The key impact of no-fault divorce has been a reduction in the

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<sup>25</sup> For example, the percentage of households consisting of married couples with children under 18 declined from 31 percent in 1980 to 25 percent in 1997. Census, ABSTRACT, supra note 24 at Table 71 at 62.

<sup>26</sup> For a more detailed discussion of the impact of no-fault divorce, see Parkman, GOOD INTENTIONS, supra note 3 at 91.

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compensation to a divorced spouse for their commitment to their marriage and any sacrifices that they made for its benefit resulting in adults making a weaker commitment to their marriage.

### 1. Divorced Spouses

Initially, these concerns were addressed to divorced women and their children, while more recently other concerns about the effect of no-fault divorce on other members of society, especially those in intact families, have developed. Perhaps the most striking consequence of the introduction of no-fault divorce has been the deterioration in the financial condition of divorced women and the children of divorced parents.<sup>27</sup> The dissolution of a marriage can result in financial arrangements to cover a property settlement, spousal support, and child support. After the introduction of no-fault divorce, the financial settlements received by divorced women appear to have declined substantially.<sup>28</sup> This was especially the case for women in marriages of long duration.<sup>29</sup> The smaller settlements are due to no-fault divorce reducing the negotiating power of spouses who did not want to dissolve their marriage. The initially unwilling plaintiffs usually would have been unlikely to agree to filing the suit if they did not already know the financial outcome. The negotiations and the settlements were essential for inducing their cooperation. The fault grounds for divorce were important for providing leverage for the initially nonconsenting spouses, not for determining the details of financial arrangements. The courts' role was generally only to certify the parties' agreements.

No-fault divorce reversed the roles of the parties and the courts. With fault divorce, there were incentives for the couple to negotiate their own arrangements ignoring the applicable

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<sup>27</sup> See Weitzman, *REVOLUTION*, supra note 1.

<sup>28</sup> *Id.* at 323.

<sup>29</sup> More than half of the women married more than 15 years are not awarded support. See *id.* at 187. Moreover, divorces are becoming more common among long duration marriages. See Marilyn Chase, *No-fault Divorce Has a Fault of its Own, Many Women Learn*, *THE WALL STREET JOURNAL* 1 (January 21, 1985) (in 1960, only 4 percent of divorces involved couples married more than 15 years with that percentage rising in 20 percent in 1985). While divorces can occur for numerous reasons, the asymmetry of the contributions of husbands and wives to marriage can leave wives vulnerable at middle age. This occurs because the child care responsibilities of wives tend to occur before the prime income earning years of the husband creating incentives for husbands to seek a divorce especially if the costs of divorce are low. See Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 *J. LEG. STUD.* 267 (1987).

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statutes and courts.<sup>30</sup> Alternatively, with no-fault divorce the parties who did not want their marriage to be dissolved had significantly less negotiating power and in many states a divorce could be obtained unilaterally. If the divorce was litigated, the courts based these settlements on the existing laws that dictated how property was to be divided and alimony and child support awarded.<sup>31</sup> These laws had not been critically analyzed during the fault divorce era because they had seldom been applied in controversial cases. The divorced spouse could then expect to receive half of the limited marital property, short-term rehabilitative spousal support, and child support if there were minor children.<sup>32</sup> The spousal and child support was often difficult to collect.<sup>33</sup> The laws governing property settlements had serious problems as they considered only a narrow set of assets as property.<sup>34</sup> Most important, they ignored the spouses' income earning capacities, which financial analysts would recognize as just as much an asset as a car, a house or a share of stock.<sup>35</sup> This omission was particularly egregious when a spouse had reduced their future income earning capacity by limiting a career during marriage. Recognizing the fairly predictable outcome of litigation probably resulted in negotiated settlements that were not substantially different from those expected at trial. While a couple might trade off the different components of the settlement, a spouse was not likely to receive greater value overall than that provided by law.

While there is general agreement that women in long duration marriages have been adversely affected by the introduction of no-fault divorce, there has been some debate about the

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<sup>30</sup> Max Rheinstein, MARRIAGE, STABILITY, DIVORCE AND THE LAW 8 (1972) (divorcing couples privately agreed to an uncontested divorce) and REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY 30-1 (1966) (estimating that 94 percent of divorce hearings in California were uncontested).

<sup>31</sup> Replacing the fault grounds for divorce with no-fault grounds lead some authors to conclude that family law was being privatized. See, for example, Jana B. Singer, *The Privatization of Family Law*, 1992 WISC. L. REV. 1443, 1445 (1992).

<sup>32</sup> Weitzman, REVOLUTION, supra note 2 at 110 (property), at 143 (spousal support) and at 262 (child support).

<sup>33</sup> For example, in 1991 only 54 percent of custodial parents—mostly mothers—even had child support awards. While some of these parents had never married, most were either still married, divorced or separated. Of those with awards, three quarters received any payments at all and of those receiving payments approximately two thirds received full payments. See Lydia Scoon-Rogers and Gordon H. Lester, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS: 1991, Current Population Reports, Series P60-187 (August 1995).

<sup>34</sup> See Parkman, *Consistency*, supra note 4 at 55.

<sup>35</sup> Id. at 66.

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magnitude of the effect. The initial evidence was provided by Lenore Weitzman, who, based on interviews with divorced men and women in Los Angeles County, California, in 1978, concluded that divorced men experienced an average 42 percent increase in their standard of living in the first year after divorce and divorced women and their children experienced a 73 percent decline.<sup>36</sup> Other scholars have questioned the magnitude of the impact that she observed. Using a different data set, Saul Hoffman and Greg Duncan found the economic status of divorced women fell an average of approximately 30 percent in the first year after divorce.<sup>37</sup> Richard Peterson replicated her analysis and demonstrated that the estimates reported in her book are inaccurate.<sup>38</sup> His analysis, which used the same sample and measures of economic well-being as her book, produces 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.<sup>39</sup> More recently, Sanford Braver addressed some issues that the other authors had ignored such as the effects of taxes and additional transfers between the parents to conclude that men were only 2 percent better off and women 1 percent worse off after a divorce.<sup>40</sup> Certainty, we now have to conclude that Weitzman's often quoted numbers are probably inaccurate and the more accurate effects may be substantial, but smaller, than she reported.<sup>41</sup>

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<sup>36</sup> Weitzman, *REVOLUTION*, supra note 2 at 323.

<sup>37</sup> Greg J. Duncan and Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Divorce*, 22 *DEMOGRAPHY* 485 (1985) and Saul D. Hoffman and Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 *DEMOGRAPHY* 641 (1988) .

<sup>38</sup> Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 *AM. SOC. REV.* 528 (1996) (finds a 27 percent decline in women's standard of living and a 10 percent increase in men's standard of living after divorce).

<sup>39</sup> *Id.* at 533. In Weitzman's response to his article, she acknowledges that a subsequent review of her data revealed problems. See Lenore J. Weitzman, *The Economic Consequences of Divorce Are Still Unequal: Comment on Peterson*, 61 *AM. SOC. REV.* 537 (1996) (the policy impact of her earlier research was not caused by its specific statistics). For example, her sample over sampled people in longer marriages, who were more adversely affected by divorce. Moreover, she notes that she had questioned the 73 percent decline in women's post divorce standard of living, but had been reassured by her computer assistant that the number was accurate. *Id.*

<sup>40</sup> Sanford L. Braver, *DIVORCED DADS* 55 (1998).

<sup>41</sup> Also see, H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 *AM. ECON. REV.* 437 (1986) (an empirical study of the impact of legal and informational constraints on the marriage relationship) and Maccoby and Mnookin,

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Although less documented, no-fault divorce also has been a disaster for numerous divorced men. Because of unilateral divorce, they could easily have the marriage to which they had committed themselves dissolved against their will. Then, these men frequently are the primary source of income for two households instead of one. Financial support may be going to an ex-wife who left him for another man with whom she is then living. In addition, child support can be going to his ex-wife with him essentially having no control over how it is spent. For legal as well as practical reasons, fathers often are given only limited access to their children after divorce.<sup>42</sup>

### 2. Intact Families

A more subtle effect of no-fault divorce may be on the quality of life for members of intact family. As noted above, the key impact of no-fault divorce has been a reduction in the compensation to a divorced spouse for their commitment to their marriage and any sacrifices that they made for its benefit. The people who traditionally made these sacrifices rationally responded to this new environment by making a weaker commitment and fewer sacrifices.

Marriage is expected to be an arrangement that increases the welfare of all participants. Altruism is very important within families.<sup>43</sup> People tend to make decisions in markets based on narrowly defined self-interest, but the same people tend to base their decisions within the family on altruism. That is not to say that they are rational in one setting, but not in the other. Relationships in markets are often temporary. If a decision in a market confers uncompensated benefits on a stranger, the actor is not likely to receive anything in return.

Meanwhile, relationships within families can continue for a longer term. Actions within families that benefit the other members often result in the other members acting similarly at another time. Consideration of the effects on other family members is more likely when the persons bestowing benefits anticipate that the other family members will reciprocate. This is more

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supra note 5 at 260 (both fathers' and mothers' incomes adjusted for any court awards fell after divorce with the income of the mothers falling substantially more than that of the fathers).

Some scholars have questioned whether women were actually worse after divorce. See Herbert Jacob, *Silent Revolution: The Transformation of Divorce Law in the United States* 159 (1988). However, Jacob does not address questions that are capable of refuting Weitzman. See Parkman, GOOD INTENTIONS, supra note 3 at 105..

<sup>42</sup> When there is a conflict in the custodial preferences of fathers and mothers, the courts tend to respond to the mothers' preferences. See Maccoby and Mnookin, supra note 5 at 104.

<sup>43</sup> Becker, TREATISE, supra note 10 at 277. An argument for more state control over marriage than over other contracts is based on contracts being based on self-interest, while marriage should be based on altruism. See Schultz, supra note 12 at 241-2. Unappreciated are the disincentives that no-fault divorce creates for considering the welfare of others..

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likely to occur when marriage is a long-term arrangement or at least if the persons making the decisions know that they will eventually be compensated for any costs that they incur. Under those circumstances, the parties recognize that there is a quid pro quo: They act with the knowledge that their actions will benefit others and they in turn will benefit from the acts of the other members of the family. The incentives for these activities are often the benefits received from the other parties' activities.

If a marriage can be dissolved unilaterally without adequate compensation, the incentive structure changes. This is especially true if the benefits generated by the parties' actions are not concurrent. For example, the childcare services frequently provided by one spouse tend to occur before the other spouse's peak earnings period. Both child rearing and income earning confer benefits on the other family members, but the care giver may question whether their marriage will continue long enough for them to receive the external benefits produced by the other spouse's future income and their children's love. If they do not have faith that their marriage will continue into that period, they do not have as strong an incentive to increase their specialization in child rearing.

If the marriage is not viewed as a long-term arrangement, conflicts arise between preferences of the family and of individuals who worry about their fate if the marriage is dissolved. Some individuals who limit their employment opportunities may fear that they will not be compensated for any reduction in their future earnings, their human capital, that occurs if they work only part time, since full-time jobs provide opportunities for on-the-job training that are not available in the part-time jobs.<sup>44</sup> Spouses have incentives to evaluate the takeoff between working at home and at a job by their welfare rather than that of their family. Increasing their work outside the home from twenty to forty hours per week might impose more costs than benefits on the family--the net benefits for the family are negative. Conceptually, the benefits include the psychic income from the jobs,<sup>45</sup> but from the spouses' perspective, the extra hours of employment provide them with skills that would be beneficial if their marriage is dissolved. Therefore, the benefits of the jobs exceed the costs and they decide to work full time.<sup>46</sup>

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<sup>44</sup> Firms expect to get a higher return on investments in on the job training for full time workers than for part time workers, so they make larger investments in full time workers. See Gary S. Becker, *HUMAN CAPITAL*, 3<sup>RD</sup> ED. 30 (1993).

<sup>45</sup> Often the psychic income of employment is overestimated. As retirement benefits increase, many workers elect to take early retirement that indicates that they prefer leisure to their jobs. Better-educated workers are more likely to find interesting jobs and, therefore, work longer. See Fuchs, *HOW*, supra note 21 at 160 (1983) (at ages 55-64, over 80 percent of men with a college degree are still in the work force, compared with only 60 percent of men with an elementary school education).

<sup>46</sup> Although the substantial increase in the labor force participation rate of married women is frequently attributed to financial necessity, the largest increase in the labor force participation

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The effects of no-fault divorce are particularly apparent with married women. On the one hand, they have been forced to increase their emphasis on maintaining their marketable skills during marriage, while on the other they have felt compelled to sustain an important role in the home. Judging by the increase in the number of hours that they work, no-fault divorce has reduced their welfare. Victor Fuchs found that married women are working more hours per year after no-fault divorce than they had worked under fault divorce, and when they work outside the home, their responsibilities at home are not absorbed by the other members of their families.<sup>47</sup> My research provides some additional support that this shift in behavior by married women was a result of the introduction of no-fault divorce.<sup>48</sup> Living in a no-fault divorce state was shown to increase the total hours worked by married women by four and a half hours per week. This occurred because married women in no-fault divorce states on average worked outside the home six and half more hours per week while only reducing their work in the home by two hours.

### 3. Children

Although the discussion here has centered on adults, no-fault divorce also probably has had an adverse effect on the quality of life for many children. Certainly, children can benefit from the additional income and stimulation that come from their parents' employment.<sup>49</sup> This is most likely to occur when parents place a primary importance on their welfare of their family when making decisions. However, no-fault divorce creates incentives for parents to interpret their self-interest more narrowly based on themselves and less on the welfare of their family. With marriage

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rate of married women has been among those with middle to high income husbands. See Chinhui Juhn and Kevin M. Murphy, *Wage Inequality and Family Labor Supply*, 15 J. OF LABOR ECON. 72 (1997) (these findings cast doubt on the notion that the primary cause of the increased employment of married women has been financial necessity).

<sup>47</sup> Fuchs, *WOMEN'S QUEST*, supra note 2 at 78. Between 1960 and 1986, women increased the annual hours that they worked in the house and at a job by 7 percent, even as the hours spent by men in those two activities fell by the same percent. Married women increased their paid employment by 74 percent, while they decreased their housework by 14 percent and their child care by 26 percent. Over the same period, men increased their housework slightly, but they provided even less child care than before. Much of this shift was due to women continuing to assume most of the responsibility for child care.

<sup>48</sup> Parkman, *Married Women*, supra note 3.

<sup>49</sup> For support for this position, see Susan Chira, *A MOTHER'S PLACE* (1998) (reviews scientific evidence supporting gains for children from mother's employment) and Joan K. Peters, *WHEN MOTHERS WORK* (1997) (mothers' sacrificing themselves is not good for children).

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being a much more fragile institution, there are potentially fewer rewards for being concerned about the other family members.<sup>50</sup>

Most parents are deeply concerned about the welfare of their children, but--like all choices--parenting is influenced by its cost and benefit. When employment opportunities outside the home were limited and sacrificed careers were protected to some extent by fault divorce, the cost of a parent placing an emphasis on child care was low. As the cost rose because employment opportunities increased and no-fault divorce reduced the protection for a sacrificed career, parents became less willing to make this sacrifice. Moreover, the high rate of marriage dissolutions increased the likelihood that parents--especially fathers--might eventually have a more limited interaction with their children, thereby, reducing the benefit of parenthood.<sup>51</sup> With higher costs and lower benefits of parenthood, many parents have reduced their commitment to their children. As parents spend more time at jobs, they usually have less time to devote to their children.<sup>52</sup>

The importance of parents extends beyond just the preschool years as they are an important source of assistance and encouragement later on that can be frustrated when both parents have major obligations outside the home or the marriage has been dissolved. The period of increased parent employment and marital instability has been associated with the deterioration in the performance of children in school.<sup>53</sup>

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<sup>50</sup> For example, see Fuchs, *WOMEN'S QUEST*, supra note 3 at 78 (after the introduction of no-fault divorce, married couples increased their paid work while decreasing their housework, but more importantly, by reducing their child care).

<sup>51</sup> Margaret F. Brinig & Frank H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 *IND. L. J.* 393 (1998) (with joint custody laws fathers feel more involved with their children and are more likely to meet their child support obligations).

<sup>52</sup> Although parental involvement with their children is important, increasingly parents are turning responsibility for child care over to others. In 1990, more than half of American infants were in the care of someone other than their parents. See Shannon Brownlee, Matthew Miller, Susannah, Amy Saltzman, Brendan I. Koerner, and Jason Vest, *Culture & Ideas: Lies Parents Tell Themselves About Why They Work*, 122 *U. S. NEWS & WORLD REPORT* 58 (May 12, 1997). In 1994, in families in which the mother is either employed full time, has more than a college education, or the family income is more than \$50,000 a year approximately 35 percent of preschool children are either in child care or a nursery school and another 15 percent are being cared for by someone other than a relative in the provider's home. See Lynne M. Casper, *Who's Minding Our Preschoolers? Fall 1994 (Update)*, U. S. Bureau of the Census, *CURRENT POPULATION REPORTS*, P70-62, (1997).

<sup>53</sup> Between 1967 and 1997, the average score on the verbal component of the Scholastic Assessment Test (SAT) fell from 543 to 505, while the math score fell from 516 to 511. During intervening years, these scores were even lower. Census, *ABSTRACT*, supra note 24, Table 290

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While no-fault divorce has reduced the attention that children get in two-parent households, they get even less attention if their parents are divorced. No-fault divorce has not only made family life less stable during marriage, it has also probably contributed to the increase in the divorce rate.<sup>54</sup> Although the divorce rate rose under fault divorce, people did not casually

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at 183. While the increase in single parent households has undoubtedly contributed to this trend, no-fault divorce has probably reduced parental academic support for their children.

<sup>54</sup> It has been difficult to test for the effect of no-fault divorce on the divorce rate. First, no-fault divorce has taken a variety of forms from “irretrievable breakdown” to “living separate and apart” for a specific period creating ambiguity about how it should be specified in empirical studies. Second, the effects would be expected to be lagged and the structure of the lagged effects is unknown. Last, since all states have had some form of no-fault divorce for more than a decade there are no states with different laws against which the no-fault divorce states can be compared. Any comparison with an earlier period is forced to deal with a broad variety of others changes that have occurred.

These problems have not deterred scholars. Gary Becker found that the change in the grounds for divorce in California in 1970 led only to a short-term increase in the divorce rate in that state with the rate quickly returned to its old trend. See Becker, *TREATISE*, supra note 10 at 334 (the actual rates for California were higher than the "trend" in 1970-1972, but they returned to the long-term trend by 1973). In the first systematic study of the impact of no-fault divorce on the divorce rate, Elizabeth Peters found that residence in a no-fault divorce state in 1979 did not increase the probability that a woman would divorce. Peters, supra note 41 at 446. Peters' results have been challenged by Doug Allen who questions her designation of no-fault divorce states. See Douglas W. Allen, *Marriage and Divorce: Comment*, 82 AM. ECON. REV. 679 (1992) (by removing the influence of the regional variables used by Peters, no-fault divorce has a positive effect on the divorce rate). Using different data than Peters and Allen, Martin Zelder concludes that no-fault divorce caused an increase in the divorce rate. Martin Zelder, *Inefficient Dissolution as a Consequence of Public Goods: The Case of No-fault Divorce*, 22 J. LEG. STUD. 503 (1993). Using still another data set, Jeffrey Gray concludes that unilateral divorce had little effect on the probability that a couple would divorce. Jeffrey S. Gray, *Divorce-Law Changes, Household Bargaining, and Married Women's Labor Supply*, 88 AM. ECON. REV. 628 (1998). However, Leora Friedberg determined that divorce rates would have been about 6 percent lower if states had not adopted no-fault divorce. Leora Friedberg, *Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data*, 88 AM. ECON. REV. 608 (1998). Since some states that have no-fault grounds for divorce still consider fault in determining financial settlements, a true no-fault divorce state would be one in which both the laws governing both dissolution and the financial settlement are no-fault. Using that definition for no-fault divorce, Peg Brinig and Frank Buckley found that no-fault divorce was associated with higher divorce levels. Margaret F. Brinig and F. H. Buckley, *No-Fault Laws and At-Fault People*, 18 INT. REV. L. & ECON. 325 (1998). For a recent discussion of the evidence on this issue, see

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dissolve a marriage. There had to be a strong sense that the marriage was a failure and at least one spouse frequently had to make major concessions to induce the other spouse to cooperate in a divorce. Knowing that it was going to be difficult to dissolve their marriage gave spouses an incentive to strive to make their marriage work. The durability of marriage frequently worked to the benefit of children.

No-fault divorce permits either parent to dissolve a marriage unilaterally based potentially on very flimsy motives. This is compounded by the potential for a no-fault divorce often making marriages more fragile by reducing the spouses' commitment to their marriage in the first place. Therefore, a marriage could be dissolved when there was still the potential for a successful and rewarding relationship for the spouses and their children. Paul Amato and Alan Booth found that between 1980 and 1992 that only a minority of divorces that they reviewed involved high conflict marriages.<sup>55</sup> Not having made a substantial commitment to their marriage, some spouses divorced after a minor provocation. Their weighing of the cost and benefit of divorce might not adequately take into consideration the impact of the divorce on any children.

While children are frequently hurt by disruptive families, they are usually better off in reasonably smoothly functioning two parent households than in single parent households or stepfamilies.<sup>56</sup> In single parent households, the relations between the custodial parent—usually the mother—and their young children are often strained after divorce.<sup>57</sup> Being a single parent is a demanding and frustrating experience. Divorced mothers, compared with married mothers, are less affectionate with their children, punish them more harshly, and monitor their behavior less carefully.

In addition, after divorce there is a reduction in the critical link between children and their father.<sup>58</sup> When a father is not present in home, his son is twice as likely to end up in jail.<sup>59</sup> Much

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Robert Rowthorn, *Marriage and Trust: Some Lessons from Economics*, 23 CAMBRIDGE J. ECON. 661 (1999). In conclusion, the more recent evidence lends some support to the argument that no-fault divorce has increased the divorce rate.

<sup>55</sup> Paul R. Amato and Alan Booth, A GENERATION AT RISK 220 (1997) (only 28 percent of parents who divorced during the study reported any sort of spousal physical abuse prior to divorce, 30 percent reported more than two serious quarrels in the last month, and 23 percent reported that they disagreed “often” or “very often” with their spouses).

<sup>56</sup> See Sara McLanahan and Gary Sanderfur, GROWING UP WITH A SINGLE PARENT 3 (1994) (an intact family can provide the child with important social capital).

<sup>57</sup> E. Mavis Hetherington, *Presidential Address: Families, Lies and Videotapes*, 1 J. OF RES. ON ADOLESCENCE 323 (1991) (the effect on sons was greater than that on daughters).

<sup>58</sup> David Popenoe, LIFE WITHOUT FATHER 10 (1996) (studies show that virtually all children clearly distinguish a mother role from a father role) and Paul R. Amato, *Father-child*

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of what fathers contribute to child development is simply the result of having a second adult in the home. Their presence is also important because men and women have many fundamental differences that benefit children.<sup>60</sup> Differences have universally been found in aggression and general activity level, cognitive skills, sensory sensitivity, and sexual and reproductive behavior. Conditions for children do not necessarily improve if the custodial parent remarries. Children in stepfamilies are no better off, on average, than children in divorced, single parent families.<sup>61</sup>

In summary, no-fault divorce has created incentives for adults to be more concerned about themselves and less about their family. The repercussions of no-fault divorce go beyond the deteriorating conditions of divorced women and their children. By making a long term commitment to a marriage less attractive, no-fault divorce has also had an adverse effect on married couples and their children.

### III. LEGISLATIVE REFORMS OF THE NO-FAULT GROUNDS FOR DIVORCE

While there has been substantial criticism of the effects of the current divorce laws, the reform of the no-fault divorce statutes has been very limited.<sup>62</sup> Surveys show that roughly half of

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*Relations, Mother-child Relations, and Offspring Psychological Well-being in Early Adulthood*, 56 J. OF MAR. & FAM. 1031 (1994) (discusses the important role of fathers in the lives of young adults).

<sup>59</sup> In a report presented at the 1998 American Sociological Meetings, Cynthia Harper and Sara McLanahan found that boys whose fathers were absent from the household had double the odds of being incarcerated—even when other factors such as race, income, parents' education, and urban residence were held constant. Boys who grew up with a stepfather had an even higher rate of incarceration. *Boys With Absentee Dads Twice as Likely to be Jailed*, WASHINGTON POST A3 (August 21, 1998).

<sup>60</sup> Popenoe, *supra* note 58 at 139 (men and women think and act differently).

<sup>61</sup> McLanahan & Sandefur, *supra* note 56 at 71 (remarriage of the custodial parent does not affect a child's chances of graduating from high school or avoiding a teenage birth).

<sup>62</sup> Laura Bradford, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STANFORD L. REV. 607 (1997) (considers three proposals to

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all Americans favor changes that would make it more difficult to get a divorce,<sup>63</sup> which is a significant increase from a decade ago. Still, it was almost thirty years after the passage of no-fault divorce in California before states seriously considered alternatives. In 1996, at least 20 states considered divorce reform, including proposals in 12 states to modify or eliminate no-fault divorce statutes.<sup>64</sup> The reform movement got its start in the Midwest, where legislators in Michigan and Iowa sought to create a divorce system that would prohibit a no-fault dissolution in cases in which one spouse contests the divorce or minor children are involved. On Valentine's Day 1996, Michigan State Representative Jessie Dalman launched the divorce counter revolution. In an announcement made on the steps of the Michigan Capital Building, Representative Dalman unveiled a series of bills designed to strengthen the institution of marriage by ending unilateral divorce.<sup>65</sup> For a divorce, these bills would require proof of fault consisting of desertion, infidelity, abuse, a prison sentence of more than three years, alcoholism or drug addiction if one spouse opposes the divorce.<sup>66</sup> If both the husband and wife were to dissolve the marriage, the no-fault grounds would remain. However, if children still live at home, the couple would be required to get counseling and a parenting plan first. It also encouraged premarital counseling by having a lower fee and shorter waiting period for those people who had gone through sessions with a minister, psychologist or family therapist.

Representative Dalman's bills have not been passed and similar bills have fared no better in other states. The first bill to be voted on was in Washington state that would have permitted couples the option to sign a prenuptial contract excluding no-fault divorce.<sup>67</sup> Common among the opponents of any change in the no-fault divorce laws has been concern for the people who make a mistake when they marry. For example, the minority leader of the Washington legislature, who was a family lawyer, argued that the bill might induce many couples to sign prenuptial contracts they would later regret. Ignored, because it is subtle, was that many people want and are willing

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return to consideration of fault in the divorce process).

<sup>63</sup> Ann Scott Tyson, *States Put Minor Speed Bumps in Divorce Path*, THE CHRISTIAN SCIENCE MONITOR 1 (September 10, 1996) (some reform proposals include waiting periods and mandatory counseling).

<sup>64</sup> Maggie Gallagher, *Time to 'fess Up to Messing Up*, USA TODAY 15A (January 23, 1997) (no changes had occurred in the 12 states considering reform).

<sup>65</sup> H. B. 4432, 88<sup>th</sup> Leg., 1995 Reg. Sess. (LEXIS, States Library, MIBill File, Mich. 1995).

<sup>66</sup> Kenneth Cole, *Bills Work Make Divorce Harder*, THE DETROIT NEWS 1 (February 13, 1996) (Rep. Jessie Dalman introduced an 11 bill package).

<sup>67</sup> Id.

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to make a long term commitment to their spouse, which is not permitted in most states under current legislation. The Washington bill did not pass. Iowa did pass legislation in 1996 that requires parents to take classes on how to protect their children from the pain of divorce.<sup>68</sup>

In 1997, Louisiana became the first state to enact a major revision of its no-fault divorce statute when it passed the Covenant Marriage Act.<sup>69</sup> This Act gives those planning to marry in Louisiana a choice between two options: a standard marriage with the potential for a no-fault divorce or a covenant marriage.<sup>70</sup> The covenant marriage differs from the standard marriage in several ways. Most fundamentally, those choosing a covenant marriage must receive counseling prior to the wedding,<sup>71</sup> must agree to pursue additional counseling if the marriage encounters difficulty,<sup>72</sup> and cannot obtain a no-fault divorce without a lengthy separation.<sup>73</sup> Under these covenant marriages the grounds for divorce are limited. A spouse to a covenant marriage may obtain a judgment of divorce only upon proof of one of the following: (1) the other spouse has committed adultery,<sup>74</sup> (2) the other spouse has committed a felony and has been sentenced to death or imprisonment at hard labor,<sup>75</sup> (3) the other spouse has abandoned the matrimonial domicile for a period of one year and constantly refuses to return,<sup>76</sup> (4) the other spouse has physically or sexually abused the spouse seeking the divorce or a child of one of the spouses,<sup>77</sup> or

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<sup>68</sup> Jenifer Warren, *No-fault Divorce Under Fire in State, Nation*, LA TIMES A1 (April 12, 1998) (reformers wanted to create three divorce options in California).

<sup>69</sup> LA. REV. STAT. ANN. 9:272(West Supp. 1998). See Nicole D. Lindsey, *Marriage and Divorce: Degrees of "I Do," an Analysis of the Ever-Changing Paradigm of Divorce*, 9 J. LAW & PUB. POL'Y 265 (1998) (discusses a proposed Florida statute similar to the one enacted in Louisiana) and Katherine Shaw Spaht, *Propter Honoris Prestum: For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547 (1998) (the author drafted the Louisiana Covenant Marriage law).

<sup>70</sup> Id. at 9:272, 9:273.

<sup>71</sup> Id. at 9:273(A)(2)(a).

<sup>72</sup> Id.

<sup>73</sup> Id. at 9:307.

<sup>74</sup> Id. at 9:307(A)(1).

<sup>75</sup> Id. at 9:307(A)(2).

<sup>76</sup> Id. at 9:307(A)(3).

<sup>77</sup> Id. at 9:307(A)(4).

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(5) the spouses have been living separate and apart continuously without reconciliation for a period of two years, if there is no separation agreement.<sup>78</sup> If a separation agreement has been obtained, the parties can obtain a divorce after one year of separation if there are no minor children<sup>79</sup> and one year and six months of separation if there are minor children.<sup>80</sup> Separation judgments can be obtained for the same fault-based reasons as the divorce, as well as for the “habitual intemperance of the other spouse, or excesses, cruel treatment, or outrages” if such behavior is “of such a nature to render their living together insupportable.”<sup>81</sup> So far, the covenant marriage has not been warmly received by couples in Louisiana. After one year, only 1 percent of Louisiana newlyweds have chosen it.<sup>82</sup> Similar covenant marriage legislation was passed in Arizona in 1998.<sup>83</sup> Meanwhile, other states such as Pennsylvania, Illinois, Virginia, Georgia and a handful of other states are also considering legislation.

In summary, public concern about no-fault divorce has not led to any significant reforms to date. While the Louisiana Covenant Divorce Legislation has received substantial publicity, it is not likely to affect many people’s behavior. Therefore, our next concern is why there has been such a limited response.

### IV. IMPEDIMENTS TO REFORM

Although we have observed substantial reform activity, there has not been much progress. A major problem with any reform of no-fault divorce is that the conditions that led to the shift from fault to no-fault divorce no longer exist. The problems with fault divorce were obvious. The laws were hypocritical forcing people to fabricate testimony to obtain a divorce that ended a marriage that had failed for other reasons. People were lying to get a divorce and, to add to the

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<sup>78</sup> Id. at 9:307(A)(5).

<sup>79</sup> Id. at 9:307(A)(6)(a).

<sup>80</sup> Id. at 9:307(A)(6)(b).

<sup>81</sup> Id. at 9:307(A)(6).

<sup>82</sup> Christine B. Whelan, *No Honeymoon for Covenant Marriage*, WALL STREET JOURNAL A12 (August 17, 1998) (while 17 states considered similar legislation during 1998, only Arizona passed it into law). 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 three 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.

<sup>83</sup> ARIZ. REV. STAT. § 25-901.

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discomfort, they were lying under oath. They were committing perjury. In addition, there were some very vocal advocacy groups. Because the problems with fault were obvious, it had strong support among academics.<sup>84</sup> In addition, the matrimonial bar was very uncomfortable suggesting perjury to its clients giving it a strong impetus to change the grounds for divorce.<sup>85</sup> Last, you had divorced people—the most vocal being men—who were often unhappy with the negotiations necessary for their divorce.<sup>86</sup>

### A. *Subtle Repercussions*

The problem with no-fault divorce is that its repercussions are subtle, while not being hypocritical. It is subtle because the primary reaction has been a reduction in the commitment by adults to their family. Few people recognize that both parents frequently are making a major commitment to employment, not because of dire financial circumstances or that the jobs are wonderful and fulfilling, but because they are both concerned about their circumstances if the marriage is dissolved. Although there is broad concern about the state of the American family, seldom is no-fault divorce recognized as a significant contributing factor.<sup>87</sup> Since no-fault divorce is effectively unilateral divorce in most states, there is no opportunity for hypocrisy. If someone wants out of a marriage, they do not have to rationalize why, they just file for divorce. Without

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<sup>84</sup> See Herma Hill Kay, *A Family Court: The California Proposal*, 56 Cal. L. Rev. 1205, 1220 (1968) (the matrimonial offense approach to divorce should be modified) and (Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32 (1966) (rejecting the idea that marriage fails because of certain specific acts)

<sup>85</sup> Professor Grace Blumberg argues that the primary beneficiaries of the no-fault divorce reform were lawyers and judges who had been forced to compromise professional ideals in the routine management of divorce cases. See Grace Blumberg, *New Models of Marriage and Divorce*, in Kingsley Davis, ed, in association with Amyra Grossbard-Shechtman, CONTEMPORARY MARRIAGE: COMPARATIVE PERSPECTIVES ON A CHANGING INSTITUTION 349, 352 (1985).

<sup>86</sup> The concern of divorced men can be illustrated with James A. Hayes, who was the Chairman of the California Assembly Judiciary Committee that drafted the California no-fault divorce act. He had negotiated a divorce settlement prior to the passage of the act, which he eventually had modified based on the act and the Assembly's Report that he wrote. See Parkman, GOOD INTENTIONS supra note 3 at 80.

<sup>87</sup> For a discussion of concerns about the family, see Elizabeth Gleick, *Should This Marriage Be Saved*, TIME MAGAZINE 48 (February 27, 1995) (discusses the problems facing the family without referring to no-fault divorce).

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recognition of the problem and a committed advocacy group, the reform of no-fault divorce has not progressed very far.

Regrettable, the debate so far represents the triumph of the obvious over the subtle. No-fault divorce is defended because it protects people who have made a miscalculation by marrying someone with whom they no longer want to live—the obvious.<sup>88</sup> What about the unfortunate women who would be locked into loveless marriages if the grounds for divorce were either mutual consent or fault? Ignored—because it is a great deal subtler—are the gains from encouraging and rewarding those who have made or are attempting to make better decisions. They want to search diligently for the best spouse and then after marriage they want to make the decisions that increase their and their family’s gains from marriage. No-fault divorce does not encourage or reward success in this process. A number of disciplines use the term “moral hazard” to describe the tendency of a person who buys insurance to relax his efforts to prevent the occurrence of the risk that he has insured against.<sup>89</sup> In a similar manner, no-fault divorce is a form of insurance against bad decisions and as a result it encourages bad decisions.<sup>90</sup> Since no-fault divorce—relative to fault or mutual consent divorce—reduces the cost of poor judgment when choosing a spouse, we would expect less diligent search for spouses and, consequently, poorer matches—and more divorces.<sup>91</sup> Rather than reducing the cost of poor decisions, this article argues that the preferred solution would be to encourage wiser decisions.

The debate about divorce reform also represents an unfortunate use of the English language. The problem with the current divorce laws is not that they are necessarily no-fault, but rather that they permit unilateral divorce. In fact, it is interesting to consider whether the divorce reforms that we have observed over recent decades would have been as warmly received if the proposed legislation had been called unilateral divorce rather than no-fault divorce. If the true problem with the current laws is recognized to be their permitting unilateral divorce, then the

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<sup>88</sup> For example, Stephanie Coontz, *THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA’S CHANGING FAMILIES* 82 (1997) (making divorce more difficult only exacerbates bitterness and conflict). Others argue that no-fault divorce protects children from the mistakes of their parents, without recognizing the benefits to children from parents having incentives to make better decisions. See Robert M. Gordon, *The Limits of Limits on Divorce*, 107 *YALE L. J.* 1435 (1998)

<sup>89</sup> See Richard A. Posner, *ECONOMIC ANALYSIS OF LAW*, 4<sup>TH</sup> ED 108 (1992).

<sup>90</sup> With no-fault divorce making it easy to limit the costs of poor judgment as to a choice of a spouse, it should be no surprise that adults are less likely to search diligently for a spouse often resulting in poor matches. See Bruno S. Frey and Reiner Eichenberger, *Marriage Paradoxes*, 9 *RATIONALITY & SOCIETY* 187 (1996).

<sup>91</sup> See *supra* text accompanying note 54.

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appropriate alternative to consider is mutual consent rather than fault divorce. Mutual consent divorce for established marriages has a great deal more to recommend it than fault divorce.

### *B. The Constitutional Constraint on Divorce Reform*

Even if the grounds for divorce were changed in a few states in a manner that encouraged adults to make a long term commitment to their marriage, the impact would be feeble at best. Lurking ominously behind even public awareness of the problems created by no-fault divorce is federal law that holds that a marriage is a status<sup>92</sup> that gives the state in which either spouse is domiciled jurisdiction to grant a divorce which usually will be honored in the other states due to the Full Faith and Credit Clause of the U. S. Constitution.<sup>93</sup> As a practical matter so long as marriage is treated as a status, the federal system in the United States discourages states from having grounds for divorce that are substantially stricter than those in other states.<sup>94</sup> Divorces are governed by state statutes and yet reform will be hard to accomplish on a state by state basis. Regulating the family is part of the police powers and has historically been confined to the states under the 10th Amendment of the U. S. Constitution<sup>95</sup> The federal government has only made

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<sup>92</sup> *Williams v. North Carolina*, 317 U.S. 287 (1942). The references here to the problems associated with marriage being treated by the courts as a status really consists of three interrelated conflict of laws doctrines: the status exception, the domicile rule and the choice-of-law corollary. The status exception compels respondents in divorce cases either to defend in states with which they have no meaningful connection or to forfeit their right to stay married. The domicile rule gives a state court jurisdiction only over people domiciled within the state. Last, the choice-of-law corollary authorizes states to apply their divorce laws to marriages with which they have no real connection. See Rhonda Wasserman, *Parents, Partners, and Personal Jurisdiction*, 1995 U. ILL. L. REV. 813 (1995) (the status exception should not be used to sanction divorce or child custody proceedings in states that lack in personam jurisdiction over all interested parties) and Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 WM AND MARY L. REV. 1 (1997) (neither the domicile rule nor its choice-of-law corollary further the policies for which they have been defended).

<sup>93</sup> U.S. CONST. art. IV, 1. For discussions of the jurisdictional issues in divorce see Homer H. Clark, Jr., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES*, 2<sup>ND</sup> ED. 413 and Gregory, et. al., *supra* note 7 at 189.

<sup>94</sup> See Mary Ann Glendon, *THE TRANSFORMATION OF FAMILY LAW* 190 (1989) (it is common for a state to grant a divorce when it does not have jurisdiction over the couple's property or children).

<sup>95</sup> For example, *Simms v. Simms*, 175 U.S. 162, 167 (1899) holds, "The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the State, and

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limited intrusions into family law.<sup>96</sup> Although divorce law is a state matter, the U. S. Supreme Court has delineated some special rules for divorce jurisdiction, primarily to specify which divorce decrees must be afforded full faith and credit.

When most states had similar fault grounds for divorce, seldom was it advantageous for a spouse to move to another state to obtain a divorce. Moreover, the U. S. Supreme Court was unwilling to give full faith and credit to a divorce obtained by a spouse in a proceeding in which their spouse, who was domiciled in another state, did not participate. In 1905, the Supreme Court first addressed the issue of migratory divorce in *Haddock v. Haddock*.<sup>97</sup> In that case, a couple was married in New York in 1868 and never lived together. Eventually, the husband moved to Connecticut and in 1881 obtained in that state a divorce based on constructive, but not actual, service of process on his wife who continued to live in New York and who never appeared in the Connecticut action. In 1899, the wife sued for divorce in New York and obtained personal service on her husband in that state. In his defense, the husband pleaded the Connecticut judgment. The U. S. Supreme Court held that one party to a marriage being domiciled within a state did not give the court of that state jurisdiction to render a decree of divorce enforceable in all the other states by virtue of the full faith and credit clause of the Federal Constitution against a nonresident who did not appear and was only constructively serviced with notice of the pendency of the action. The court emphasized that the divorce suit is not a proceeding *in rem* justifying the court to enter a decree as to the *res*, or the marriage relationship, entitled to be enforced outside the territorial jurisdiction of the court.<sup>98</sup> The court acknowledged that the states had an important role in regulating marriage and the decisions in one state can conflict those in other states. The court concludes, “For if it be that one government in virtue of its authority over marriage may dissolve that tie as to citizens of another government, other governments would have a similar power, and hence the right of every government as to its own citizens might be rendered nugatory by the exercise of the power which every other government possessed.”<sup>99</sup>

The trend toward migratory divorces continued especially as some states discovered that easy divorces and short term residency requirements could attract new business. This trend was particularly apparent in Nevada. In 1942, the U.S. Supreme Court reconsidered the credit to be

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not the laws of the United States.”

<sup>96</sup> See Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 UCLA L. REV. 1297 (1998) (challenges both the existence of an exclusively local tradition in family law and the uncritical use of historical claims in federalism discourse)..

<sup>97</sup> 201 U.S. 562 (1905).

<sup>98</sup> *Id.*.

<sup>99</sup> *Id.* at 573.

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given migratory divorces and it overruled *Haddock* in *Williams v. North Carolina (Williams I)*.<sup>100</sup> The Court held that the domicile of one or both spouses is sufficient to confer divorce jurisdiction to a state court, stating that “each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there.”<sup>101</sup> Mr. Williams and Mrs. Hendrix were initially married in North Carolina and lived with their spouses there for more than 20 years.<sup>102</sup> In May 1940, they went to Las Vegas, Nevada, and after the statutory minimum period of six weeks to establish a domicile in that they state, they filed for a divorce from their spouses. Their spouses, who continued to live in North Carolina, did not enter an appearance nor were they served with process in Nevada. Mrs. Hendrix’s husband was served through publication of the summons in a Las Vegas newspaper and by mailing a copy of the summons and complaint to his last post office address.<sup>103</sup> Mr. Williams’ wife was served by a North Carolina sheriff delivering a copy of the summons and complaint to her, obviously in North Carolina.<sup>104</sup> She also did not appear at the proceeding in Nevada. Mr. Williams was granted a divorce on August 26, 1940, on the ground of extreme cruelty and Mrs. Hendrix received hers on October 4, 1940, on the same ground plus wilful neglect.<sup>105</sup> The couple married on the same day that Mrs. Hendrix received her divorce. As husband and wife they returned to North Carolina where they were eventually prosecuted and convicted of bigamous cohabitation.<sup>106</sup>

In reversing this conviction, the U. S. Supreme Court created a somewhat unique role for divorce proceeding. While acknowledging that they are not *in rem*, they also concluded that it is not a mere *in personam* action either because of the states’ interest in the marriage relationship.<sup>107</sup> It held “. . . that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own borders the marriage status of the spouse domiciled there, even though the other spouse is absent.”<sup>108</sup> It recognized the concern expressed

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<sup>100</sup> *Williams v. North Carolina*, 317 U.S. 287 (1942).

<sup>101</sup> *Id.* at 299.

<sup>102</sup> *Id.* at 289.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 290.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 291.

<sup>107</sup> *Id.* at 297.

<sup>108</sup> *Id.* at 298.

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in *Haddock* that due to the full faith and credit clause divorces obtained without personal service would substantially dilute the sovereignty of other states.<sup>109</sup> The Court noted that it did not address the issue of the power of North Carolina to refuse full faith and credit to the Nevada divorce if, contrary to the findings of the Nevada court, North Carolina found that no bona fide domicile was acquired in Nevada.<sup>110</sup>

This last issue was addressed by the U. S. Supreme Court in *Williams v. North Carolina (Williams II)*,<sup>111</sup> which followed the Williams being convicted again of bigamy in North Carolina when a North Carolina court rejected Nevada's determination that they had established a valid domicile in Nevada and, therefore, their divorces were not valid in North Carolina. The Court emphasizes the important role of the states in the regulation of marriage by stating,

“Divorce, like marriage, is of concern not merely to the immediate parties. It affects personal rights of the deepest significance. It also touches basic interests of society. Since divorce, like marriage, creates a new status, every consideration of policy makes it desirable that the effect should be the same wherever the question arises.”<sup>112</sup>

Based on this concern, the standard for what is an individual's domicile assumes a central role. The North Carolina jury was instructed that a domicile was the place where a person “has voluntarily fixed his abode . . . not for a mere special or temporary purpose, but with a present intention of making it his home, either permanently or for an indefinite or unlimited length of time.”<sup>113</sup> North Carolina was not required to yield its policy toward the conditions necessary to establish a valid domicile just because Nevada found that petitioners were domiciled there. North Carolina was entitled to find that Mr. Williams and Mrs. Hendrix did not acquire domiciles there and that the court there was without power to liberate the petitioners from the laws of North Carolina. Not having established a domicile in Nevada, the Court held that Mr. Williams and Mrs. Hendrix were still domiciled in North Carolina, where they continued to be married to others making their cohabitation bigamous.<sup>114</sup>

Although we are concerned with the honoring of divorce decrees in jurisdictions other than the one in which they are granted, the courts have continued to require an actual domicile in

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<sup>109</sup> Id. at 302.

<sup>110</sup> Id.

<sup>111</sup> 325 U.S. 226 (1945).

<sup>112</sup> Id. at 230.

<sup>113</sup> Id. at 236.

<sup>114</sup> Id. at 239.

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a state as a condition necessary for a valid decree based on due process. For example, in 1953 Mr. and Mrs. Alton lived in Connecticut, which had the traditional fault grounds for divorce. Mrs. Alton went to the Virgin Islands in which incompatibility was a ground for divorce and six weeks residency was prima facie evidence of domicile.<sup>115</sup> Her husband entered an appearance and waived service of summons. The trial court judge asked for further proof of domicile, which was not provided, so he denied the couple their divorce. On appeal, the United States Court of Appeals for the Third Circuit in *Alton v. Alton*<sup>116</sup> held that a statute that determining domicile based on a period of residency without additional requirements addressing the intent of the party was invalid under the Due Process Clause of the U. S. Constitution.<sup>117</sup> Because of marriage being a status, domicile continued to be the key issue. The court concluded that, “[a]n attempt by another jurisdiction to affect the relation of a foreign domiciliary is unconstitutional even though both parties are in court and neither one raises the question.”<sup>118</sup> Moreover, “. . . , we believe it to be lack of due process for one state to take to itself the readjustment of domestic relations between those domiciled elsewhere.”<sup>119</sup>

While the decisions in *Williams II* and *Alton* might lead one to the conclusion that migratory divorces were going to become much less attractive. That did not occur as state courts generally applied a very generous standard toward the acts and duration necessary for establishing domicile. The generous acceptance of domicile and, therefore, foreign divorces can be illustrated by *Cooper v. Cooper*.<sup>120</sup> The Coopers were married in 1935 in Iowa and continued to live in that state. In 1958, Hazel Cooper obtained an Iowa decree of separate maintenance. Eventually, her husband, Raymond, moved to Reno, Nevada, in October 1969 and he filed for divorce there in December 1969 with Hazel Cooper being personally served in Iowa. At the end of December, Hazel Cooper was adjudged to be in default for not having made an appearance and the divorce was granted to her husband. In January 1970, Raymond Cooper returned to Iowa and married

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<sup>115</sup> Bill No. 55, 17<sup>th</sup> Legislative Assembly of the Virgin Islands passed May 19, 1953, approved May 29, 1953, amending Sec. 9 of the Divorce Law of 1944.

<sup>116</sup> 207 F.2d 667 (3<sup>rd</sup> Cir. 1953), vacated as moot, 347 U.S. 610 (1954) (per curiam). Also see, Wasserman, *Divorce*, supra note 92 (limit the effect of *Williams II* by holding that due process requires domicile only in ex parte cases).

<sup>117</sup> U.S. CONST. art. V.

<sup>118</sup> 207 F.2d 667, 677 (3<sup>rd</sup> Cir. 1953).

<sup>119</sup> *Id.*

<sup>120</sup> 217 N.W.2d 584 (Iowa, 1974).

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Mary in February 1970. Prior to July 1971, Dr. Cooper died and the following year Hazel commenced an action to set aside the Nevada divorce.<sup>121</sup>

To the casual observer the facts do not appear to be substantially different from those of Mr. Williams, except that Dr. Cooper returned to Iowa for his subsequent marriage. Dr. Cooper made an effort to appear to be establishing a domicile in Nevada. He attempted to secure a license to practice anesthesiology, but was only granted one to engage as a general practitioner and he found employment in that field.<sup>122</sup> Moreover, he established a checking account and obtained a Nevada driver's license. However, balanced against these actions, he never purchased property living in an apartment during his stay nor did he obtain Nevada automobile license plates.<sup>123</sup> He maintained his office in Iowa primarily to collect bills, but his wife-to-be did administer shots to some patients when directed to by other doctors. When coupled with the short duration of his stay in Nevada, this is not a compelling case for Dr. Cooper having an intention of making Nevada his home either permanently or for an indefinite or unlimited length of time, which *Williams II* appears to require for the establishment of a domicile. The Iowa court notes that a party seeking to collaterally invalidate a foreign divorce decree for lack of domiciliary jurisdiction assumed a heavy burden.<sup>124</sup> It then placed a burden on the plaintiff to prove by clear, satisfactory and convincing evidence that Dr. Cooper did not have the requisite intent to establish a domicile in Nevada at the time that he moved there.<sup>125</sup> With some concern for the position in which Mary Cooper would find herself if the divorce was invalid in Iowa,<sup>126</sup> the Iowa court held that the plaintiff failed to negate the presumption of jurisdiction which attends the contested divorce decree.

With the introduction of no-fault divorce making the divorce laws in most states similar, the need for migratory divorces has disappeared and with it any litigation as to whether divorces granted to a spouse in one state should be honored in other states. Still the decisions in *Williams I* and *II* and how they have been interpreted in cases like *Cooper* present major problems for divorce reform. Migratory divorce was perceived to be a problem when most states had strict divorce laws, but a few had lenient laws. One can imagine the problems proponents of stricter divorce laws have if most states have lenient laws. So long as marriage is treated as a status, this problem is almost insurmountable.

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<sup>121</sup> Id. at 585.

<sup>122</sup> Id.

<sup>123</sup> Id. at 586.

<sup>124</sup> Id.

<sup>125</sup> Id. at 587.

<sup>126</sup> Id. at 586.

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### *C. Full Faith and Credit*

Whether marriage is a contract or a status is crucial,<sup>127</sup>

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<sup>127</sup> The critical distinction between these concepts can be illustrated through the RESTATEMENT (SECOND) CONFLICT OF LAWS which treats status and contract very differently. Divorce is covered under “Jurisdiction Over Status” with the RESTATEMENT stating:

#### State of Domicil of One Spouse

A state has power to exercise judicial jurisdiction to dissolve the marriage of spouses one of whom is domiciled in the state.

The situation if the marriage is treated as a contract and the couple either by choice or statute has chosen to be governed by the laws of a particular state is very different. RESTATEMENT (SECOND) OF CONFLICTS OF LAW 187 (1971) as to contracts states:

#### Law of the State Chosen by the Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.

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because the Full Faith and Credit Clause of Article IV of the U.S. Constitution<sup>128</sup> requires states to recognize the public acts, records, and judicial proceedings of other states. In 1790, the Congress passed the Full Faith and Credit Act, which provided methods to authenticate acts, records, and judicial proceedings.<sup>129</sup> That was followed in 1804, by an amendment to the Full Faith and Credit Act to assure authentication of non-judicial proceedings.<sup>130</sup> More recently, Congress has acted under this Clause to emphasize specific types of state acts that should be honored in other states. In 1980, the Congress passed the Parental Kidnapping Prevention Act, which provides that child custody rulings that comply with the Act in one state shall be honored by all other states.<sup>131</sup> This was followed in 1994 by similar legislation, the Full Faith and Credit for Child Support Orders Act, which assures that a child support orders entered in one state will be honored by sister states<sup>132</sup> and the Safe Homes for Women Act, which provides that any protection order issued by a state will be accorded full faith and credit in sister states.<sup>133</sup>

For the first time, the Congress has recently passed legislation instructing states that they do not have to honor the legal actions of other states. This occurred with the Defense of Marriage Act (DOMA)<sup>134</sup> which has two provisions. The first provision defines “marriage” and “spouse” under federal law to include only partners of the opposite sex.<sup>135</sup> The exclusion of same-sex marriages from federal law prevents those partners from obtaining numerous federal benefits. The second provision of DOMA provides that a state “shall not be required to recognize same-sex marriages performed in other states.”<sup>136</sup> The conclusion of most legal scholars is that the DOMA

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<sup>128</sup> U.S. CONST. art. IV, 1. The full text of this section is “Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof.”

<sup>129</sup> Act of May 26, 1790, ch. 11, 1 Stat. 122.

<sup>130</sup> Act of March 27, 1804, ch. 56, 2 Stat. 298 (current version at 28 U.S.C. 1739 (1994)).

<sup>131</sup> 28 U.S.C. 1738A.

<sup>132</sup> 28 U.S.C. 1738B.

<sup>133</sup> 18 U.S.C. 2265.

<sup>134</sup> Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 1 U.S.C. 7 (1997); 28 U.S.C. 1738C (1977)).

<sup>135</sup> 1 U.S.C. 7.

<sup>136</sup> 28 U.S.C. 1738C.

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will probably be declared unconstitutional under the Full Faith and Credit Clause if it is challenged in the courts.<sup>137</sup> Others have argued that it is unconstitutional under the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution.<sup>138</sup>

While the first sentence of the Full Faith and Credit Clause requires states to give full faith and credit to each others judgments, the second sentence allows Congress to prescribe the effect states must give another states' judgements or acts. The Supreme Court has not decided the issue of whether Congress has the power to create exceptions to the Full Faith and Credit Clause by using the effects clause.<sup>139</sup> The effects clause has been interpreted as only endowing Congress with the power to enact supplementary and enforcing legislation.<sup>140</sup>

In sum, the Full Faith and Credit Clause prohibits Congress from passing legislation that limits the effects of a state's divorce decrees in other states. Therefore, so long as marriage is treated as a status people cannot know the grounds for divorce that will be applied to their marriage if their spouse ever wants to dissolve it and a decree granted in another state will probably have to be honored in all the other states.

## V. OVERCOMING CONSTITUTIONAL CONSTRAINTS ON DIVORCE REFORM

So long as marriage is treated as a status and many states have no-fault divorce laws, it makes it virtually impossible for the other states to make marriage more durable by making divorce more difficult. Not knowing where a couple will eventually reside will force many spouses to protect themselves against a no-fault divorce even though they either were married in or are living in a state in which divorce is more difficult. Frequently spouses establish residency in a state other than the one in which they were married. A divorce obtained in a no-fault divorce state has to be give full faith and credit in all other states, including the one in which the other spouse lives or the one in which they were married. Domicile is not difficult to establish either

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<sup>137</sup> Heather Hamilton, *Comment: The Defense of Marriage Act: A Critical Analysis of Its Constitutionality Under the Full Faith and Credit Clause*, 47 DEPAUL L. REV. 943 (1998) (traditionally Congress' power under Article IV has only been exercised in an affirmative manner) and James M. Patten, *Comment: The Defense of Marriage Act: How Congress Said "No" to Full Faith and Credit and the Constitution*, 38 SANTA CLARA L. REV. 939 (1998) (The DOMA violates the Framers' intent).

<sup>138</sup> Barbara A. Robb, *Note, The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263 (1997) (in the wake of *Romer v. Evans*, 517 U.S. 620, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996)).

<sup>139</sup> Patten, *supra* note 137 at 949.

<sup>140</sup> Edward Corwin, *The Full Faith and Credit Clause*, 81 U. PA. L. REV. 371, 373 (1933).

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due to a legitimate move or for the purpose of pursuing a divorce. Most states impose a durational requirement ranging from six weeks to one year to met the domicile requirement to file for divorce.<sup>141</sup> The most common durational requirement for divorce is six months.<sup>142</sup>

Although long delayed, there has been some movement toward reform as noted above. Louisiana and Arizona passed covenant marriage laws and Iowa requires parents to take classes on how to protect their children from the pain of divorce. The primary problem with covenant marriage is the agreement entered into in one state is not binding on the spouses if either spouse establishes a domicile in another state.<sup>143</sup> The incentive for couples to make a long term commitment to their marriage is still severely restricted because people do not know where they will live in the future.

### A. A Framework for Divorce Reform

The first important step toward an effective reform of the divorce laws is to recognize that a marriage agreement is a contract. This can be accomplished either judicially or legislatively. The U. S. Supreme Court could overrule or modify its decision in *Williams I* to recognize that marriage is a contract rather than a status.<sup>144</sup> Alternatively, Congress could enact legislation establishing that fact. The enforcement of contracts, especially if they include a choice of law provision, is usually based on the law chosen by the parties and otherwise is determined by an interest analysis.<sup>145</sup> Then full faith and credit would have to be given to a judgment based on the contract agreed to at marriage rather than to a divorce decree obtained unilaterally in a state in which the other spouse may never have lived. More than just more accurately reflecting the couple's situation, treating a marriage as based on a contract would correct for the problems that

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<sup>141</sup> Gregory, et. al., supra note 7 at 193.

<sup>142</sup> The Alaskan legislature, for example, removed the residency requirement for divorce in 1975, so their divorce statute contains no residency requirement for a divorce uncomplicated by alimony, property division, or child custody. *Perito v. Perito*, 756 P.2d 895 (1988).

<sup>143</sup> Some authors have questioned the constitutionality of covenant marriage laws based on the right to marry. See Melissa Lawton, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471 (1998) (concluding that it is constitutional, but ineffective).

<sup>144</sup> The U.S. Supreme Court could reconcile interstate judgements law in divorce cases to conform to the law in other contexts, which would permit states to reject the status exception, the domicile rule, and its choice-of-law corollary. See Wasserman, *Divorce*, supra note 92 at 56. Alternatively, uniform legislation could be enacted, id. at 57, or Congress could enact a federal statute requiring states to recognize the divorce degrees of other states. Id.

<sup>145</sup> See RESTATEMENT, supra note 127 at §§ 186-188 (1971).

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have been created by treating marriage as a status. Uncertainty about the conditions associated with a dissolution of the marriage will be reduced as the agreement at the time of the marriage, subject to any mutually agreed upon modifications, will continue for the duration of the marriage.<sup>146</sup>

### 1. Marriage as a Contract

While the term, "contract," has sometimes been associated with marriage, activities before and during marriage traditionally have not been covered by contract law. Marriage is created by an agreement similar to a contract, but once solemnized it becomes a status controlled more by law than the preferences of the parties.<sup>147</sup> Marriage also has been described as a civil contract to subordinate the role of religious denominations in its formation.<sup>148</sup> Nevertheless, the agreement by two people to marry includes all the elements of a contract: offer, acceptance and consideration. The offer and acceptance are obvious. Both the law and the marriage vows include obligations for both parties that meet the standards for consideration.

Marriage also involves problems similar to those addressed by contract law. Contract law traditionally has served an important role in limiting two dangers when exchanges occur over time: opportunism and unforeseen contingencies.<sup>149</sup> A fundamental function of contract law is to deter people from behaving opportunistically to encourage long term investments, for example, and to reduce the need for people to take costly steps to protect themselves. The common law and more recently statutes such as the Uniform Commercial Code deal with unforeseen contingencies by prescribing the elements of a commercial contract unless modified by the parties. These types of problems also occur during marriage. Opportunism can occur when a husband attempts to divorce a wife after she has given him the "best years of her life." The laws specifying the spouses' obligations at divorce deal with unforeseen contingencies.

The creation of the marriage agreement is similar to the requirements of a commercial contract, since the agreement must be voluntary and it can be annulled if the agreement of one party was obtained by fraud or force. The parties must be competent based on age and mental capacity to make a socially acceptable choice. Marriage is often viewed as a status rather than a

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<sup>146</sup> While their agreement could call for damages as remedy for a breach, it is argued later than the more appropriate remedy for breach of a marital contract should be specific performance.

<sup>147</sup> *Maynard v. Hill*, 125 U.S. 190 (1888).

<sup>148</sup> Clark, *supra* note 93 at 31.

<sup>149</sup> See Posner, LAW, *supra* note 89 at 89.

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contract because of the government's role in establishing the terms of the marriage agreement.<sup>150</sup> However, governments play a major role in the parties to and subjects of many other contracts. Child labor laws, for example, limit the parties who can enter labor contracts and drug laws limit the subject of contracts. In addition, there are numerous governmental environmental, health and safety regulations around which parties cannot contract.

### 2. Breach of a Contract

Having argued that a marriage agreement is clearly similar to other contracts, the next issue is the preferred outcome if one party wants to terminate a contract. Most contracts are terminable at will subject to an award of damages, but in a minority of cases the parties have a right to specific performance of their agreement.<sup>151</sup> Similarly, two outcomes have been possible if a spouse wanted to dissolve a marriage: liquidated damages and specific performance. With no-fault divorce, the divorcing spouse was confronted with liquidated damages consisting of the financial and custodial arrangements required by law or specified by the parties in pre- or postmarital contracts. Meanwhile, for example, with the fault grounds for divorce, innocent spouses had a right to specific performance of the agreement to remain married during the joint lives of the parties. The desirability of damages or specific performance if a party wants to terminate a contract varies with the nature of the contract.

#### a. Damages

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<sup>150</sup> This was stated clearly in *Maynard v. Hill*, 125 U.S. 190, 198 (1888), which held “Marriage is something more than a mere contract, though founded upon the agreement of the parties. When once formed, a relation is created between the parties which they cannot change; and the rights and obligations of which depend not upon their agreement, but upon the law, statutory or common. It is an institution of society, regulated and controlled by public authority. Legislation, therefore, affecting this institution and annulling the relation between the parties is not within the prohibition of the Constitution of the United States against the impairment of contracts by state legislation.”

Also see Gregory, et al., FAMILY, supra note 3 at 25.

<sup>151</sup> Richard Posner identifies seven remedies for the breach of a contract: the promisee's reliance loss, the expectation loss, liquidated damages, consequential damages, restitution, specific performance, and a money penalty specified in the contract or other punitive damages. Posner, LAW, supra note 89 at 117.

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Damages are the usual remedy if a contract is breached based on compensating the nonbreaching party for his loss.<sup>152</sup> It is not the policy of the law to compel the performance of contracts but only to require each party to choose between performing and compensating the other party for any injury resulting from a failure to perform.<sup>153</sup> A party to a contract who is injured by its breach is entitled to compensation for the injury sustained and is entitled to be placed, to the extent this can be done by money, in the same financial position he would have occupied if the contract had been performed.<sup>154</sup> The usual standards for damages are the expected gain or the loss incurred due to reliance.

### b. Specific Performance

Specific performance will only be ordered when damages are not an adequate remedy.<sup>155</sup> This occurs when damages are difficult or impossible to measure because of the lack of good substitutes for the performance promised by the party who wants to breach the contract. It requires the party who breaches the contract to perform or face contempt of court. Still, it is a right rather than a requirement, because the party who has a right to specific performance can waive that right. The usual incentive for waiving the right is compensation. The most common use of specific performance occurs when the subject of the contract is unique. A large percent of the cases involving specific performance affect real estate transactions. However, it also can be used in suits for personal property when the property is unique. While personal services are often unique, the courts have been less willing to apply specific performance to contracts for personal services. When it has been applied to personal service contracts, it has usually been an injunction to stop the person from providing the service elsewhere rather than to require the performance of the contracted service.

### c. Welfare Enhancing Remedies

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<sup>152</sup> For a more detailed discussion of damages, see Charles L. Knapp, Editor, *COMMERCIAL DAMAGES* (1998).

<sup>153</sup> Oliver Wendell Holmes, *The Path of the Law*, 10 *HARVARD L. REV.* 457, 462 (1897).

<sup>154</sup> Martin Weinstein, *SUMMARY OF AMERICAN LAW* 190 (1988).

<sup>155</sup> *Id.* at 205.

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The contract remedies tend to create incentives for parties to make decisions that increase social welfare.<sup>156</sup> When two parties contract, it is reasonable to assume that both expect to be better off due to the contracted transaction. Contracts that involve future activities can be subject to unforeseen changes. Damages confront the parties with the option of either performing under the contract or paying damages. If the seller's costs rise so that the buyer can acquire the contracted goods from another source at a lower price than the seller's costs, society is better off if the buyer buys from the alternate source. The law requires the seller to compensate the buyer for the difference between the contract price and the price actually paid. Meanwhile, the supplier has avoided incurring the higher costs of production.

The use of specific performance as the remedy for the breach of a contract for unique goods also has been explained as based on a desire for welfare enhancing outcomes.<sup>157</sup> When a breach is worth more to the breaching party than performance to the victim, specific performance creates incentives for the parties to reach a settlement that leaves them better off. Specific performance forces the parties to identify their cost and benefit from not performing. The cost associated with nonperformance when the good is unique is the value of the good to the buyer and the expense of finding an alternative. This cost usually cannot be estimated by anyone other than the parties and they have incentives to make that calculation to determine if there is a basis for a negotiated settlement. Specific performance does have the disadvantage that it can increase the cost of settlement negotiations. These negotiations are a deadweight loss since the cost incurred by one party does not confer a benefit on the other.

The choice of a contract remedy often turns on a trade off between the potential cost of "excessive breaches" when damages are awarded and of "excessive performance" when specific performance is awarded.<sup>158</sup> Because of the legal requirement that damages must be proven and not speculative, the damages due to a breach can be underestimated. With damages, the result can be breaches when the benefits of the breach do not exceed the costs, i.e., excessive breaches. Alternatively, with specific performance, one party can demand the performance of the contract either due to spite or an incorrect estimate of the outcome of negotiations when the net benefits are negative, i.e., excessive performance. With either remedy, the parties can avoid the legal outcomes by negotiating their settlements.

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<sup>156</sup> Posner, LAW, supra note 89 at 118 (by inducing parties to consider the costs and benefits of their actions).

<sup>157</sup> See Anthony T. Kronman, *Specific Performance*, 45 U. CHICAGO L. REV. 351 (1978) (based on unique and non-unique goods); Alan Schwartz, *The Case for Specific Performance*, 89 YALE L. J. 271 (1979) (arguing for a broader application of specific performance) and William Bishop, *The Choice of Remedy for Breach of Contract*, 14 J. LEG. STUDIES 299 (1985) (default rules should be based on transaction costs).

<sup>158</sup> Bishop, *Choice*, supra note 157 at 300.

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In summary, the preferred rules will be the ones that are more likely to produce welfare enhancing outcomes with damages preferred for normal transactions and specific performance when the subject of a contract is unique. Since the costs of dissolving a marriage tends to be unique for each marriage, specific performance of each spouse's right to the continuation of the marriage has strong appeal, especially for established marriages. Because specific performance is a right rather than an outcome, the parties have incentives to negotiate a different outcome if the benefits of dissolution exceed the costs.

### *B. Specific Performance and a Marriage Contract*

Specific performance as the remedy for breach of a marriage contract is particularly attractive because the costs of divorce can be large and indeterminate, especially by any one other than the spouses. First, consider the effect of marriage on the spouses' income earning capacities, their human capital.<sup>159</sup> At marriage, individuals have already acquired some separate property. For many people, their most valuable asset then is their human capital. The value of this human capital is the discounted value of earnings that reasonably can be expected in the future net of any future investments. During marriage, human capital can increase or decrease. If it increases, marital property is created. Alternatively, if a spouse's human capital decreases during marriage due to decisions by the spouses, that loss is similar to a contribution of separate property to the marriage. Often a couple decides that the family will benefit from one spouse limiting her career to assume a primary role as a housewife and mother. At divorce, this person's human capital is worth less than if she had not limited her career.<sup>160</sup> But, by how much? It is difficult to determine the career that someone would have had, if they did not have it. The couple is probably in a better position to accurately gauge the magnitude of this sacrifice than would be any judge or jury.

The incorporation of human capital into the property considered at divorce would still not recognize other subjective costs due to a divorce. While the knowledge that the divorcing spouse no longer wants to live with the divorced spouse might reduce that person's attraction to the divorcing spouse, there is still a potential loss to that person due to the desire for a continuing relationship with that person. Another important source of costs for the divorced spouse are those associated with search.<sup>161</sup> Both parties incurred search costs to identify each other initially.

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<sup>159</sup> Parkman, *Consistency*, supra note 2 at 63.

<sup>160</sup> The decision for the wife to sacrifice her human capital for the benefit of the family can be viewed as resulting in an implied contract of indemnification for which compensation is appropriate if the marriage is dissolved. The divorce laws do not provide for this remedy in any systematic way.

<sup>161</sup> Marriage is the result of a search process during which the parties weigh the benefits and the costs of additional search. See Becker, *TREATISE*, supra note 10 at 328.

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Now, one spouse has decided that he or she has already found a person that he or she prefers to the current spouse or is willing to incur additional costs searching for a better spouse or situation. The divorced spouse involuntarily must incur the cost of searching for another mate or living situation. Often, this cost can be very high. Last, a major cost can occur because a divorce may be harmful to the couple's children.<sup>162</sup> The quality of life can deteriorate for children shared by two parents--living separately--compared to the conditions still possible living with both parents. If divorce were more difficult to obtain, some parents probably could make their marriage work and, thereby, provide benefits to their children. The parent, usually the mother, who expects custody of the children after divorce is more likely to recognize the costs that the children will incur because they will be less happy when they only live with her. These companionship, search and children's costs are difficult to calculate and, therefore, are not included in awards at divorce. As a result, the awards at divorce tend to underestimate the costs of divorce. When the costs of divorce are underestimated, the probability increases that a divorce will occur when the net benefits are negative. These divorces reduce social welfare.

### C. *The Marriage Contract*

The marriage contract proposed here starts out with the idea that for established marriages the spouses' should have a right to specific performance of their agreement for the marriage to continue for their lives. Early in the marriage, no-fault divorce would still be permitted, while extreme behavior would be the basis for a divorce based on fault.

A very simple statute is proposed here. It only prescribes the default grounds for divorce and financial arrangements at divorce, while leaving couples with the opportunity to modify their contract either before or during marriage. The statute should also state that the couple is entering into a contract and if a divorce action is ever initiated, the couple is choosing the laws of the state of marriage to govern the aspects of divorce covered by the contract. States have traditionally been reluctant to become involved in the normal interactions within a family and that is a position that is supported here.<sup>163</sup> At the same time, the states' interest in marriage itself has been held to

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<sup>162</sup> See Gary S. Becker & Kevin M. Murphy, *The Family and the State*, 31 J. LAW & ECON. 1 (1988) (little is known about the effect of divorce on children). Generally, children prefer an unhappy marriage to a divorce. Also, see Wallerstein and Blakelee, *supra* note 162 at 11.

<sup>163</sup> Traditionally, the American family has been viewed as the cornerstone of our society with the result that the state legislatures and courts have been reluctant to intervene in family affairs. See, e.g., *Maynard v. Hill*, 125 U.S. 190, 205 (1888). Still, if a legislature wanted to intervene its powers were viewed as broad until 1965. In *Griswold v. Connecticut*, 381 U.S. 479 (1965) the Supreme Court held that the Connecticut statute forbidding the use of contraceptives was unconstitutional as applied to married couples. Some authors have described marriage as a long-term relational contract in which the parties contemplate a long term commitment to pursue

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be so large that the states have had the right to control the marital status of spouses domiciled there.<sup>164</sup> This preemption by the states has become increasingly questionable. The imposition by essentially all states of a no-fault divorce agreement on all spouses has been a disaster in many cases and social welfare would be improved by giving adults more freedom to create their own marriage contracts, while maintaining state control where it is important. The state's role in protecting children is obvious, so it is appropriate for states to have statutes that establish rules for protecting children during and after a marriage. It is important to recognize that the conditions that accompany the dissolution of marriage have far greater affect on the quality of the marriage than has been commonly accepted as it strongly influences the commitment that the spouses make to their marriage.<sup>165</sup>

A basic marriage contract consisting of combination of no-fault, mutual consent and fault grounds for divorce will provide a major improvement in the incentives facing adults. At the same time, it is important to recognize that the alternatives facing adults have much more varied than those in the past and as a consequence a wider variety of relationships are appropriate. A marriage contract continues to be the appropriate choice for people who anticipate making sacrifices based on the expectation that a relationship is going to be long term. For others it may be attractive as a form of commitment; while for some people it may not be attractive at all. We should recognize that this is not a contract that is appropriate for all relationships, but just for the large number of people who want a long term relationship that they feel would be improved by having incentives to make sacrifices that benefit their family or evidence of a commitment.

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shared goals without providing specific standards for how those goals are to be reached. The terms for dissolving the relationship are important in establishing the incentives for cooperation. See Elizabeth S. Scott and Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998).

<sup>164</sup> *Williams v. North Carolina*, 317 U.S. 287, 289 (1942). Of course, the state's adoption of no-fault divorce laws can be interpreted as the state's reversing their paternalistic position on marriage, thereby, acknowledging the right of couples to have a greater control over their own affairs. See Haas, *supra* note 12 at 910.

<sup>165</sup> Since the state controls the grounds for divorce, people who do not like the legally prescribed ease of and arrangements at divorce have been forced to turn to premarital agreements. These agreements traditionally were difficult to enforce, but that situation has improved in the states that have passed the Uniform Premarital Agreement Act, 9B U.L.A. 369 (1987). See Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM AND MARY L. REV. 145 (1998). Still, premarital agreements are not attractive for most couples because they do not have a clear idea of the range of potential future events and what are the conditions that they want to attach to these events. Also see Gregory S. Alexander, *The New Marriage Contract and the Limits of Private Ordering*, 73 IND. L.J. 503, 507 (1998) (premarital agreements can lead to more egalitarian marriages).

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The default financial arrangements at divorce, which traditionally consisted of a property settlement, alimony and child support, should be based on “debts” incurred during marriage.<sup>166</sup> Choices during marriage result in obligations that are best treated as debts. Child support can be viewed as a debt to the child that the parents incur when they elect to become parents. This component of the financial arrangements should be subjected to close scrutiny by the state with it establishing minimum levels, for example. Because the reasons for and level of alimony is very ambiguous,<sup>167</sup> the primary emphasis in the financial arrangements between the spouses at divorce should be on the property settlement. The property settlement should be based on partnership principles with the items being considered expanding to include the spouse’s income earning capacities, their human capital. Couples can acquire marital property such as mutual fund shares by saving which is the sacrifice of current consumption that should be treated as a debt of the couple to the spouses as individuals if the marriage is dissolved. Other acts such as limiting a career or providing uncompensated educational support create a debt between the spouses that should be recognized at divorce. When the couple’s assets, such as their human capital, cannot easily be sold, the property distribution should be based on periodic payments.

### 1. Mutual Consent Divorce

Mutual consent would be the primary ground for divorce. Since mutual consent gives either spouse the right to the continuation of the marriage, it is similar to specific performance of other types of contracts. The mutual agreement of the spouses should be the normal basis for divorce. Traditionally, the understanding has been that when a couple marries they were entering into an agreement that is expected to last for the lifetime of at least one of the spouses<sup>168</sup> and for those who continue to have that expectation that is the agreement that is proposed here. The mutual agreement of the spouses should be the basis for the dissolution of established marriages. It is attractive because many of the costs of dissolution are difficult for persons other than the spouses to estimate—and even the spouses may find the process challenging. The opponents of fault divorce—and more recently those who support no-fault divorce--do not appear to have given

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<sup>166</sup> This topic is discussed in more detail in Parkman, *Consistency*, supra note 4 at 56.

<sup>167</sup> Ira M. Ellman, *The Theory of Alimony*, 77 CAL. L. REV. 1 (1989); Clark, supra note 93 at 620, Harry D. Krause, FAMILY LAW, 3<sup>RD</sup> ED. 404 (1995) and AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS, PROPOSED FINAL DRAFT, PART I (February 14, 1997) 5.

<sup>168</sup> For example, the wedding vows in West Virginia include the statement for both the bride and the groom, “. . . to have and to hold, from this day forward, for better, for worse, for richer, for poorer, in sickness and in health, to love and to cherish, as long as life shall last, and thereto I pledge thee my faith.” W. Va. Code § 48-1-12b (1998).

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serious consideration to mutual consent divorce.<sup>169</sup> However, mutual consent is more likely to produce welfare enhancing outcomes than either fault or no-fault grounds.

Among those willing to consider a change, the normal alternative to no-fault divorce that is considered is fault divorce rather than mutual consent divorce.<sup>170</sup> If we recognize that the true problem with the current laws is their permitting unilateral divorce, then the appropriate alternative to consider is mutual consent divorce rather than fault divorce. Knowing that the ground for divorce for established marriages is mutual consent would encourage spouses to make sacrifices that benefit their marriage. Meanwhile, not all established marriages are successful and if a couple is questioning the durability of their marriage, mutual consent would increase the incentives for them to recognize and place a value on the collective benefits and costs of marriage and, potentially, divorce. Both benefits and costs are broad concepts that include both financial as well as psychological factors. Some of the costs of divorce include the effects on the spouses' human capital as well as those associated with lost companionship, the search for a new spouse or companions, and the disruption in the lives of the children. These costs can be substantial. Under mutual consent divorce, the party who does not want the divorce would have an incentive to ask for compensation for these costs as a basis for agreeing to the divorce.

This point can be illustrated with two examples. A husband, who is being asked for a divorce by his wife, may feel that he has made only limited sacrifices for the benefit of the family, is no longer strongly attracted to her, and can find someone just as attractive with a limited amount of effort. He might also conclude that any children would not be adversely affected by a divorce. Under those circumstances, he might be willing to reach a divorce agreement at a small cost to his wife. Since the benefit of the divorce exceed the cost, social welfare would be improved by permitting the divorce. Alternatively, he may have made major sacrifices for this family's benefit, might still be strongly attracted to his spouse, and feel that only a long and costly search would find another comparable spouse or living situation. He also might be concerned that their children would suffer compared with the quality of life that is still possible if the parents stay together. He might under those circumstances ask for a level of compensation that the other spouse is unwilling to provide. In other words, the party who wants the divorce does not value

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<sup>169</sup> It was commonly recognized that prior to the shift from fault to no-fault grounds for divorce that there was a conflict between the divorce law on the books, which declared marriage indissoluble except for marital fault, and the law in practice, which tolerated divorce by mutual consent. See Kay, *Appraisal*, supra note 15 at 297.

<sup>170</sup> See Bradford, supra note 62 (three proposals to return to consideration of fault are addressed), Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773 (1996) (fault functions are better served by the tort and criminal laws than family law), and Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719 (no evidence that fault divorce could confer benefits at all).

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the divorce as much as the other spouse and the children value the continuation of the marriage. In that case, social welfare is improved by continuing the marriage.

One of the attractive aspects of mutual consent divorce is the increased likelihood that both parents will address the costs incurred by their children due to a divorce. These costs go far beyond just maintenance, which is covered by child support. If the divorcing spouses are forced to recognize the full costs of their divorce, some parents might be able to make their marriage work and thereby provide benefits to their children.<sup>171</sup> The parents, usually the mothers, who expect custody of the children after divorce are most likely to recognize the costs that the children will incur. If the children are less happy after divorce, their attitudes will impact the welfare of the custodial parent. These changes in the welfare of the children and the custodial parent are a cost. The custodial parent has incentives to take these costs into consideration when considering whether to agree to divorce.

Another attraction of mutual consent divorce is the incentives it creates for couples to consider the rules that are appropriate for their marriage. If people considering marriage knew that mutual consent was the primary ground for dissolving an established marriage that knowledge might increase the incentive for them to negotiate premarital agreements. Neither fault divorce nor no-fault divorce provides marrying individuals with the opportunity to construct their own grounds for the dissolution of their marriage. With mutual consent divorce, the dissolution of marriage would be based on the parties' criteria rather than that of the state. Under those circumstances, the parties might be more inclined to specify their own grounds at the time of marriage. Some might feel that a career conflict should be a ground for dissolution, while others might not.

Because the divorce would be based on the mutual agreement of the spouses, the default financial arrangements suggested above could be ignored by the spouses. If a spouse expected a divorce to be extremely costly, that person could ask for substantially more than would be provided by the default financial arrangements. Any agreement of the spouses should be subject to regulations that attempt to protect the interests of any children.<sup>172</sup>

Mutual consent is not a perfect solution. It can result in the continuation of a marriage if one party wants to ignore the costs imposed on the parties by the marriage.<sup>173</sup> This can occur when a spouse basing a decision on spite is opposed to a divorce under any circumstances. However, people can be surprisingly rational even when dealing with emotional issues such as

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<sup>171</sup> Under no-fault divorce, many divorces occur when there has only been a minor discord between the spouses. See Amato and Booth, *supra* note 55 at 220.

<sup>172</sup> Mary Ann Glendon, *Family Law Reform in the 1980's*, 44 LA L. REV. 1551, 1558 (1984) (the principal defect of no-fault divorce laws that promote a clean break for the spouses is an adequate concern for minor children of those marriages).

<sup>173</sup> Bishop, *supra* note 157 at 300 (specific performance can result in excessive performance).

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marriage and divorce. In most divorces, at least one spouse initially wanted the marriage to continue,<sup>174</sup> but when the collective benefits of divorce exceed the costs, social welfare is increased by a divorce. Under those circumstances, the parties have incentives to construct an agreement that leaves them both better off. The large number of divorces based on mutual consent under the fault grounds illustrates the willingness of spouses to negotiate even under trying conditions.

Although mutual consent as a basis for divorce is unappealing to some people because it appears to lock people into unsuccessful and potentially abusive marriages, the provisions for no-fault and fault grounds for divorce discussed below should address many of those concerns. No-fault divorce is appropriate early in a marriage as a couple are still evaluating each other and fault divorce is appropriate when extremely abusive behavior occurs. However, we need to recognize the limited ability of mutual consent to keep an antagonistic couple together. Either spouse can always leave the relationship with the only restrictions being the response of others, any financial obligations imposed by law on the spouses to each other and their children and—of course—the ability to marry anyone else.

### 2. No-fault Divorce

No-fault divorce is still attractive during the early period of a marriage. Mutual consent divorce gives substantial power to spouses who do not want a divorce. To limit abuse of this power, it would appear to be attractive to permit no-fault divorce when the potential costs of divorce are likely to be low as they tend to be early in a marriage and when there are no children. Early in marriage, a couple is still involved in an evaluation process. The gains from marriage are much smaller today for many couples.<sup>175</sup> Do they want to make a long term commitment to this other party? During this period of evaluation, no-fault divorce should continue to be the grounds for divorce.

Eventually, at least one spouse may make sacrifices based on a long term commitment to the marriage and then the grounds for divorce should shift to mutual consent. These sacrifices will usually occur because a spouse is limiting a career or the couple is having a child. In our highly mobile society, it is common for a couple to relocate. Frequently, in this process a spouse is forced to relinquish a desirable job so that the other spouse can take advantage of an

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<sup>174</sup> Wallerstein and Kelly, *supra* note 162 at 17 (one-third of the women bitterly opposed the divorce)..

<sup>175</sup> When the opportunities available to men and women were very different, then there substantial gains from specialization that made most adults better off married. As employment opportunities have improved for women and labor saving devices become more common in the home, some men and women have found that they have less to gain from marriage. The reduced gains from marriage are particularly apparent for a couple that does not want children. For a discussion of the gains from marriage, see Parkman, *GOOD INTENTIONS*, *supra* note 3 at 42.

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employment opportunity that appears to be in the couple's long-term best interest.<sup>176</sup> In addition, children usually require one parent to adjust his or her career to assist in child care. With these changes in the couple's circumstances, the ground for divorce would shift to mutual consent. Since accommodations for the long term benefit of the marriage may be subtle, setting a predetermined period, such as five years, as the basis for the shift from no-fault to mutual consent divorce would seem to be reasonable. Recognizing that the grounds for divorce are going to change under certain circumstances—a relocation, a child, or a specified time period—will force a couple to reevaluate their commitment to each other. If they are uncomfortable with the restrictions that will accompany mutual consent divorce, they can mutually agree to maintain no-fault grounds for divorce.

Because no-fault divorce limits the incentives for couples to negotiate, the default financial arrangements would apply to these divorces, if the couple has not agreed to alternative arrangements. Because no-fault divorce would only be permitted early in a marriage, the property issues should not be complicated. The major sacrifices such as limiting a career due to a relocation or the assumption of child care responsibilities would already have shifted the grounds for divorce to mutual consent.

Under this proposal, no-fault divorce would be limited to the early phase of a marriage. The most vocal defense of no-fault grounds for divorce throughout a marriage is based on protecting people who eventually realize that they made a mistake in their choice of a spouse.<sup>177</sup> Seldom is recognition given to the benefits of mutual consent that would flow to people willing to make a long term commitment. Therefore, this combination of no-fault divorce early in a marriage followed by mutual consent appears to address both of those concerns. We need to recognize that using no-fault divorce to protect people from their own poor judgment is not the proverbial "free lunch" as it imposes substantial costs on the people wanting to make a long term commitment.

### 3. Fault Divorce

Fault divorce can also still have a role in dissolving marriages. Mutual consent can create problems when someone is "driven out" of a marriage rather than "wanting out." It is often difficult for anyone, including the spouses and judges, to clearly identify fault. Being driven out of a marriage raises concerns similar to those addressed with the fault divorce statutes. Under fault divorce, the "guilty" spouse did something that gave the "innocent" spouse a right to dissolve the

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<sup>176</sup> Some critics of reform have suggested that the elevation of the criterion for divorce based on children degrades couples who have either not had or are not capable of having children. David M. Wagner, *Divorce Reform: New Directions*, CURRENT 7 (February 1998) (some covenant marriage proposals would only make divorce difficult if the couple had a child).

<sup>177</sup> See ABA PRESS RELEASE (October 18, 1996) (84 percent of family lawyers in an American Bar Association's survey opposed rescinding no-fault divorce).

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marriage: The innocent spouse was driven out of the marriage. Mutual consent would not provide a solution for the situation in which one spouse is the victim of acts such as cruelty or adultery, but the "guilty" spouse does not want a divorce. Courts during the fault divorce era showed little skill, however, at making determinations in these cases. Often the grounds given for fault divorce were hypocritical and the marriage had failed for other reasons.<sup>178</sup> And even when the fault grounds could be proven, the reasons why a marriage failed were probably a great deal more complicated than just the acts that established the grounds. Still fault divorce would appear to be appropriate when there is clear evidence of fault such as abuse of a spouse or any children. Because abuse is socially unacceptable behavior and should be discouraged, it should also be the basis for an adjustment in the default financial and custodial arrangements at divorce.

In sum, mutual consent as the ground for the dissolution of most marriages is not a perfect solution to problems facing the family, but it is superior to the alternatives, especially no-fault divorce for all marriages. No-fault divorce early in marriages provides spouses with an opportunity to evaluate their commitment to each other at a fairly low cost. Fault divorce can still be appropriate when a spouse is forced out of a marriage under extreme circumstances. The program advocated here has a logical foundation and would be a substantial improvement over the current divorce laws. However, for these reforms to be effective, marriage has to be recognized as a contract entered into at marriage and upon which a dissolution has to be based, thereby, overcoming the current Constitutional limits on divorce reform.

### 4. The Enforceability of Marriage Contracts

Our last concern is with the enforceability of a contract such as the one suggested here in states other than the one in which it was created. Until recently contracts between spouses were seldom enforced even in the state in which they were created.<sup>179</sup> A couple of recent trends suggest that the likelihood is increasing that states other than the marriage state will honor these contracts.

The Restatement (Second) of Conflict of Laws gives support to enforcing the law of the state chosen by contracting parties.<sup>180</sup> These laws will be applied unless two conditions exist. First, the chosen state has no substantial relationship to the parties and there is no reasonable basis

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<sup>178</sup> See Rheinstein, MARRIAGE, *supra* note 30 at 247.

<sup>179</sup> Since marriage itself was not treated as a contract, the only contracts were pre- and post-marital agreements between the spouses that were severely restricted. The states had preempted the grounds for divorce so they were not a legitimate subject for these contracts. Other issues have gradually been recognized as appropriate for premarital contract under certain conditions. Initially, these contracts addressed property at death and later property at divorce. More recently, they have been expanded to consider alimony. See Clark, *supra* note 93 at 1-20.

<sup>180</sup> RESTATEMENT (SECOND) OF CONFLICT OF LAWS 187 (1971).

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for the parties' choice.<sup>181</sup> While an argument can be made that this requirement has been met by the marriage state even if residency there was brief, couples probably would be advised to more carefully choose their marriage state even if it is a source of inconvenience for others. That is currently not an issue because the laws of the marriage state are not relevant if a spouse seeks a divorce in another state.

Second, a state can reject the law chosen by a couple if the “application of law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.”<sup>182</sup>

This section would have created a major problem if some states had the contract proposed here when most states had only fault divorce. If the couple attempted to enforce the contract in a fault divorce state, the courts in that state probably would have concluded that its concern for its domiciliaries was a “materially greater interest” thereby permitting it to apply its laws rather than those chosen by the couple. The states' central role in marriage, which often was interpreted as having precedence over the spouses' interests, has declined dramatically over the last few decades as evidenced by the passage of no-fault divorce statutes. If a state has acknowledged that its “fundamental policy” is to let spouses dissolve their marriage unilaterally even in the face of the opposition of their spouse, it would be hard pressed to impose its laws on spouses who had elected to make it more difficult to divorce. No-fault divorce is a reflection of the state's willingness to permit couples to decide for themselves when their marriage had failed.<sup>183</sup>

Further evidence of the decline in the paternalistic role of states is provided by the growing willingness to give spouses greater freedom to draft pre- and post-marital contracts.<sup>184</sup> Many see *Posner v. Posner*<sup>185</sup> as the turning point toward permitting couples more flexibility in drawing up their own marriage contracts.<sup>186</sup> In that case, the court upheld an award of alimony

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<sup>181</sup> Id. at 187(2)(a).

<sup>182</sup> Id. at 187(2)(b).

<sup>183</sup> See Haas, *supra* note 12 at 910.

<sup>184</sup> Bix, *supra* note 165; Allison A. Marston, *Planning for Love: The Politics of Prenuptial Agreements*, 49 STAN. L. REV. 887 (1997) (rather than restricting these contracts steps should be taken to ensure full knowledge and the opportunity to negotiate); and Singer, *supra* note 31.

<sup>185</sup> 233 So, 2d 381 (Fla. 1970)

<sup>186</sup> See Haas, *supra* note 12 at 907, and Bix, *supra* note 165 at 152, n. 20.

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that had been prescribed in an antenuptial agreement. The court acknowledged that some states were retreating from the position that the state's interests in marriage take precedence over the private interests of spouses.<sup>187</sup> In particular, it noted the passage of no-fault divorce statutes as a reflection of this trend.<sup>188</sup> Subject to fair disclosure, the court held that the antenuptial agreement that addressed the alimony after divorce was valid and binding.<sup>189</sup>

The enforceability of premarital agreements became much more predictable with the approval of the Uniform Premarital Agreement Act (UPAA),<sup>190</sup> which has been adopted by half of the states.<sup>191</sup> Under the uniform act, an agreement is unenforceable under only two sets of circumstances: (1) if there was a lack of voluntariness<sup>192</sup> or (2) the agreement was substantially unreasonable at the time of execution and the aggrieved party did not have adequate knowledge of the other party's financial position.<sup>193</sup>

The willingness of states to enforce contractual parties' choice of law even as applied to marriage is reflected in a recent Connecticut case, *Elgar v. Elgar*.<sup>194</sup> In that case, the couple were married in New York having signed an antenuptial agreement containing a choice of law provision specifying that the agreement was being made pursuant to New York law and would be interpreted accordingly. During the marriage, the wife remained a New York resident, while the husband continued to reside in Connecticut with them sharing time in both places. When the husband died, the wife challenged the validity and enforceability of the agreement. A referee concluded that under §§ 187 and 201 of the Restatement (Second) of Conflict of Laws (1971),<sup>195</sup>

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<sup>187</sup> 233 So. 2d 381, 384.

<sup>188</sup> *Id.* at 387.

<sup>189</sup> *Id.* at 394.

<sup>190</sup> Unif. Premarital Agreement Act, 9B U.L.A. 369 (1987).

<sup>191</sup> As of May 1998, 26 jurisdictions had adopted the UPAA. See *id.* at 78 (Supp. 1998) (listing jurisdictions).

<sup>192</sup> *Id.* at 6(a)(1).

<sup>193</sup> *Id.* at 6(c).

<sup>194</sup> 238 Conn. 839; 679 A.2d 937 (1996).

<sup>195</sup> RESTATEMENT, Section 187, *supra* note 127, and Section 201,

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the parties' expressed choice of New York law was valid and under New York law the agreement was enforceable.<sup>196</sup> The trial court found the referee's findings of fact were supported by the evidence and the conclusions of law were legally and logically correct.<sup>197</sup>

That decision was upheld on appeal. Particularly important here is the court's consideration of the choice of law provision based on § 187 of the Restatement. The court took special notice of the importance of protecting the justified expectations of the parties.<sup>198</sup> It then went on to conclude that the law selected had a substantial relationship to the parties and that there was a reasonable basis for their choice. In addition, Connecticut did not have a greater material interest in the determination of the issue than New York, the laws of which had been chosen by the couple.

In summary, the last thirty years has not only observed a shift from fault to no-fault grounds for divorce, but also a reduction in the states' role in matrimonial decisions. Couples are being permitted to include a broader range of provisions in antenuptial agreements and, either through statutes such as the UPAA or court cases, it is much more likely that their preferences will be enforced by the courts. It is logical step for states to extend this trend to permit couples to contract as to the grounds for divorce either through statutes or case law.

## VI. CONCLUSION

This article discusses the need for a reform of the earlier divorce reform that resulted in no-fault divorce. Reform efforts to date have not been impressive. A program is proposed that would make mutual consent the ground for divorce in established marriages in which at least one

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a contract is determined by the law selected by application of the rules of §§ 187-188.

<sup>196</sup> 238 Conn. 839, 845; 679 A.2d 937, 941 (1996).

<sup>197</sup> *Id.*

<sup>198</sup> Comment (e) to § 187 of the RESTATEMENT provides,

Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations.

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spouse has made a significant sacrifice based on the expectation that the marriage is going to last for a substantial period. Prior to those sacrifices, no-fault divorce would be the basis for divorce. Fault divorce would be available in extreme cases. The impact of any reform is limited because the Full Faith and Credit Clause of the U. S. Constitution currently requires states to honor divorces acquired in other states. This impediment can be resolved by recognizing that a marriage creates a contract rather than a status.