Divorce: A matter of rights and responsibilities

Mary Jane Watson Brick
University of Nevada, Las Vegas

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DIVORCE: A MATTER OF RIGHTS
AND RESPONSIBILITIES

by

Mary Jane Watson Brick
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MARY JANE WATSON BRICK

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Dean of the Graduate College

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Graduate College Faculty Representative
ABSTRACT

Divorce: A Matter of Rights and Responsibilities

by

Mary Jane Watson Brick

Dr. Alan Zundel, Examination Committee Chair
Associate Professor of Political Science and
Ethics and Policy Studies
University of Nevada, Las Vegas

In 1970, American society, steeped in a culture that emphasizes individual rights, turned away from traditional fault-based divorce laws to embrace the easy, unilateral no-fault divorce laws in place today – divorce laws that have had unexpected and disastrous economic consequences for the children of divorce. During the 1990s, many political and social groups advocated divorce reform that would return divorce law to a more traditional, fault-based system; however, no significant revisions to the no-fault laws were passed, arguably because our cultural norms will not support a return to fault-based divorce. Recognizing the underlying political and ethical theories that have shaped our culture, and turning the focus away from one of limiting divorce to one of improving the circumstances of children of divorce may be the first steps in creating national-level public policy that can positively impact the worst outcomes of divorce while presenting the best chance of passage into law.
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A friend recently congratulated me on my personal achievement in completing this thesis. I appreciated the comment for the true compliment it was, and also because it made me think about how much other-than-personal effort was represented here.

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Thank you one and all.
CHAPTER 1

INTRODUCTION

Eva McNulty had been married to her husband Ralph for twenty-three years — none of which had been happy. Both of the McNultys drank too much, they fought often, and Eva suspected Ralph of infidelity. Their marriage finally broke down when Eva discovered that Ralph had committed incest with their 13-year old daughter. Ralph was prosecuted, convicted and sentenced to three to four years of hard labor. Eva sought divorce on the grounds of cruel and abusive treatment; her petition was denied. On appeal to the Supreme Court of the State of Massachusetts, the decision was upheld because "incest with the daughter was not cruel or abusive to the wife, in either a physical or emotional sense."\(^1\) The court also denied the divorce on the basis of adultery — even though adultery is clearly implicit in the facts — because Eva had not explicitly alleged adultery as grounds for the divorce.\(^2\)

Barbara Welch thought she and Bill had it all — a comfortable marriage, two great daughters, and her job as a secretary to help them make ends meet. That was until she came home one day to find her husband had beaten their oldest daughter and had left her a note

\(^1\) Michael Wheeler, *No-Fault Divorce*, (Boston: Beacon Press, 1974), 2

\(^2\) Ibid.
that said he wouldn't be back — he had found someone younger, prettier and smarter. Her husband called her later that night to let her know he had paid the apartment rent through the end of the week, but after that she would have to leave or come up with the rent herself because he would no longer be supporting her. Having unilaterally decided to dissolve their marriage under cover of the California no-fault divorce law, Bill left Barbara a single parent of two young daughters living on a secretary's wage. In the following years, Bill consistently earned over $50,000 annually and managed to send his $200 a month child support about eight months out of ten; he has not seen or called his daughters since he left.

These two cases serve to illustrate the extremes of the effects of divorce law in twentieth century America. Eva McNulty's case was heard in 1956, and the court's decision was never overturned. Barbara Welch's case occurred in California in 1973 shortly after that state passed its sweeping, no-fault divorce law reform.

The voice of the communitarians is one of many in today's society calling for a return to morality. While this call is ill defined in many quarters, for the communitarians it means starting at home, in the family, and in particular with children. The communitarian platform published in November of 1991 asserts that "bringing children into the world entails a moral responsibility to provide, not only material necessities, but also moral education and character formation." They lay the responsibility for the moral fiber of society squarely on parents saying that "moral education is not a task that can be delegated," that fathers and

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3 Ibid.

mothers who are too consumed by "making it" cannot "discharge their most elementary
duty to their children and fellow citizens." 

In particular, the communitarians stress that families headed by single parents are
most likely to fall short of their duties to their children and for this reason divorce laws
should be modified. Specifically, the communitarians argue for modifying the economic
aspects of divorce laws to protect children from bearing the brunt of the dissolution of
marriages that leave the primary caretakers financially unable to provide adequate economic
support for the children in their care.

And the communitarians are not alone in this consensus -- civic, spiritual, academic
and government leaders in many states have joined forces in an attempt to reverse or at least
mitigate the effects of no-fault divorce policies through family law and divorce policy
reform. Many states such as Iowa, Michigan, Colorado and Pennsylvania have family and
marriage forums that are actively supporting and introducing legislation to change current
divorce law. These groups also work diligently at the grass roots level, endeavoring to
educate and persuade the general populace that no-fault divorces are not in the community's
best interest.

This thesis proposes a means of changing current divorce laws to help protect children
of divorce while remaining true to our underlying cultural and political traditions, namely, a
commitment to the pursuit of happiness and our long-standing reliance on individual rights.
In other words, we need a uniform divorce policy that protects the rights of children
without totally denying the rights of unhappily married men and women to divorce.

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5 Ibid., 7-8.
Chapter Two of this thesis examines the cultural and political background of divorce law in America. This includes a brief history of American divorce law, some comparisons with the divorce laws of other Western cultures, and an investigation of the causes leading to the divorce policy reform that swept the nation in the 1970s. Chapter Three follows this theme with a discussion of how the no-fault reform was crafted and implemented, and an in-depth review of the unintended outcomes of that reform.

Chapter Four examines the dominant ethical and political theories of Western thought that have influenced the development of the American culture over the last two hundred years. Chapter Five then examines our political penchant for pursuing individual rights (sometimes at the expense of the communal good), and the connection between the Lockean theory of happiness, the inalienable (and culturally ingrained) American right of "pursuit of happiness," and our current reluctance to back away from a divorce policy that is so clearly destructive to so many.

Chapter Six provides an analysis of the arguments for and against reforming no-fault divorce policy. The chapter concludes with a brief discussion of the most prominent alternatives currently promulgated for developing a new policy.

Chapter Seven concludes with an analysis of the failure of reform in the 1990s and a recommendation for divorce policy reform that will have a better chance of acceptance by the American public.
CHAPTER 2

DIVORCE IN AMERICA

Despite the recent media and political attention, divorce is not a new phenomenon in our society. Quite the contrary, as early as the 1630s the Puritans allowed couples to divorce in cases of willful desertion or adultery. In addition, these early divorce laws allowed Americans to remarry -- the Puritans held that a loveless union did no honor to God, and they allowed divorced husbands and wives to remarry hoping that a stronger union would result. Also, the Puritans treated divorce as a civil matter rather than an ecclesiastical one (as was the practice in Europe), and while obtaining a divorce may not have been easy nor socially acceptable, it was certainly more available than in other societies of the time.¹

The American reliance on civil law for divorce cases was in all likelihood a result of the resentment and resistance to the Church of England’s conservative stand on divorce which, at the time, mirrored the Roman Catholic policy. In addition, the early Americans

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saw the restrictive and unwieldy procedures for obtaining a divorce in England as evidence of the Crown's abuse of authority.²

For instance, in England divorce cases came before the ecclesiastical courts (or in very rare circumstances were granted as a special act of Parliament), and were available only to the wealthy. These divorces were rarely sought, more rarely granted, and did not allow the divorced spouses to remarry -- resulting instead in a divorce of "bed-and-board" in which the husband and wife could live separately, but were, in essence, still married.³ This focus on the indissolubility of marriage is understandable in light of how English (and most other nations') marriages were contracted.

Until the 16th century, marriage was seldom entered for the sake of love. In fact, many marriages were arranged during the infancy or childhood of one or both of the marital partners as a means of increasing families’ property, wealth, loyalties and power, and these ties and allegiances made marriages very stable. As Lawrence Stone put it,

There can be little doubt that the institutional marriage, in the arrangement of which parents and "friends" played a large part and financial considerations loomed large, tended to create marital stability. This was because the ties that bound the spouses together were more numerous and


³ Himmelfarb, Gertrude, The De-Moralization of Society, (New York: Alfred A. Knopf, 1995), 111. It wasn't until the Divorce Act of 1857 that divorces in England were removed from the ecclesiastical courts and made a civil action (thus making divorce more available to the lower, less wealthy classes). Interestingly, recent studies indicate that in the first ten years of the law's enactment, slightly over 50 percent of petitioners were women -- this coincides with current statistics on American divorces that show that more women than men file for divorce today.
more permanent than those ephemeral psychosomatic experiences, romantic love and sexual passion.\textsuperscript{4}

The Protestant Reformation, however, sought to create a society that was run by puritanical, biblical norms.\textsuperscript{5} In 1712, the theologian Benjamin Wadsworth wrote in his treatise, The Well-Ordered Family, that love is a mutual duty of both husband and wife, and that the husband who is not kind and loving "then shames his profession of Christianity, he breaks the divine law, he dishonours God and himself, too." Of unloving, unkind wives, Wadsworth wrote "she not only affronts her Husband, but also God, her Maker, Lawgiver and Judge."\textsuperscript{6}

Our Puritan Heritage

Promoting this norm, Protestantism created a new pattern of family life, "making marriage a more ethical and personal matter and recognizing a mutual right of divorce," while still enforcing the patriarchal ideal passed down from medieval times.\textsuperscript{7} The Puritan ideal was also one of social harmony, and they believed that functional families were particularly crucial to that harmonious society. Truly troubled marriages that ended in desertion, or in one or the other spouse bringing a marital complaint before the minister


\textsuperscript{6} Benjamin Wadsworth, The Well-Ordered Family, quoted in Talbot, 32.

\textsuperscript{7} Kagan, 393.
or magistrate, disrupted this ideal. So, while marriage as a life long agreement was still strenuously promoted, the Puritan leaders also allowed for divorce proceedings in extreme cases of disruptive marriages. The hope was that by providing for divorce in remedial cases, the family as an institution would be protected. These puritanical beliefs are influential in the American predisposition to the right to divorce.

All of the colonies, however, were not in accord with the Puritans on the matter of divorce. As might be expected, divorce laws and practices varied from colony to colony, as well as regionally. The New England colonies led the way in not only the most lenient laws, but also in number of divorces granted. The New England colonies had well established laws setting forth grounds for divorce (such as female adultery, desertion, bigamy, abuse or cruelty, and impotence), for division of property and alimony upon granting a divorce; and for determining whether or not divorcees could remarry.

The middle colonies (New York, Pennsylvania, New Jersey and Delaware), on the other hand, allowed divorce but instituted few formal procedures and laws in this regard. In part this was due to a lessening of the puritanical influences felt in the New England colonies, but more directly, it was a result of England's interference in the fashioning, implementation and execution of laws in the colonies. Not only did England strike down

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10 See Riley, 25-29 and Phillips, 144-147.
some of the colonies’ bills of divorce, but the English government actually overturned several divorces.\textsuperscript{11}

For these reasons, few divorces were granted in the middle colonies, and most of the cases that are recorded were presided over by governors or legislatures, and were granted only for grounds such as adultery and desertion. The southern colonies (Virginia, Maryland, North and South Carolina) were even more conservative -- no divorces were granted before the American Revolution.\textsuperscript{12}

This disparity between divorce practices in the northern and southern colonies may have had two basic causes. First, the southern colonies were established primarily by colonists who followed the Anglican faith with its strong prohibition of divorce (Henry VIII notwithstanding). Unlike the Puritans, the southern colonists followed the English practice of divorce of bed and board only; however, they followed the American practice of keeping divorce a civil rather than an ecclesiastical matter.\textsuperscript{13}

Moreover, the unavailability of divorce did not mean southern marriages were happy. Formal and informal separations were widespread; spouses "divorced" each other by publicly repudiating one another’s debts and announcing informal separations, and families with property tried to protect their daughters financially by negotiating pre-marital contracts for them in case their daughters’ marriages failed.\textsuperscript{14}

\textsuperscript{11} Phillips, 148-153.

\textsuperscript{12} Riley, 25-29.

\textsuperscript{13} Phillips, 143.

\textsuperscript{14} Riley, 27-28.
The second reason for the difference in divorce laws between the southern and northern colonies may lie in the importance each placed on the family as a source of social stability. William O'Neill has suggested that family patterns may have played a significant role in this disparity. He proposes that

when families are large and loose, arouse few expectations, and make few demands, there is no need for divorce. But when families become the centre of social organization, their intimacy can become suffocating, their demands unbearable, and their expectations too high to become easily realizable. Divorce then becomes the safety valve that makes the system workable. . . . Divorce is, therefore, not an anomaly or a flaw in the system, but an essential feature of it.15

The flaw with this premise, as Roderick Phillips observes, is that divorces were not granted during colonial times due to unfulfilled expectations or mutual discontent: incompatibility or irreconcilable differences were not held as grounds for divorce.

Phillips agrees, however, that there is enough evidence to suggest that family patterns did have some influence on the issue of divorce policy. The southern colonies, for instance, held an informal attitude toward families, where common law marriages occurred frequently, and where new settlements were established first by single men venturing into new territory with no families at all. In the northern colonies, by contrast, the puritanical and Protestant Reformation influences put a high value on family cohesiveness as the basis of social and political order -- families lived in very close quarters where almost "all important daytime activities were sustained in one room, by

groups comprising six, eight, ten, and even a dozen persons.” In addition, northern settlements were mostly comprised of married couples, to the extent that solitary living was sometimes forbidden.

From this short overview, it is obvious that the colonial Puritans' religious convictions influenced not only American divorce law, but also contributed to one of the most important cultural and social changes in Western society: removing divorce from religious to secular jurisdiction is one of the major political changes of the time and reflects an overall change in political theory throughout the Western civilization.

Revolutionary America

As Whitehead points out, revolutionary America was philosophically preoccupied with the right to form and disband unions, and the issue of divorce politically and socially fit within this preoccupation. Consequently, both family and political relationships were central to the republican thinking of the day. As evidence of this, the only two magazines printed in 1774 and 1775 (Robert Aitken's Pennsylvania Magazine and Isaiah Thomas's Royal American Magazine) ran frequent articles on the subject of marriage and divorce.

Thomas Paine (who had left an unhappy marriage in England) was both editor and


17 Phillips, 145.

18 Whitehead, 15.
frequent contributor to the Pennsylvania Magazine. In his article "Reflections on Unhappy Marriages" published in 1775, Paine argued against marriages based on cold calculation, advantage, greed or lust and compared these marriages to prostitution. He also argued that these marriages belonged to the Old World, and that republican marriages should be unions of the heart, freely chosen by the partners involved and free of other interests and claims.  

19 The republican ideal of freedom of choice, however, extended a type of conditionality to marriage: if true marriage was based on mutual love and affection, then the marriage could be disbanded when that love grew cold or tyrannical.  

20 In fact, Thomas Paine recommended quite plainly that "we instantly dissolve the band."  

21

Even more strongly, the pamphlet An Essay on Marriage, or the Lawfulness of Divorce published five years after the Revolutionary War argued that freedom to divorce was actually an expression of republican liberty. The writer of the pamphlet wrote that America should extend the spirit of love of liberty to allow divorce for people "united together in the worst bondage."  


20 Whitehead, 15.

21 Paine, 11120 quoted in Whitehead, 15.

22 Whitehead, 15.
Although divorce rates at the end of the 1700s varied somewhat by region, divorce laws were liberalized and statistics show a sharp increase in the numbers of divorces in the last decade of the century. Nonetheless, marriage breakdown before the nineteenth century remained extremely rare: economic success depended on conjugal cooperation, alternatives to marriage were few, and social and religious institutions created enormous pressure on couples to remain married.

For the most part, the new states enacted legislation at the end of the Revolutionary War similar to or more liberal than the divorce laws in place during the colonial period. Additionally, the more conservative southern states began to allow divorce relying on the legislative system of divorce proceedings in an effort to control and monitor the rate of divorce. More importantly, however, the middle and northern states began a shift to judicial divorce (usually by petition to the highest level of state courts) as opposed to the colonial system of legislative divorces (granted by legislative act).

This geographic spread of the availability of divorce and the shift from legislative to judicial control of divorce proceedings had an enormous impact on the divorce rates of

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23 Ibid., 17.

24 See Phillips, Chapter 10, "The Social Context of Marriage Breakdown." Phillips notes that while divorce, separation and desertion were harder for women, men also found single or divorced life difficult. Phillips also suggests that the extremely low rate of marital breakdown is a reflection of the low and flexible expectations of marriage: when expectation is low, tolerance can be correspondingly high for a wide range of behavior and conditions that might not be tolerated otherwise.

25 Phillips, 154-158.
the nineteenth century: divorce rates in the United States would soon surpass those of all other Western nations.

Divorce In The 1800s

The nineteenth century saw the continued liberalization of divorce policies and a progressive expansion of permissible grounds for divorce. Paradoxically, we also see strong attempts to keep divorce at a minimum through statutory and judicial control. This parallels our continuing social and cultural commitment to the institution of marriage while recognizing the unacceptability of binding couples in perpetual unhappiness if the marriage goes awry.

Between 1800 and 1850, the northeastern states (with the exception of New York) continued to expand the grounds for divorce to include offenses such as extreme cruelty, a wife's insanity (but not a husband's), imprisonment for a felony, and a spouse's desertion to join a religious sect that did not believe in sexual relationships.26 In addition, the northeastern states continued the effort of disengaging divorce proceedings from legislative control and codifying the resultant judiciary procedures. New York, however,

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26 The latter ground for divorce was in response to the Shaker movement which held all sexual relations were against divine law. Since celibacy was required of its members, a spouse who joined without his or her partner's agreement was technically guilty of desertion. The Shaker communities tried to guard against this by only accepting as members couples in agreement on the issue. Nonetheless, some spouses managed to join without their mates' consent, and states with Shaker communities began to allow divorce in these cases. (See Phillips, 441 and Riley, 67-68.)
steadfastly continued to grant divorce by legislative act alone with adultery as the sole
ground for divorce.27

At the turn of the century, the southern states (except for South Carolina) began
granting legislative divorces and then gradually moved away from legislative to judicial
divorce proceedings in most states. In general, the southern states enacted laws with
fewer grounds available for obtaining divorce than the northern states had, but by 1860
all the states that would form the Confederacy (with the exception of South Carolina) had
adopted policies establishing at a minimum adultery, desertion and cruelty as grounds for
divorce. Taking into consideration that the southern colonies previously had not allowed
any form of divorce, this seemingly slower progress to liberalize divorce laws is still
comparable to the more progressive trend of the northern states.28

The West and Midwest, on the other hand, provide a sharp contrast to southern
conservatism. Phillips argues that the liberalism of the West and Midwest is in part due
to the fact that these states entered the Union when divorce laws were already being
liberalized in other states (as opposed to having started with more conservative laws).
The specific grounds for divorce were not significantly different in the western states, but
the legislatures were frequently given great latitude in determining cases at their own
discretion beyond the grounds specified by law. For instance, the 1824 law passed in
Indiana allowed for divorce in any case the court in its discretion found just and
reasonable.

27 Phillips, 444.

Along with this judiciary discretion, the West and Midwest frequently had lenient residency requirements: in Indiana the person filing suit had only to prove residency at the time of filing the suit; Utah went as far as to allow anyone to file who could show he or she was a resident or wished to become one! While there was a wide variety of differences in the divorce policies of the western and midwestern states, the broad discretionary powers accorded the courts allowed for rapid liberalization of laws and even encouraged the lessening of severity of cause in justifying a divorce.29

From the beginning of the nineteenth century, there had been those who voiced their concern over liberalizing divorce laws, but a full scale reaction against divorce was not mounted until after the Civil War. Divorce rates began rising steadily after 1850 with a sharp increase from 1865 through the end of the century. This rise in divorce rates set off alarm bells for conservatives who equated the dissolution of marriage with the downfall of society.

In the 1850s, conservative social and political commentators including Horace Greeley, then editor of the New York Tribune, began expressing concern over the issue of divorce. Greeley in particular was a vocal opponent of any form of divorce and used the Tribune as a pulpit for his arguments.

While debate on divorce became inconsequential during the Civil War, the end of the war fanned the flames of the renewed debate in the late 1860s and 1870s. As statistics show, divorce rates always rise immediately after a war, and the War Between the States was no exception. As divorce rates continued to rise, the issue of divorce

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29 Ibid., 451-454.
became a major part of the social discussion again — in fact, divorce became "one of the first aspects of what we call the Revolution in Morals to become a matter of public controversy."\(^{30}\)

The fight against divorce was carried on through the work of social scientists, organized religion, and social and political commentators — men such as Theodore Woolsey, retired president of Yale University, attorney and Doctor of Divinity. The pressure created by Woolsey and other clergymen lobbying for divorce reform led to the formation of the New England Divorce Reform League in 1881, which became the National Divorce Reform League in 1885, and the National League for Protection of the Family in 1897, and was the first organized political opposition to rising divorce rates in the United States.\(^{31}\)

The debate in the 1880s and 1890s centered on familiar themes to those of us living in the year 2000: the destruction of the family unit that is the foundation of our society, the welfare of children of divorce, the concern of organized Christian religions that view divorce as socially destructive and scripturally immoral, and women's rights advocates concerned that men hold the power to determine and enforce divorce laws that so greatly affect the lives of women.\(^{32}\)

\(^{30}\) O' Neill, vii quoted in Phillips, 461.

\(^{31}\) Phillips, 456-461.

\(^{32}\) Riley, 108-118.
By the beginning of the twentieth century, all states except New York and South Carolina had established liberalized legal processes for divorce available to virtually all social strata and had thus set the stage for what Whitehead calls the divorce culture of the later 1900s. In sum, the twentieth century turned its back on hundreds of years of western tradition: divorce, which had always been marginalized, penalized, and treated as a deviant social phenomenon, became accepted, expected (statistically at least), and an integral part of the pattern of American familial and cultural lives.

From 1900 to 1920, there were actually few significant changes to the laws already enacted by the 1890s. This is undoubtedly due in part to the outbreak of World War I. The war did, however, have a now predictable effect on divorce rates: the number of divorces rose dramatically immediately following the war (from 75,000 divorces in 1910 to over 155,000 in 1920).\(^{33}\)

Phillips argues that there are several possible explanations for the increase. First, the lengthy enforced separation of spouses weakened many marriages. Second, spouses grew apart because their wartime experiences were so different. Men, for example, experienced not only the horrors of war, but also new places and cultures;\(^{34}\) women

\(^{33}\) Phillips, 517. Many of these divorces were undoubtedly sought by couples who had married hastily at the outset of the war, but that does not adequately explain such a dramatic increase in the divorce rate.

\(^{34}\) The popular culture of the time suggests an awareness of the idea that these new experiences might (or did) create new problems. For example, in the World War I song How You Gonna Keep 'Em Down on the Farm? by Arthur Fields part of the lyrics read, "How you gonna keep 'em down on the farm, after they've seen Paree?"
worked outside the home and gained a new sense of independence. Third, Phillips suggests that wartime adultery (possibly a result of the first two conditions) accounted for many of the post-war divorces.\textsuperscript{35}

The post-war years established a new level of acceptance of divorce, and while divorce rates dropped slightly in 1921 and 1922, they steadily increased from 1922 until 1930.\textsuperscript{36} Migratory divorce was common for citizens who could not easily obtain a divorce in their own states -- sometimes this meant traveling to France, the Virgin Islands, Cuba or Mexico, but more often it meant a less exotic trip to Nevada. In fact, the 1920s became the decade of a virtual divorce trade war between states such as Idaho, Nevada, Arkansas and Indiana.

These states vied for out-of-state clients by lowering residency requirements and making inexpensive lodging available. A city where the trade could boom had "a good railway station, was centrally located, had good shopping and recreational facilities, and an eager group of lawyers who courted the divorce trade."\textsuperscript{37} The competition, however, was not an endeavor to see who could enact the most liberalized residency laws, but more a case of economic expediency: the trade from out-of-state clients provided a lucrative

\textsuperscript{35} Phillips, 519-522.


\textsuperscript{37} Ibid.
income for these states — an income that would become even more attractive during the
depression years of the 1930s.\textsuperscript{38}

After the stock market crash in October, 1929, the divorce rates declined in the
United States for the first time in ten years. From 1930 to 1933, divorce rates fell by
twenty percent compared to the rate in 1929. This drop in divorces can be attributed to
factors influenced by economics: women's employment opportunities decreased, thereby
making divorce less feasible for them; couples could not afford to get married and
marriages declined by thirteen percent during this time; and couples who had separated
did not seek divorce because they could not afford to remarry (making a divorce
unnecessary). By 1934, however, divorce rates began to rise again and by 1936 surpassed
the pre-Depression rate.\textsuperscript{39}

The onset of World War II had little effect on the divorce rate, but the post-war
years saw an unprecedented increase. Most likely, the same factors that caused the
increase in divorces after World War I were at work after World War II. Also, as in the
1920s after World War I, divorce rates declined somewhat and stabilized in the 1950s.
Unlike the 1920s, however, the decade from 1950 to 1960 saw very little increase in the
divorce rate for the first time in nearly a century.

The stability of divorce rates in the 1950s may be explained by several social,
economic and political factors. Post-war society entered a period of social conservatism.
Families and marriage were held in higher esteem by society probably in reaction to the

\textsuperscript{38} Phillips, 530-533.

\textsuperscript{39} Ibid., 553-555.
exigencies of the war following close on the heels of the Depression. Also, the nation enjoyed a period of great prosperity and economic boom. Finally, legislation changed so little, that there was not even the usual rise in rates due to liberalization of laws.40

Stephanie Coontz suggests that the strong pro-family sentiment and the great economic improvement combined to make a powerful (if short-lived) cultural shift.

Not only was the 1950s family a new invention, it was also a historical fluke, based on a unique and temporary conjuncture of economic, social, and political factors. During the war, Americans had saved at a rate more than three times higher than that in the decades before or since. Their buying power was further enhanced by America's extraordinary competitive advantage at the end of the war, when every other industrial power was devastated by the experience.41

As evidence that these factors worked in concert, she cites the purchases of appliances and household furnishings that rose by two hundred and forty percent following World War II, and the fact that nearly the entire increase in the gross national product in the mid-1950s was attributable to residential building and consumer durable goods.42

In addition, Coontz suggests that emotionally, people were putting "their mouths where their money was" — the majority of people responding to a 1955 marriage study said they gave up "nothing" in being married, and less than ten percent believed that

40 Ibid., 555-561.


42 Ibid.
single persons could be happy. Coontz quotes a popular advice book as stating, "The family is the center of your living. If it isn't, you've gone far astray."\(^{43}\)

This advice is indicative of the mood of the 1950s. Tremendous social pressure was brought to bear on both men and women to live by this precept. A pseudo-Victorian revival of separate spheres occurred: the real difference being that Victorian women were responsible for the moral realm of the home, while their 1950s counterparts were responsible for what amounted to personal service. Victorian women with even modest means left housework to servants — 1950s housewives \textit{regardless} of their means were expected to cook, clean and be cheerfully attentive to their husbands' needs.\(^{44}\)

Men also were pressured into new roles: men belonged married and at home (not single, and certainly not out with the guys); they were supposed to control the behavior and attitudes of their families; and frequently, promotions depended on the suitability of a man's marriage, i.e., the suitability of his wife. Coontz points out that all of this laid the groundwork for tremendous familial conflict that was internalized due to the perceived lack of divorce as an option and was most likely a major factor in the tremendous rise in divorce rates in the late 1960s.\(^{45}\)

Beginning in 1959, the divorce rate began climbing again, and by 1968, the rate was increasing by up to twelve percent a year. By 1974, the rate of increase per year

\(^{43}\) Ibid., 25.

\(^{44}\) Coontz uses as an example the public relations releases for Joan Crawford showing the star mopping her own floors.

\(^{45}\) Ibid., 27-29.
23

slowed, but it was not until 1982 that the divorce rate decreased slightly.46 The reasons for the increase are consistent with previous rises in the divorce rate: women's economic independence, cultural attitudes in the form of marital expectations, and legal reform.

The first two apply to the sharp increases from 1960 to 1968. The depression and the war profoundly affected marital expectations after World War II. It has been argued that through the years of economic deprivation, Americans internalized a strong commitment to family combined with low material expectations — many of them had quite likely despaired of ever marrying. These people subscribed to (and perhaps created) the cultural shift with its focus on marriage and family — they regarded their marriages as something to protect and maintain.

During the 1950s, however, women paradoxically began entering the work force in unprecedented numbers. Coontz argues that during this period of reasserted domesticity for wives, women returned to work in response to growing economic factors. As demand for labor outstripped supply, and with so many men remaining in military service, barriers to women workers fell and wages paid to women rose. By 1960, forty percent of all women worked — and increasingly these women stated that they worked for reasons of self-esteem as well as economic need.47

Phillips argues that throughout western history, women's employment is one of the most significant factors in the rise of divorce rates. He suggests this is so because women's employment affects several marital conditions. It not only provides an

46 Phillips, 560.

47 Coontz, 160-161.
economic avenue of escape for women in marriages that have broken down, but it also may facilitate divorce for men who financially could not afford two households. Additionally, employment outside the home may contribute to the actual breakdown of a marriage that otherwise might survive. Women who work, for the most part, continue to bear all or nearly all of the burden of maintaining their homes which creates even more stress that can contribute significantly to marital discord. Phillips further points out that by 1960, many women were working to pay for the extras or luxuries of life -- not just for the necessities such as food and shelter, and Coontz reminds us that the late 1950s set the scene for the runaway indebtedness of the 1970s and 1980s -- it was the beginning of the era of the two-wage family.

This change in material expectations in the marriage has paralleled a corresponding rise in the importance of affection in the marriage -- an increasing focus on the couple's emotional relationship. Evidence of this can be found in the ever mounting numbers of self-help books (for example, *Men Are from Mars and Women Are from Venus*) stressing communication, understanding each other's needs and improving sexual relations within the marriage. Phillips argues that these are concerns that in the past were associated with pre- or extra-marital affairs, and that the traditionally held expectation of a "slide from intense passion to comfortable companionship after the initial years of

48 Phillips, 621-622.

49 Coontz, 37-38.
married life⁵⁰ has become less than acceptable and possibly contributes to the stresses that can lead to marital breakdown.

After 1968, however, the tremendous rise in divorce rates can also be correlated with the reform in divorce law. It is apparent that during the 1960s, Americans changed their attitudes about divorce — in fact, surveys show that the attitude toward liberalizing divorce occurred faster than the divorce law reform. This attitudinal change appears to have occurred primarily between 1968 and 1974 — coincidental with sweeping divorce policy reforms and the greatest phase of increase in the divorce rate.⁵¹

⁵⁰ Phillips, 623.

⁵¹ Phillips, 623-627.
Until the 1970s, traditional marriages in the United States and other western cultures were viewed as contracts wherein both husbands and wives had legal obligations that were specified in various forms of law. These laws reinforced the responsibilities of both parties, rewarding those who fulfilled their marital obligations and punishing spouses who did not.¹

Despite the gradual liberalization of divorce laws, the traditional fault-based divorce law, which prevailed in the United States until California's landmark reform in 1969, sought to maintain this traditional family relationship by making it difficult for spouses to obtain a divorce. This meant that traditional western law reinforced and helped define the roles and responsibilities of a traditional legal marriage. In her book *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*, Lenore J. Weitzman points out that these roles and responsibilities were gender-based in a patriarchal family structure that had a moral framework and presumed a lifelong commitment to the marital partnership.

To obtain a divorce under traditional divorce law it was rarely enough to demonstrate that the marriage was dead — that both parties agreed to irreconcilable differences or simply had made a mistake and agreed that they wanted out of the marriage. Under traditional law, spouses had to establish that one or the other of them was solely responsible for the death of the marriage. In addition, grounds for divorce were limited to a few kinds of marital fault, usually adultery, cruelty, drunkenness or desertion. Proponents of traditional divorce law saw these obstacles to divorce as representing society's "valid interest in promoting family stability, pointing to statistics correlating broken homes with higher crime rates and increased welfare payments, as well as less tangible moral values."2

In any event, traditional divorce laws laid a moral framework of guilt or innocence; divorce was a means for the innocent to obtain redress from the guilty. In fact, many states carried this to the extent that unless the party seeking the divorce was entirely blameless or innocent, neither party would be granted the divorce. Presumably, this approach precluded the court from rewarding anyone with "dirty hands."3

Consequently, financial awards at the dissolution of a marriage were also linked to innocence or guilt; in other words, alimony was awarded to an innocent spouse as a "judgement against the guilty spouse."4 And because traditional divorce laws reinforced the traditional roles of marriage, women stayed home and raised children, and men

2 Wheeler, 2-8.
3 Ibid., 10.
4 Ibid., 12.
supported them -- even in divorce. This meant that men usually paid alimony subsequent to a divorce, and women almost always were awarded custody of the children.

Weitzman concludes that traditional divorce law reinforced the traditional marriage through reward and punishment. Wives who committed adultery, cruelty or desertion would be denied alimony; husbands would be punished through awards of property, alimony and child support to the wife. Justice in this system was the "assurance that the marriage contract would be honored."5

Unfortunately, this system thrust an already unpleasant situation into an inescapably adversarial confrontation as well as often inducing flagrant perjury so that someone could be judged guilty and someone innocent. In his book *No-Fault Divorce*, Michael Wheeler quotes Monrad Paulsen of the University of Virginia Law School, "The necessity of proving a ground of divorce such as adultery, cruelty, or desertion leads to the most flagrant collusion and outright fraud on part of divorce seeking couples."6 This policy often resulted in one or both parties committing perjury and, as we shall see, led in part to the establishment of no-fault divorce laws.

The 1960s heralded an era of liberalizing changes in Western society and especially the United States. This was the decade of the civil rights movement; the war in Vietnam and its tremendous opposition from the youth of America; the beginning of a strong feminist movement that would challenge the social and political dominance of men in the 1970s; liberalized attitudes toward sex and birth control; and even the Roman Catholic Church (a bastion of staid traditions) gave way to the progressive forces of

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5 Ibid., 14.

6 Ibid., 5.
society with sweeping changes as a result of the 21st Ecumenical Council (Vatican II). In short, authorities, governments and institutions responded to the social pressure by liberalizing many policies -- including divorce laws.

According to Roderick Phillips, Western society in the 1960s reevaluated not only divorce laws, but the institution of marriage itself. He argues that the introduction of no-fault divorce laws was the "result of a long debate about the character of marriage and the functions of marriage law." He further argues that the social scientific approach to marriage and divorce shifted the emphasis from individual responsibility for success or failure of a marriage to an analysis of "causal or predisposing conditions in society at large." This cultural shift was not endemic to the United States alone and bears out Philips' contention that marriage itself has not changed so much as the context of marriage has. As Table 3.1 shows, most western nations made overhauling changes to their long-standing divorce policies between 1960 and 1980.

While Table 1 shows only the dates for changes in California and New York in the United States, all fifty states adopted reform at varying times from 1967 (New York) to 1985 (South Dakota). The California reform, however, was the first true no-fault reform in the United States, and a discussion of its adoption and the consequences of its implementation can serve as a good example of the divorce reform movement of the 1960s and 1970s.

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7 Phillips, 565-566.

8 Ibid., 562.
Table 1 -- Divorce Law Reform, 1960-1981

<table>
<thead>
<tr>
<th>Year of Legislation</th>
<th>Country/State</th>
<th>General Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>1961/1976</td>
<td>West Germany</td>
<td>Major reform/complete revision</td>
</tr>
<tr>
<td>1963/1980</td>
<td>New Zealand</td>
<td>Complete revisions</td>
</tr>
<tr>
<td>1967</td>
<td>New York State</td>
<td>Complete revision</td>
</tr>
<tr>
<td>1968</td>
<td>Canada</td>
<td>First federal divorce law</td>
</tr>
<tr>
<td>1969</td>
<td>England and Wales</td>
<td>Complete revision</td>
</tr>
<tr>
<td>1969</td>
<td>Denmark</td>
<td>Major reform</td>
</tr>
<tr>
<td>1969</td>
<td>Finland</td>
<td>Major reform</td>
</tr>
<tr>
<td>1969</td>
<td>Norway</td>
<td>Major reform</td>
</tr>
<tr>
<td>1969</td>
<td>California</td>
<td>Complete revision</td>
</tr>
<tr>
<td>1970</td>
<td>Italy</td>
<td>Divorce legalized</td>
</tr>
<tr>
<td>1971</td>
<td>Netherlands</td>
<td>Complete revision</td>
</tr>
<tr>
<td>1983</td>
<td>Sweden</td>
<td>Complete revision</td>
</tr>
<tr>
<td>1974</td>
<td>Belgium</td>
<td>Major reform</td>
</tr>
<tr>
<td>1975</td>
<td>Australia</td>
<td>Complete revision</td>
</tr>
<tr>
<td>1975</td>
<td>France</td>
<td>Complete revision</td>
</tr>
<tr>
<td>1975</td>
<td>Italy</td>
<td>Major reform</td>
</tr>
<tr>
<td>1976</td>
<td>Scotland</td>
<td>Complete revision</td>
</tr>
<tr>
<td>1977</td>
<td>Portugal</td>
<td>Complete revision</td>
</tr>
<tr>
<td>1978</td>
<td>Austria</td>
<td>Major reform</td>
</tr>
</tbody>
</table>

The California Initiative

When California passed its divorce reform law in 1969, the United States became the first nation in the Western world to support unilateral, no-fault divorces. The divorce law reform that started in California actually began as an effort to reduce the adversarial nature of divorce proceedings inherent in a one-party-is-guilty system and to eliminate the hypocrisy and outright perjury required of couples who lied under oath in order to find one party guilty and the other innocent. As evidenced by the fact that every other state in the Union followed suit by adopting no-fault divorce laws within 15 years, California's concerns were probably representative of many of the concerns felt by society at large – further bearing out Phillips’ arguments for a cultural shift in our views on marriage and divorce. In fact within four years of the California reform, thirty-six states had adopted no-fault divorce laws. Ironically, South Dakota was the last state to adopt no-fault divorce laws in 1985 -- its frontier divorce mill days notwithstanding.

The most troublesome aspects of the traditional fault-based divorce laws were: 1) the adversarial environment, 2) child custody, 3) awards of child support, and 4) awards of alimony and the division of property. In themselves, however, these problems were not enough to trigger what can loosely be termed the divorce movement. Instead, the

9 Wheeler, 14-20. Ostensibly, Governor Brown appointed his Commission on the Family to revise the divorce laws in California to help stem the rising divorce rate, but clearly, the emphasis from the legislature was to eliminate the hypocrisy and perjury. This is most evident in the legislature ignoring the recommendations of the commission to institute family and marital counseling provisions as part of the reform adopted in 1970.


11 Ibid.
four major themes that set the reform in California in motion were: 1) the high divorce rates, 2) the adversarial process, 3) the need to recognize the inevitability of divorce, and 4) the strong reaction of divorced men who charged that "the divorce law and its practitioners were in league with divorced wives to suck the blood, not to mention the money, of former husbands."12

It is interesting to note that the instrumental call for change in California divorce law was made by then-Governor Edmund Brown. Governor Brown appointed the Governor's Commission on the Family which was a bipartisan group of professionals (lawyers, judges, law professors, politicians and others).13 Governor Brown appointed the commission to proceed in a "concentrated assault on the high incidence of divorce and its tragic consequences" in an attempt to right the social and economic ills of divorce, namely juvenile delinquency, crime, alcoholism, and welfare dependency.14

Even after the California example, divorce policy reform in the rest of the states occurred with no structured or self-conscious policy reform movement. That is not to say, however, that the reform happened void of interest group participation. According to Herbert Jacob in his essay "Women and Divorce Reform" published in Women, Politics, and Change, the most active groups were lawyers, men's rights groups, and the Catholic Church.15

12 Weitzman, 16-17.
13 Wheeler, 19.
14 Weitzman, 18.
15 Jacob, 495.
Divorce reform legislation proposals were often initiated by individual lawyers or the organized bar, and most legislatures asked the bar in their states for opinions on the proposed legislation. Adding to their expertise in family law and access to legislatures, many lawyers also served in state legislatures, frequently monopolizing positions on judiciary committees. All these circumstances put together made (and make) lawyers a very influential group as states considered divorce reform.\(^{16}\)

Also, it should not go unnoticed that family lawyers have a vested economic interest in the divorce laws of their states. Jacob cites the fact that the 1980 revision of property division laws in the state of New York was in the bar's economic interest. The reform "spurred an enormous amount of litigation that made divorce expensive for many clients and remunerative for many attorneys."\(^ {17}\)

Wheeler holds a similarly jaundiced view of the motives and even of the ability of lawyers involved in reforming divorce laws. From the perspective of the late 1960s and early 1970s, he quotes Robert Drinan, a previous editor of *Family Law Quarterly* as writing:

Despite the basic unsuitability of America's present divorce procedure, borrowed from the ecclesiastical courts, little if any imagination has been exercised in the creation of a better process. The fact is that the American bench and bar have never really been interested in the law of domestic relations. Lawyers have tended to avoid divorce cases and have allowed a "divorce bar" to grow up in each metropolitan area. Similarly judges, at least until very recently, have acquiesced in the fact that the divorce court enjoys the least prestige of all the courts.\(^ {18}\)

\(^{16}\) Ibid., 496.

\(^{17}\) Ibid.

\(^{18}\) Wheeler, 134.
Men's Rights Groups

Although lawyers and the bar had more influence with the state legislatures, men's rights groups were still very active from the beginning (as early as 1964 in California), and many testified before state legislatures though there is little evidence that they were taken seriously before the 1980s.19 According to Wheeler, many of the men's rights groups were considered "borderline kooks" which could have had a lot to do with their lack of influence. He recounts the story of Paul Hansen, the founder of Fathers United for Equal Rights in Maryland, who received national publicity for picketing in front of a church attended by a Baltimore judge. Hansen wore nothing but a wooden barrel and his underwear and carried signs that read, "This Could Happen to You" and "Judge McGuire Repent." Hansen's group complained about alimony and the difficulty fathers had in obtaining custody of their children. His opinion of the system was, "The laws stink, the lawyers are putrid, and the judges are so slow to change."20 In addition to his theatrics, Hansen's unflattering language could not have endeared him or his cause to the influential lawyers, bar, judges and legislators of Maryland.

Men's rights groups were very successful, however, in pressing for reform of the custody laws in the 1980s. These groups made intuitively appealing arguments for joint custody, and even though they were not nationally organized and had relatively low membership, they prevailed by focusing on the narrow issue of child custody.21

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19 Jacob, 496.

20 Wheeler, 137.

21 Jacob, 496-497.
The Roman Catholic Church

Like men's rights groups, the Catholic Church achieved some success by narrowly focusing its interests, but unlike lawyers or men's rights groups, the church took a defensive rather than an offensive position. As a matter of doctrine, all divorce is unacceptable to the Catholic Church, and it tried (in some cases successfully) to prevent divorce reforms from going through.

Because the Catholic Church is not really the monolithic entity that some suppose (at least not in the United States), and because the situations were different in each state, the church did not have a universal approach to divorce reform. Additionally, the church did not have easy access to legislatures as did lawyers and men's rights groups, but its influence was felt in states with large Catholic populations because many of the legislators in these states were Catholic. In addition, the church had lobbyists in state capitals, and it used the pulpit to deliver its message to parishioners.

In some states, however, the Catholic Church provided little resistance and in some cases actively supported divorce reform. In California, for example, the divorce laws were already so liberal that the church had no vested interest in maintaining a status quo. Additionally, the Governor's Commission was ostensibly charged with reforming the divorce laws to stem the high rate of divorces, something the church viewed as a definite improvement. Consequently, there was at least tacit approval by the church of the divorce reform in that state.22

22 Wheeler, 146-150.
So, while the church's principles may have seemed unshakable, it often made compromises and in the end had little effect on the eventual outcome of divorce reform. The notable exceptions were the effects of its efforts in some of the states with large Catholic populations: New York never explicitly embraced no-fault, and no-fault reform came late to Wisconsin (1977), Pennsylvania (1980), and Illinois (1983).23

As a final observation, the women's movement was conspicuously absent as a major contributor in the reform of divorce -- especially since divorce reform occurred during a period of intense feminist activity that reached a peak during the 1970s. According to Herbert Jacob, some of the apparent disinterest on the part of feminist groups can be attributed to the lack of influence of women in state legislatures. Jacob contends that while the feminist movement made a strong impression during this time on the American public through the mass media, it did not penetrate to all levels of the policy making process and that "to claim a voice in divorce law change, feminists needed continuous representation in state capitals, a requirement which the fledgling movement could not meet."24

The Unexpected Consequences

The divorce law reform that started out in California to contain the rising rate of divorce, and to "rid the divorce process of its anachronistic moral elements and reduce the acrimony, hostility, perjury and hypocrisy that pervaded the divorce process under the old

23 Jacob, 497.

24 Ibid., 490.
law,\textsuperscript{25} has had some unexpected outcomes over the last thirty years. These unexpected outcomes have been most evident in terms of the economic and moral consequences of post-no-fault divorce reform.

In discussing the results of the divorce law reform, it is helpful to look at the intended outcomes of the changes to the law. Lenore J. Weitzman used the comparisons in Table 2 to illustrate the differences between traditional and no-fault divorce laws.\textsuperscript{26} The fault-based laws were restrictive, pro-marriage laws with specific grounds for divorce that were based on a moral framework, required one party to be at fault, and could not be sought unilaterally. The change to no-fault was almost a complete turnaround: no-fault laws facilitate divorce, require no grounds, have an administrative rather than a moral framework (no guilt or innocence), and can be undertaken by either party without the other’s consent. This “administrative” quality of no-fault leads to gender-neutral decisions that leave both parties responsible for self-support, both eligible for custody, and both responsible for child support as opposed to the traditional role based decisions in which fathers pay alimony and child support, and wives get custody of the children.

This comparison helps us understand how the reform was perceived as equitable to all parties and advantageous in eliminating adversarial proceedings (as well as perjury). It also helps identify the areas that were impacted most by the changes: the economic status of women and their children (gender-neutral responsibilities and financial awards based on equality) and the moral trap tacitly expressed in no-fault

\textsuperscript{25} Weitzman, 51.

\textsuperscript{26} Ibid., 40.
proceedings whereby either spouse can leave at will and without cause — a situation that clearly undermines the individual responsibility and obligation incurred in a marriage.27

Economically, the issue is relatively clean cut — women and children have been most hurt by the equal division of property and by the lack of alimony or adequate child support perpetuated by the new laws. While the "equal" division of property suggests fairness and equity, it does not necessarily bring equal results to all parties in a divorce.

Table 2 — Summary of Changes in Divorce Law

<table>
<thead>
<tr>
<th>Traditional Divorce</th>
<th>No-Fault Divorce</th>
</tr>
</thead>
<tbody>
<tr>
<td>Restrictive Law — pro-marriage</td>
<td>Permissive Law — facilitates divorce</td>
</tr>
<tr>
<td>Specific Grounds</td>
<td>No Grounds</td>
</tr>
<tr>
<td>Moral Framework</td>
<td>Administrative Framework</td>
</tr>
<tr>
<td>Fault</td>
<td>No fault</td>
</tr>
<tr>
<td>Consent of Innocent Spouse Needed</td>
<td>No Consent Needed</td>
</tr>
<tr>
<td>Gender-based Responsibilities</td>
<td>Gender-neutral Responsibilities</td>
</tr>
<tr>
<td>Financial Awards Linked to Fault</td>
<td>Financial Awards Based on Equality and Need</td>
</tr>
<tr>
<td>Adversarial</td>
<td>Nonadversarial</td>
</tr>
</tbody>
</table>


As Weitzman points out, it can hardly be considered equitable to force the sale of the family assets (especially a home) so that the proceeds can be shared between the

spouses when the sale of the assets means disruption and sometime dislocation in the lives of minor children. This method of distributing property equally between the spouses belies the fact that the average family consists of four people, not two. Under this rule, three people (the children and custodial parent, usually the wife) share one-half of the property while the non-custodial parent (usually the husband) receives one-half all for him or herself.28

One way to avoid the sale of the custodial home is for the custodial parent to "trade" an equally valuable asset for the home. The drawback to this solution is that many if not most women who are custodial parents have no assets to trade — frequently, the family home is the only real asset a couple owns. Another alternative is for women to trade the amount of child support or alimony the court might award them. Unfortunately, many women cannot live without the awarded support, so they are forced to sell the home.29

To compound the issue of equal treatment with unequal results, child support awards are low, and the awarded amount is rarely the same as the amount women actually receive.30 As Michael Sandel points out, no-fault divorce law fails to respect traditional roles and penalizes mothers and homemakers who have lived their married lives as "situated selves" — whose identities were constituted by their roles. These women have depended on their husbands for economic support and in return cared for children and

28 Weitzman, 104.

29 Ibid., 79-80.

30 Ibid., 265; also see Phillips, 628.
home so that their husbands could pursue their careers. When the marriage breaks up, however, the husband still has his career while she has the care of the children and the necessity of finding employment — many times without the benefit of marketable job skills.\(^\text{31}\)

In practice, this means that women and children frequently experience a significant decrease in their standard of living. Women typically are left with half of the marital property (amounting to less than $10,000 on average), no alimony, child support they may never receive and custody of the children.\(^\text{32}\) Weitzman's research shows that after only one year of divorce, "Men experience a 42 percent improvement in their post-divorce standard of living while women experience a 73 percent decline." Weitzman points out that these data indicate a financial catastrophe for women who must then deal with "severe deprivation: every single expenditure that one takes for granted -- clothing, food, housing, heat -- must be cut to one-half or one-third of what one is accustomed to."\(^\text{33}\)

Although Weitzman's study has been criticized as being too narrowly focused, and other studies have shown the economic consequences to be considerably less dire, the fact remains that children and their mothers suffer disastrous economic setbacks in divorce. For example, forty percent of all children eligible for child support have no legal

\(^{31}\) Sandel, 114.

\(^{32}\) Ibid.

\(^{33}\) Weitzman, 339.
child support awarded to them,\textsuperscript{34} while those children who do receive child support do not fare that much better when one considers that the average annual child support obligation in the United States is $3,000.00. The median male salary, on the other hand, is $30,000 annually\textsuperscript{35} -- even after taxes, fathers of intact families have considerably more income than $3,000.00 per year to invest in their children's behalf.

In addition, studies such as those conducted by Judith Wallerstein and Sandra Blakeslee show that children of divorce are more at risk of dropping out of school, suffering emotional problems such as low self-esteem and alienation, and abusing alcohol and drugs.\textsuperscript{36} Although some studies report statistics that show a lesser degree of negative impact on women and children of divorce, all of the findings indicate that in divorce, women and children are the losers.

While this economic "catastrophe" can be seen as a direct result of striving for equality under the no-fault divorce laws, it is perhaps even more a result of the new laws giving way to moral-blind grounds for divorce. Both the moral framework of the old divorce laws and the gender-based responsibilities of married partners protected women in the past from the kind of destitution that divorce brings to them and their children today.


CHAPTER 4

SOME ETHICAL APPROACHES TO MARRIAGE, CHILDREN AND DIVORCE

It is clear that in today's society, divorce has been transformed from a last resort into an acceptable, common response to marriage breakdown. This attitude toward marriage (reflected in no-fault divorce laws) is a direct result of the shifts in religious, ethical, political and socio-economic conditions that affect the family, marital expectations and our responses to marriage breakdown. This leads Phillips to argue that marriage has become less stable over time "not primarily because of changes in the emotional content of marriage but rather because the social context of marriage has been transformed."¹

Furthermore, Sandel notes that the provisions for unilateral divorces, the concept of gender-neutral roles and the emphasis on self-sufficiency after divorce "reflect the liberal conception of persons as unencumbered selves independent of their roles and unbound by moral ties they choose to reject."² This all leads one to conclude that the high rate of divorce and the lack of commitment to provide even minimal child support much less

¹ Phillips, 640.

² Sandel, 112.
alimony may be linked at least in part to our cultural propensity to insist on individual rights without an accompanying sense of duty or responsibility.

This is a great cultural leap from the attitudes on divorce during most of our 200-year history. To better understand the process of how our cultural attitudes changed so dramatically in such a relatively short span of time, it is helpful to look at how the ethical theories affecting early America before the Revolutionary War shaped our political processes of the time, and at the two major influences on Western thought, namely utilitarianism and deontological theories, that have strongly impacted and changed the way in which people have viewed their rights and obligations in the two hundred years since the revolution. An understanding of these last are essential to crafting public policies that can better deflect the negative consequences of divorce.

Early Influences

In addition to Puritanical influences, American political theories played a big part in liberalizing the divorce laws of the 1700s. The secularization of divorce proceedings in colonial America is evidence of a long-term trend in the secularization of political attitudes and theories in western cultures. This turning away from the Bible for political and legal guidance was a result in particular of the legal, political and social theories advanced by proponents of natural law and contract philosophies. These theories contributed significantly to the political birth of the United States and to the formation of our policies, laws and attitudes toward divorce.

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Gradually during the seventeenth and eighteenth centuries, western political theories and philosophies began to deviate from the religious assumptions of medieval times. At the end of the sixteenth century, many found themselves weary of religious strife that had left them with incipient disbelief in Catholicism and Protestantism both. In addition, the Renaissance and the Protestant Reformation had well prepared the intellectual and political thinkers of the day for a change. The Renaissance had celebrated human achievements and inspired a renewed interest in the humanism of classical Greece. The Protestant Reformation created new perspectives on how religion could interact with economics, politics and cultural attitudes. These shifts in thinking during the sixteenth century allowed political thought to move toward the theories of natural law and social contract — the seventeenth century became a time of transition.4

Although this paper cannot encompass a detailed history of natural law and contract philosophies, it is important to understand the role these emerging theories of the period played in shaping our current laws and attitudes toward divorce. In brief, philosophers of natural law developed theories based on nature and reason rather than on biblical or religious teachings. Also (and of particular interest to divorce law), most natural law theorists came to support the principle of contract whereby a contractual obligation was binding only if both parties entered into it freely. In a social context, then, it became easy to see how the institution of marriage fits the definition of a civil contract,

and it was not a far step to then allow divorce — a subsequent civil action in the case of failure to deliver on the part of either spouse.

Early proponents of natural law such as Hugo Grotius tried to interpret natural law within the parameters of the Bible to proscribe divorce except in biblical terms. However, later philosophers such as John Locke relied strictly on nature and reason in developing arguments for allowing divorce.\textsuperscript{5} It is interesting to note that one can first find references to children in the matter of divorce in seventeenth century works. Earlier theological based writing on marriage and divorce referred to children as the procreational obligation of the marriage. In contrast, natural law with its focus on duty stressed the parental obligation, both during marriage and in the event of divorce, to the children the marriage produced.\textsuperscript{6}

In addition to secularizing the law, the turn to natural law in the seventeenth century led to a shift of emphasis that focused more on natural rights. We clearly see the results of this shift in the seventeenth century where the distinction between natural law and natural rights is evident in the political rhetoric of the day. Natural law is a system based on God's universal prescription for all people and individual rights and duties are found within this context. Natural rights, by contrast, are primary rights — every individual is endowed with them. Moral questions in natural law are analyzed with a focus on duties or obligations. Natural rights theories focus on the rights of the individual rather than on his or her obligations.

\textsuperscript{5} Phillips, 210-214.

\textsuperscript{6} Ibid., 214.
By the end of the 1600s, the distinction between natural law and natural rights had crystallized, and modern political theory was being built upon it. Part of the reason for the shift in thinking may have come from the translation of the word \textit{ius} or \textit{jus} which can mean both "law" and "right." There is no evidence that \textit{ius} in the thirteenth century was ever translated as a right that one could possess. However, between the thirteenth and seventeenth centuries, a shift began to take place in how the word \textit{ius} was translated. Through this time frame, \textit{ius} "shifts from 'the just thing itself' (Aquinas), to 'power' (Ockham), then to 'ability' (Gerson and Suarez), then to 'quality' (Grotius), and finally, to liberty (Hobbes)."\textsuperscript{7}

Thomas Hobbes, in fact, came to build a modern political theory on this difference:

\begin{quote}
The names \textit{lex} and \textit{ius}, that is to say, law and right, are often confounded, and yet scarce are there two words of more contrary signification. For right is that liberty that law leaves us; and laws those restraints by which we agree mutually to abridge one another's liberty.\textsuperscript{8}
\end{quote}

This focus on rights became a fundamental premise for framers of the Constitution and has had a great influence on the development of the American culture.

\section*{Rights-Based, Duty-Based and Goals-Based Theories}

The real dilemma in crafting an acceptable, uniform divorce policy is not in convincing the American public that the welfare of our children is at stake. Rather, the dilemma is


\textsuperscript{8} Thomas Hobbes, \textit{Elements of Law II}, 10 quoted in Edel et al., 108.
one of balancing the responsibility or duty to one's children with one's right as an individual to divorce. Over the last two hundred years, deontological and utilitarian theories have dramatically reshaped how the American culture views rights and responsibilities, and importantly for this discussion, on the different ways we judge whether an action is moral or not. Understanding the distinction between rights-based, duty-based and goal-based rights and their underlying theories of ethics (primarily deontological and utilitarian theories), then, is essential to devising a uniform divorce policy that is acceptable to the broadest spectrum of our society.

According to Jeremy Waldron, Ronald Dworkin first made the distinction between rights-based, duty-based and goal-based theories in the 1970s. Dworkin holds that theories of political morality are based on requirements to act or refrain from acting in a given set of circumstances, and the bases of differing political theories are determined by how the requirements are generated and justified. From this point of view, political moral theories can be categorized as rights-, duty- or goal-based.9

To illustrate the differences, Waldron uses the paradigm of a requirement for police and others to refrain from torturing individuals. If we subscribe to this requirement because we believe no one should have to endure that kind of suffering, we are working from a rights-based theory (derived from the duty to hold each person as an end not a means). If we think the requirement is justified because torturing others debases the torturer, then we are working from a duty-based (deontological) theory.

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9 Jeremy Waldron, ed., *Theories of Rights*, (New York: Oxford University Press, Inc., 1984), 12. Waldron points out it is difficult to hold a rights-based view if one's having a right is correlated with someone else's duty - how can some theories be rights-based and others duty-based? Waldron recommends that a better definition of rights for this purpose is "individual interests."
Finally, a goals-based (e.g., utilitarian) theory in this paradigm would view the torture unacceptable only in the light of the impact of the torture on the aggregate of those having an interest (did the torture, for instance, provide a benefit to society that outweighed the pain to the individual).\textsuperscript{10}

**Deontological Influences**

In the last half of the eighteenth and first part of the nineteenth centuries, deontological and utilitarian theories emerged in Europe as the two most significant theories of modern Western ethics. Both of these theories, though very different in approach, emerged as people began to question the traditional Western assumptions that morality must come from a natural (or religious) source outside of man. The move away from this traditional view to a belief that the source for morality arises from within human nature led to a view that human beings could understand morality in terms of self-governance or autonomy rather than morality being imposed on human beings.\textsuperscript{11}

Deontological thought is an ethics of duty by which morality is based on specific, foundational principles of obligations. It is based on the idea that human beings clearly have certain obligations in life, such as the care of their children and not to commit murder. These theories follow the premise that the moral person must act on the principles of obligation regardless of the consequences of those actions. In simple terms, deontological theories are based on the input rather than the outcome of actions.

\textsuperscript{10} Ibid., 12-14.

Immanuel Kant, whose work in the 1780s and 1790s revolutionized all branches of thought, gives us a deontological theory in which moral action is judged by examining the nature of the action and the will of the agent. This derivation of moral law from the will of the agent lays the foundation for moral autonomy. Influenced by Grotius and Pufendorf, Kant agreed that moral duties include duties to oneself and others, but he also argued that there is a single, self-evident principle of reason that would stand as a categorical imperative — the foundation for all other ethical judgment. Kant developed his discussion of ethics around the question, “What ought I do?” and he was concerned primarily with identifying the maxims or fundamental principles of action that one ought to adopt.

In answering the question “what ought I do,” Kant held that only maxims or principles that could be adopted by a plurality of persons could serve as moral principles. This categorical imperative, known as the Formula of Universal Law, is the keystone to Kantian ethics; for Kant, principles that are not universalizable must be rejected. The Formula of Universal Law is most often quoted as: “Act only on the maxim through which you can at the same time will that it be a universal law.”

The categorical imperative most commonly recognized and that has had the most cultural impact, however, is the Formula of the End in Itself. This formula demands that one treat “humanity in your own person or in the person of any other never simply as a

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12 Edel et al., 276-277.


14 Ibid., 177.
means but always at the same time as an end."\textsuperscript{15} Holding that persons are ends and
should never be treated only as means has been the fundamental concept some
philosophers have used for establishing rights-based theories even though Kant clearly
worked from a concern for the rational integrity of persons who would treat other people
in a purely instrumental way.\textsuperscript{16}

\textbf{Utilitarianism}

During the last quarter of the 18\textsuperscript{th} Century, the effects of the industrial revolution
created intense social pressures in England with the doubling of the population, the
steadily increasing urbanization and the disruptions of industrialism. In this environment,
Jeremy Bentham, a radical (not violent) reformer, advanced a complex theory of utility to
be used "as a test for moral action and a practicable standard for social policy, especially
legislation."\textsuperscript{17}

From a basis of egoist hedonism that argued man was governed only by pain and
pleasure and that both determined man's actions, Bentham constructed a theory of
utilitarianism in which an action was moral only if its consequences were more favorable
than unfavorable to everyone -- or provided the greatest happiness to the greatest number
of people. Bentham argued that moral action is not dependent on natural laws or divine
guidance, but rather by abstract moral principles. He also argued that social reform

\textsuperscript{15} Ibid., 178.

\textsuperscript{16} Waldron, 12-13.

\textsuperscript{17} Edel et al., 299.
should be based on human knowledge of the motivation of institutions, and on objective, quantifiable ways of calculating the pain-and-pleasure consequences of actions.\textsuperscript{18}

Since Bentham’s day, several forms of utilitarianism have emerged addressing the theoretical limitations of utilitarianism including rule, preference, ideal and welfare utilitarianism. All of these variations on Bentham’s original theory, however, have one factor in common: they are standards for judging public action based on the “conclusion that the right action is that which maximizes utility (however constructed) summed impersonally across all those affected by that action.”\textsuperscript{19}

Applications to Policy Reform

In looking at these brief descriptions of deontological and utilitarian theories, it is obvious they differ in very fundamental ways. One (deontology) bases morality on principles of duty or obligation without regard for the consequences of the moral act (one must return a borrowed gun to its owner, even if the owner states she is going to shoot someone with it). The other (utilitarianism) focuses strictly on outcome, i.e., actions that maximize the greatest good (torture of an individual may be permissible if the information gathered in interrogation would save a great many lives). The one holds as a categorical imperative that no individual can be used as a means to an end, and the other asserts that the end (the greatest good) is all that counts and anything (or anyone) should be used to achieve the end.

\textsuperscript{18} Ibid., 298-299.

In today's political discourse, the two most often heard arguments mirror the differences between these theories: either we cannot implement social policies that deny the individual rights of persons, or we must implement policies that promote the good of society — even though some individual rights are lost (or trammeled, depending on the point of view). In creating the best public policies, lawmakers must focus their attention on finding ways to accommodate both of these very different types of arguments — a seemingly insurmountable task on the surface, but one that can be accomplished if both sides have common goals. For instance, in divorce reform, some emphasize the individual rights of the spouse(s) desiring a divorce, while others worry about the effects on society of making divorce too easy to obtain. But it is not difficult for people to agree that parents have an obligation or duty to care for their children. From this point of agreement, we can then work toward a change in current policy that will meet that end.
CHAPTER 5

THE RIGHT TO DIVORCE

As an introduction to his book, *Rethinking Rights and Responsibilities*, Arthur J. Dyck quotes G.E.M. Anscombe as noting that English philosophers have helped construct "systems according to which the man who says 'We need such-and-such, and will only get it this way' may be a virtuous character."¹ Anscombe complains that this includes accepting as moral many circumstances that can only be called strictly unjust — that equate to "the judicial condemnation of the innocent."² It is not difficult to perceive the current status of our divorce laws in exactly the same manner: the individual's right to pursue of happiness (divorce) through unilateral divorce systems has impacted unjustly on the quality of life of children and women in our nation.

A hue and cry is rising to fix our divorce system gone awry, but the fix is problematic because it requires a shift from focusing on rights to focusing on responsibilities — from strict individualism to a more organic or community-based focus. The tension between individual rights and community responsibilities in seeking a divorce versus maintaining a


² Ibid, 4.
marriage remains at the core of our inability to devise reforms to no-fault policies. This chapter investigates the impact of individual rights on divorce law.

Constitutional Influence

As we have seen, our cultural traditions have made our society receptive to rights dominated thought and processes -- the appeal to rights is how we have always advanced our interests and causes. In the words of Benjamin R. Barber, "Rights are how we enter our political conversation; they are the chips with which we bargain, collateral in the social contract."  

In today's society, those rights are increasingly (one might even say obsessively) becoming focused on the private individual rather than on the individual as community member or citizen. This gives rise to an environment where a spouse can insist that it is his or her right to unilaterally end a marriage and walk away from dependent children leaving them both emotionally and economically bereft.

Originally, however, the American emphasis on rights had a different purpose than to advance strictly personal interests. While Federalists and Anti-Federalists both saw the Constitution as a means of furthering rights, each camp had its own agenda for the use of a rights-based Constitution. The Federalists wanted a government capable of guaranteeing its citizens' rights; the Anti-Federalists wanted to be sure citizens' rights were protected from the government. Barber links these differing interests to Hobbes and Locke: "In the

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Federalist case, there is a Hobbesian faith in strong contract-based government as a guarantor of rights; in the anti-Federalist case there is a Lockean distrust of strong government that issues in a strong version of rights understood as constraints on government.  

In both cases, however, the individual rights protected by the Constitution were founded in political participation and civic responsibility. It was clearly understood that the rights of citizenry entailed civic responsibilities and duties. Today, this distinction has nearly disappeared, and rights have become something to which one is born. We forget that the rights guaranteed by the Constitution, when entailed with civic duty, laid the cultural and political foundation for the communities in which we live. The sense of individual rights belonging to an actively participating citizen of the community has all but disappeared leaving only a notion of individual rights belonging to each as a person rather than as a citizen. According to Barber, "Rights cease to be a civic identity to be posited and won; they become a natural identity to be discovered, worn, and enjoyed." This attitude has led us to a place where individual rights have ceased to be the rights of citizens involved in a community but have become the personal, private rights of each individual to be left alone — to live as he or she pleases without regard for the community.

This obsession with private rights (to the near exclusion of political discourse on the public good) is evident in many of the outcries against invasion of privacy: opposition to

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4 Ibid., 25.

5 Ibid., 33.

roadside sobriety checks, to the mandated use of seat belts and motorcycle helmets, and to airport security checks, for example. These areas of concern that normally are considered community rights, or at least the responsibility of citizens as members of a community, are given short shrift — they "are not weighed and found wanting; they are ignored. The language of rights simply is not permitted to extend to them."7 This is exactly the case we find in the arena of marriage, divorce, and family law.

In addition, the Declaration of Independence by affirming the right of the pursuit of happiness also encourages our tendency to view divorce as a right. The pursuit of happiness is a Lockean idea. Locke proposed that human beings develop a notion of happiness that goes beyond merely seeking pleasure and avoiding pain, and that we consciously pursue the goal of attaining happiness. According to Locke, the concept of the pursuit of happiness accounts "for the various and contrary ways men take, though all aim at being happy." Because we each seek happiness in our own, individual ways, and because the pursuit of happiness is an inescapable part of being human, Locke believed that any society living within the guidance of nature had to provide freedom or at least tolerance for individual goals of happiness.8

By including this right in the Declaration of Independence, the citizens of the United States have been given a guarantee of freedom to pursue their own happiness each in his or

7 Barber, 34.

her own respective, individual ways. Ronald Hamowy exactly captures the sense of this freedom:

They [citizens] may act as they choose in their search for ease, comfort, felicity, and grace, either by owning property or not, by accumulating wealth or distributing it, by opting for material success or asceticism, in a word, by determining the path of their own earthly and heavenly salvation as they alone see fit.9

Locke, however, clearly understood the pitfall in our pursuit of happiness — in fact, he understood that pursuit as personal and individual from the outset. In An Essay Concerning Human Understanding, Locke wrote he was "forced to conclude that good, the greater good, though apprehended and acknowledged to be so, does not determine the will, until our desire, raised proportionately to it, makes us uneasy in the want of it."10 (Italics are Locke's.) In other words, Locke concluded that the greater good only truly becomes our concern when it intersects with our own personal "desires"— in which case we will become "uneasy" and may then assert our "will" in the form of action to pursue our own happiness.

For the framers of the Constitution and the Declaration of Independence, however, rights in general, and the right to pursue happiness in particular, were not disconnected from the duty we owe the community, the responsibility to act without causing harm to others. Our problem, as Barber succinctly wrote, is that "the powerful alliance between rights and political emancipation, between the claim to be a person and the right to be a citizen, has come unstuck." Our conception of rights in the private individual sense has overshadowed

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the underlying truth that rights belong to citizens and come entailed with community duties and responsibilities. Our arrival at this place of disconnected rights and responsibilities may partially account for the ease with which four hundred years of fault-based divorce law was supplanted with the no-fault policies of the 1970s.

Rights Talk

Contrary to some beliefs, this disconnect between individual rights and community responsibilities is not new — it is not a product of the 1960s or 1980s. In fact, its symptoms go back at least to the 19th century. For instance, in 1890 two lawyers, Samuel D. Warren and Louis D. Brandeis, co-authored an article for the Harvard Law Review titled "The Right to Privacy." In this article, Warren and Brandeis stated:

That the individual shall have full protection in person and in property is a principle as old as the common law; but it has been found necessary from time to time to define anew the exact nature and extent of such protection. . . . Gradually the scope of these legal rights [to life, liberty, and property] broadened; and now the right to life has come to mean the right to enjoy life — the right to be let alone.12

Nonetheless, while the tendency to appropriate rights as private, individual rights is an old theme in the American political landscape, the problem of rights talk that restricts and diminishes the effectiveness of political discourse is new.

In her book, Rights Talk: The Impoverishment of Political Discourse, Mary Ann Glendon argues that this new version of rights talk has become increasingly dominant over

11 Barber, 33.

the past thirty years. Glendon contends that our current rights talk is different from that of previous American eras (and that of other liberal democracies as well) in its "starkness and simplicity, its prodigality in bestowing the rights label, its legalistic character, its exaggerated absoluteness, its hyperindividualism, its insularity, and its silence with respect to personal, civic, and collective responsibilities." While this abbreviated form of discourse may fit our media-influenced culture of political sound-bites, it does not lend itself to political discourse that opens avenues of compromise and provides for the mutual understanding that is necessary for settling issues on common ground.

The issues of marriage and divorce have not been exempt from the malaise of rights talk that diminishes responsibility and focuses on individual rights. To understand the effects of the individual right to divorce (in the pursuit of happiness), it is necessary to understand something of family law in the United States. When children are involved, the issues of divorce are inextricably tangled in our ways of defining family, the importance we put on family as a culture, and in family law. In fact, the most serious contention in the political discourse over divorce is the consequences of divorce to women and children — the family created in a marriage.

Until the 1960s it was more or less universally accepted in the United States that "family" meant a husband-father responsible for providing financially for his family, a wife-mother who was homemaker and primary care-giver, and their children. The law emphasized family solidarity — one could not usually bring suit against members of one's

13 Glendon, x.
immediate family (husband, wife, children) for example, and constitutional law supported this view until the late 1960s early 1970s.

Glendon uses the example of two Supreme Court cases to illustrate the quick shift in the Court's view of the family. In describing a marriage in a 1965 birth control case involving a married couple's right to privacy, the Court stated: "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." 14 Compare this language to the language of a subsequent 1972 birth control case involving an unmarried woman's right to privacy, and it is easy to see the shift from family unit to the focus on individuals disconnected from each other. The 1970 case cited that "the married couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up."15

Aside from the language of the courts, Glendon postulates that our individual rights-laden talk prevents us from expressing and understanding competing interests and goals. Glendon reminds us that thinking and speaking of divorce in terms of rights makes it difficult to "take account of the obvious fact that the public has a much greater interest in the conditions under which children are being raised than in the ways that adults generally choose to arrange their lives."16 This lack of social focus is obvious in the fact that the


16 Ibid., 125.
United States does not have a coherent national family policy, and that we are only slowly moving toward policy that makes a distinction between childless marriages and marriages with children.

The Major Political Parties and Family Issues

None of this is to say that families or family issues are forgotten or unattended by three of our largest political parties, the Republicans, the Democrats and the Libertarians. To the contrary all of them include statements and proposals regarding families and governments' proper role in family issues. The underlying problem, however, remains in the degree of importance each places on the role of individual rights.

The Libertarian Party, as can be expected, places the utmost importance on individual rights. In fact, their Statement of Principle (which serves as a preamble to the party platform) states:

We the members of the Libertarian Party, challenge the cult of the omnipotent state and defend the rights of the individual. We hold that all individuals have the right to exercise sole dominion over their own lives, and have the right to live in whatever manner they choose, so long as they do not forcibly interfere with the equal right of others to live in whatever manner they choose.17

Consistent with this opening statement, the Libertarians oppose government regulation of the lives of individual and interference with private property. Further, the platform states that Libertarians "oppose all interference by government in the areas and contractual relations among individuals."18


18 Ibid.
Of families specifically, the Libertarian Platform states, "We support protection of the integrity of families and households as contractual institutions against government intrusion and interference."19 Although the platform does not mention the issues of divorce, it is obvious that the Libertarians call most strongly for the rights of individuals and would support the right of consenting parties to divorce without further involvement from the government on the issues of division of assets, child custody or support. In fact, the Libertarian platform indirectly addresses this issue by stating that individuals should be free to make their own choices and then be free to be responsible for them; that governmental intervention through laws that deny individuals the opportunity to exercise their decisions (e.g., to divorce) actually encourages irresponsibility.

The Republican and Democrat platforms both address the issue of families in terms of strong families creating the foundation for improving social problems and improving the quality of life for everyone. Both platforms address remedies for many of the economic issues that make family living difficult, such as tax breaks for working parents, adequate health care availability and education opportunities. The major difference for the two parties is the means of achieving these ends.

The Republicans work for minimal government intervention, stressing that our religious, community and private groups of all kind are the best sources for "tackling the social ills that government programs have only worsened."20 In this regard, the Republicans

19 Ibid.

agree with the Libertarians that people will learn to be most responsible for their actions through other than governmental means.

The Democrats, however, choose alternatives that require more government involvement. Their platform specifically addresses the need for laws that allow parents to take time off without pay or work flex-time to attend school functions, parent-teacher conferences or take a child to the doctor. More specifically to the issue of divorce, however, the 1996 Democratic Platform included a section on child support calling for a crackdown on deadbeat parents, stating, “If you neglect your responsibility to your children, we will suspend your license, garnish your wages, track you down, and make you pay.”

The Communitarian Perspective

While not a political party, the communitarian movement should be noted here as having the most specific platform that deals with the issues of divorce. As noted in Chapter One, the communitarian movement is a leading group in the call for divorce reform. The movement is a nonsectarian, nonpartisan coalition of individuals and organizations whose purpose is “to shore up the moral, social, and political environment.” The communitarians believe that strong individual liberties presume strong responsibilities, and that the best way to achieve strong individual liberties depends on bolstering families,

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21 1996 Democratic Party Platform, Democratic Party web site (online); accessed on 6 April 2000; available from http://www.democrats.org/hq/resources/platform/index.html; Internet.

schools and neighborhoods as the foundations of civil society. The movement has a centrist philosophy focused on "finding effective ways to restore social and moral consensus without a small group of people imposing a set of behaviors and values on all of us."23

In the Responsive Communitarian Platform, a seminal document of the communitarian movement, a communitarian perspective is defined as recognizing both individual human dignity and the social dimensions of human existence, and the connection between strong individual liberties and the active maintenance of the institutions of society.

In order to bring the regard for individual rights into a better relationship with a sense of personal and civic responsibilities, the communitarians emphasize starting with the family. To accomplish this, the communitarians focus on the premise that bringing children into the world entails a moral responsibility to provide not only material necessities, but also moral education, which requires that the parents be present in the lives of their children.

The platform recommends specific changes to facilitate this, including workplaces with flexible opportunities for parents to attend to their roles as parents, a realignment of our attitudes toward child-rearing, recognition that children are best served by a two-parent family, and changes in divorce laws that would modify, but not prevent, divorce.

Additionally, many of the voices heard in the debate over divorce are communitarian. Amitai Etzioni, Mary Ann Glendon, and William A. Galston, as well as The Council on Families in America, are representative of this group.

23 Ibid.
The Case For Reform

The view in constitutional law of marital partners as separate individuals is most evident in no-fault divorce law that recognizes little or no connection between partners of a marriage beyond an easily broken legal contract to live together as husband and wife. As we have seen, no-fault laws allow either party to unilaterally seek divorce for no better reason than incompatibility — which translates into the pursuit of happiness for at least one-half of the partners in the marriage contract. Consequently, the change from fault to no-fault divorce laws had the effect of de-emphasizing the "right" to remain married and emphasizing the "right" to divorce.24

Perhaps even worse, the no-fault divorce laws emphasize the individual right to divorce. This right is singularly devoid of responsibility to the other marital partner or the children of the marriage, neither in regard to the other partner's wishes for continuing or saving the marriage, nor in terms of continued duty or obligation to one's children once the marriage is dissolved.

The right to unilaterally decide to divorce exactly reflects what Sandel calls the notion of the "unencumbered self, independent of roles and unbound by moral ties one chooses to reject."25 In other words, we have become disconnected from our roles and the associated responsibilities of being parents and spouses: unencumbered by the obligations or duties of a father or mother, for instance, one can simply walk away from a marriage and a family without feeling further responsibility.


25 Ibid., 112.
Unilateral, no-fault divorce possibly epitomizes the results of exercising individual rights with no concomitant acceptance of responsibilities. As Sandel points out, no-fault divorce law fails to respect traditional roles and penalizes mothers and homemakers who have lived their married lives as "situated selves" — people whose identities were constituted by their roles. These are the women who have depended on their husbands for economic support and in return cared for children and home so that their husbands could pursue their careers. In practice, this means that women and children frequently experience a significant decrease in their standard of living.

As the evidence of the fallout of divorce mounts, more and more voices are calling for divorce reform — in particular for cases of divorce involving children. From the Democrats, First Lady Hillary Clinton recently wrote in her syndicated newspaper column, "I think getting a divorce should be much harder when children are involved. . . . Divorce has become too easy because of our permissive laws and attitudes." In a *New York Times* editorial published in December of 1995, Communitarian William A. Galston wrote, "For couples with dependent children, we should eliminate unilateral no-fault [divorce] . . . and return to an updated fault-based system, with the alternative of a five-year waiting period." And in the last three years, eighteen states including Georgia, Idaho, Illinois, Iowa,
Michigan, Minnesota, Pennsylvania, Virginia and Washington have introduced proposals to reform their respective state laws.\textsuperscript{29}

It becomes clear that there is a tremendous interest in reforming the no-fault divorce policies – and there is a common ground among these groups that recognizes that healthy families create environments for people to reach their full potential whereas the division of families increases the likelihood of delinquency and crime. These are the factors, after all, that have a tremendous impact on the success or failure of our economic and political survival as a nation.\textsuperscript{30} It is likewise evident that the real challenge is constructing a policy reform that will be accepted in the current culture of individual rights while still retaining the facility to protect the victims of divorce (children, women and to some degree, the partners who truly wish to save their marriages).

The Responsibilities Of Divorce

It is tremendously important in this discussion to always bear in mind the distinction between marriages with children and marriages without children. Margaret Mead most eloquently stated:

We badly need to recognize a new form of marriage -- a marriage between childless partners with no commitment to continuity. Such marriages should be easier to contract, should involve no automatic economic relationships, and should be capable of dissolution by mutual consent, without undue delay, cost or supervision from the constituted organs of society. On the other hand, marriages which are parental should be placed in a different category, and have

\textsuperscript{29} Kim A. Lawton, ""No Fault' Divorce Under Assault, Christianity Today, April 8, 1996, vol. 40 n4, 85.

In keeping with this, it might be helpful to create two separate, distinct divorce laws: one for childless marriages, and one for "parental marriages."

**Divorce in Non-parental Marriages**

With the exception of the unilateral right to divorce, the current no-fault divorce laws are basically consistent with Mead's recommendation for childless marriages: they are dissolvable without undue delay, cost or supervision from the courts or government. The issue then for these marriages is mutual consent. Several possibilities for cases lacking consent come to mind: provisions could be allowed that force the suing partner to maintain the non-consenting partner's standard of living for a specified time; marriage counseling could be imposed by the courts; or unilateral petitions could be denied except in the case of abuse, adultery or other egregious forms of behavior (basically a return to the old fault system). While all three of these options would require a longer delay, more cost and more supervision from the courts, they still offer recourse to the non-consenting spouse who, after all, has rights, too.

Of these options, however, the provision for maintaining a non-consenting spouse's standard of living has the most appeal for several reasons. Spouses who know that a unilateral divorce will cost them (attorney's fees and court costs in addition to monies or property awarded to the non-consenting spouse) should be more likely to work harder with

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31 As quoted by Wheeler, 172.
the non-consenting spouse to arrive at a mutually acceptable divorce agreement (outside the court's jurisdiction) or reconcile the differences in the marriage on their own.

This option also creates a cushion for the non-working spouse, who though childless, may not have worked outside the home during the marriage and finds him- or herself unprepared to re-enter the workforce. In an article in Dissent (Summer 1991), Susan Moller Okin argues that this option is a means of diminishing the disparity between men's and women's financial situation after divorce — and in that regard, this option works well for divorces in parental marriages also. Okin also suggests that the lost economic potential of a marriage should be considered: "Change must begin with the recognition that future earning power is the principal asset of most marriages."32 (Italics are Okin's.) She recommends that the arrangement after divorce should "aim to equalize the standards of living of both post-divorce households," and that the amount awarded and the length of time the support would continue should depend on both the length as well as the practices of the marriage (i.e., did both partners work outside the home, and if so, what was the difference in their paychecks, opportunities for advancement, benefits packages, etc.).33

The problems with this option, however, are easily recognized: it increases the likelihood of litigation (as opposed to simply filing a petition for divorce); it would increase the workload of an already overburdened family court; and its fair and equitable administration and enforcement would require new ways of thinking. Of all these obstacles, administration and enforcement might be the hardest to overcome. For instance, as we see


33 Ibid., 386.
currently with child support, collecting court-ordered payments can be difficult. Obviously the most efficient way to enforce a financial ruling of this sort is to garnish wages — and that brings us to a whole different issue of individual rights!

In the end, however, this type of approach seems fair to all parties because it addresses the rights of both spouses and requires actions based on the recognition of attendant responsibilities. Each spouse may have the right to divorce, but that right does not include neglecting to meet obligations one accepted on entering the marriage.

Divorce in Marriages with Children.

The most serious concern in the current discourse on divorce, of course, is the well-being of the children of divorce, which as we have seen, is also the most common argument for no-fault divorce reform. This common thread could be the key factor to developing a new divorce policy — that all-elusive common ground. Even arguments that downplay the need for divorce reform acknowledge that life is more difficult both emotionally and economically for the children of divorce — here the differences are only in the degree and the longevity of these ill effects.

The real difficulty in fashioning divorce reform policy lies in the substantially differing approaches to how the reform should proceed. This is due in large part to the underlying belief systems about marriage, divorce, individual rights and community responsibility that ultimately affect the ways people approach the issue. Basically, there are two camps in this discussion; both seek to ameliorate as much as possible the economic and emotional damages caused by divorce but one does so by focusing on saving the marriage, the other by focusing on just and fair treatment in the event of divorce.
For instance, the Council on Families in America (working from a communitarian, pro-marriage perspective) recommends such changes as:

♦ Reform no-fault divorce laws to emphasize the importance of marriage especially where children are involved; give support of the law to the partner trying to save the marriage.

♦ Formulate vision statements that establish goals to strengthen marriage and denounce out-of-wedlock childbirths.

♦ Change the tax code to favor marriages, e.g., by eliminating the marriage penalty, increasing the personal exemption, and creating a $1,000 per child refundable tax credit.

♦ Provide funds (credits or vouchers) for parents who leave school or the workplace for an extended period of time to care for young children.

♦ Replace the welfare system with approaches that discourage unwed motherhood and that empower families, e.g., mandatory identification of fathers before benefits can be used, programs that encourage unwed teenage mothers to place their children up for adoption, favor marriages-with-children in the allocation of subsidized housing, and create a poverty tax credit whereby taxpayers could directly allocate a portion of their taxes to nonprofit organizations that work to reduce child poverty and strengthen families.

♦ Reassess state and federal child support enforcement programs and foster more marriage and more fatherhood.

♦ Provide an annual measurement of the nation's marital health using the following statistics: percent of adults married, percent of first intact marriages, numbered of births to married parents, percent of children living
with their natural parents, and percent of children living with two married parents.\textsuperscript{34}

All of these recommendations focus on strengthening marriages and promoting a culture where marriage is a valued institution. Additionally, these recommendations play best to those who are moved by virtue, civic responsibility, a sense of community and (without referring to it) religious duty.

The other side of the reform recommendations comes from those who are less impelled to see marriage as a sacred institution to be saved at all or nearly all costs — instead they are seeking justice and equity in the event of divorce. This camp sees divorce as an inevitable corollary to many marriages but not necessarily as something that needs to be devastating to the women and children involved. Recommendations from this side include:

◆ Distributing wealth and property equitably rather than equally; for example, a wife and two children equal three-fourths of the family and should receive three quarters of the family property and wealth.

◆ Financial distributions that recognize the future earnings of the primary bread winner including considerations such as benefits and professional status.

Looking at these differing views of the problem only reinforces the need to carefully analyze the motivations and expectations that accompany any proposed divorce reform. To successfully appeal to both camps (and any others in between), divorce reform must strike a balance between individual rights (with its focus on the procedure of divorce) and community responsibility (with its focus on encouraging marriages).

Conclusion

In her book, *The Way We Never Were: American Families and the Nostalgia Trap*, Stephanie Coontz reminds us that children, while certainly their parents' responsibility, are also the responsibility of the community at large. To make her point, Coontz relates the story of a Jesuit missionary from France and his encounter with the Montagnais-Naskapi Indians in 16th century North America. The Jesuit was appalled by the Montagnais-Naskapi traditions of child-rearing and egalitarian relations between husbands and wives, in particular the lax sexual code tolerated amongst the women. After many failed attempts to persuade the Naskapi men to impose stricter monogamy on their wives, the Jesuit finally came to what he believed was an incontestable reason for his side. When the Jesuit explained to a Naskapi man that if his wife had sexual relations with others, he would never

know for sure if the children she bore were really his, the Naskapi man answered: "Thou hast no sense. . . . You French people love only your own children; but we love all the children of our tribe."\textsuperscript{36}

While divorce reform gets bogged down in individual rights versus community responsibility arguments, political priorities, and special interest group struggles, we seem to be losing sight of what amounts to the common ground for all factions: the welfare of our nation's children. Our individual right to bear children brings a responsibility to care for them; our right to live in an orderly society bears the responsibility of providing for our children so that society may continue. In the end, the individual right to divorce must not be allowed to trump all other family and community rights.

\textsuperscript{36} Coontz, 231.
CHAPTER 6

TOWARD DIVORCE REFORM

While few will argue that a high divorce rate is good for the nation, there are many, very diverse arguments for why a high divorce rate is not good. Many of these arguments center around the importance of intact families in our culture. As evidence of this widely held belief, consider that the Carter administration was elected in part on a campaign that promised a political focus on family issues; that during the Reagan and Bush administrations, there were pushes from the religious right to reestablish family values that emphasized the importance of the traditional family; and that President Clinton also used pro-family language as part of his election campaign. In short, across time and politics, Americans believe in the value of families to society, and much of the debate over divorce is embedded in this larger issue of family values.¹

Since 1996, and within the context of concern for “family values,” eighteen states including Georgia, Idaho, Illinois, Iowa, Michigan, Minnesota, Pennsylvania, Virginia

¹ This focus on family in politics has also led to many efforts to define family: do we mean the traditional family, the extended family, a family including close friends? Can people with alternative lifestyles be successful as parents and constitute a family? This issue, however, is beyond the scope of this paper, which focuses only on the effects of divorce on the traditional, mother-father-and-children unit.
and Washington have introduced proposals to reform their respective state divorce laws. The Michigan initiative was introduced on Valentine's Day 1997 by State Representative Jessie Dalman. Dalman proposes to return to a fault-based system in which there is no unilateral divorce except in instances where cause can be proven, specifically adultery, physical abuse, desertion, substance abuse or imprisonment. The proposal, supported by the Michigan Family Forum, would require divorcing parents to receive counseling on the effects of divorce on children and to submit a post-divorce parenting plan. Dalman also proposes incentives for premarital counseling including a break on the fee paid for the marriage license and a reduced waiting period after applying for a license. Over thirty states have requested copies of the Michigan bill.

Although no significant reform has been passed to date, the 1990s was obviously the decade of no-fault divorce reform at the state level. At the broadest level, the argument against easy, no-fault divorce ultimately has taken one of two tacks -- either it is not good for society because it contributes to the worst of a community's ills (increased crime, lower education statistics, higher drug addiction, etc.), or it is not good for the economy (often for the same reasons). In either case, maintaining traditional family relationships (i.e., protecting children from the effects of divorce) has been seen as the key to alleviating these social problems.

Although the ramifications of divorce for children are clear, the solution for policy makers has proven problematic, primarily because American culture, steeped in individual rights and focused on the pursuit of happiness, does not support a return to

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2 Lawton, 85.
fault-based divorce laws that make divorce more difficult to obtain. Before analyzing the reasons for our failure to implement divorce law reform in the 1990s, however, we need to understand the underlying arguments put forth by each group seeking reform so that future policy efforts can draw on overlapping values to fashion divorce reform that will be more acceptable to the American public.

The Issues and the Players

The overriding issue for most proponents of divorce reform in the 1990s is a growing concern over the erosion of family values. Defining the term "family values," however, is problematic because it means different things in different contexts to different groups. The Council on Families offers the following definition when referring to family values:

The loving two-married-parent family is the best environment for children -- the place where children gain the identity, discipline, and moral education that are essential for their full individual development. And, as the institution which most effectively teaches the civic virtues of honesty, loyalty, trust, self-sacrifice, personal responsibility, and respect for others, the family is an irreplaceable foundation for long-term social efficacy and responsibility.³

This description is consistent with the communitarian call for "restoring the moral voice" starting with the family and insisting that "bringing children into the world entails a moral responsibility to provide, not only material necessities, but also moral education and character formation."⁴ Furthering this idea, the communitarian platform states that

³ The Council on Families in America, 294.

⁴ 1991 Responsive Communitarian Platform (online).
two-parent families are better able to discharge their child-raising duties, that divorce is not in the best interest of children, and that "divorce laws should be modified, not to prevent divorce, but to signal society's concern."5

Allan Carlson, president of the Rockford Institute in Illinois and director of its Center on the Family, concurs in even stronger language. In his 1995 article "The Family: Where Do We Go from Here?" Carlson states that "we need to raise the political visibility and muscle of the family cause, relative to the demands of the corporate economy, the state, and the new world order."6 While Carlson supports the repeal of no-fault divorce laws, he is also concerned with over-regulation of pro-family issues: "In the United States, the greatest threat to democratic rule is the federal court system, which over the last half-century has struck down hundreds of democratically created pro-family measures"7 (emphasis is Carlson's).

The Christian communities have also been active in calling for divorce reform based primarily on family issues. In 1991, the bishops of the Catholic Church published "Putting Children and Families First," a report that urged Catholics to reconsider "the consequences of permissive divorce" and called for modifications in divorce laws to "recognize the frequently devastating consequences of divorce on children."8 In line with

5 Ibid., 8.


7 Ibid., 64.

8 Lawton, 86.
this, Protestant leaders are beginning to call for policies that will save marriages. Mary Stewart Van Leeuwen, a professor of gender studies at Eastern College, recommends that churches develop a "just divorce theory" similar to the criteria theologians have developed on war. Van Leeuwen adds that the "default option [in a divorce] should obviously be toward the maintenance of marriage."9

The issue for feminists, however, is framed differently. Rather than addressing a concern over family values, feminists have rallied behind the issue of equality of treatment in the law which has led women and children into economic catastrophe. Martha Fineman argues that by focusing on the issue of equal treatment before the law, reforms of fault-based divorce and family law "have actually reinforced men's control within the family before and after divorce."10

Additionally, recent statistics that indicate that single-parent families headed by women are the "new poor" are part of the argument Fineman uses to advance her call for "result-equality" laws that place individuals in essentially equal positions. Such rules would take into account the different positions of men and women in our society and would attempt to achieve parity in the economic positions of the individuals as a result of the divorce.11 Fineman recognizes, however, that reforming current divorce and family laws to ensure that both parties leave the marriage on more or less equal footing may

9 Ibid.


11 Ibid., 39.
appear unequal, will demand more justification, and will require a shift in the use of one of the traditional weapons of feminism, i.e., insistence on "equality."12

Competing Positions

While we might find a majority of Americans who agree no-fault divorce reform is needed to address the economic inequities experienced by minor children, it would be difficult, indeed, to find a consensus among these many competing positions in the United States today on what form the change in policy should take. For example, should we return to fault-based divorces, should we modify the current divorce policy, should we leave no fault divorce basically intact and concentrate on strengthening the rules applied to children in divorce, or should there be new rules applied to marriages once a couple comes before the court seeking divorce? Not surprisingly, each of these options has its advocates.

Return to Fault-Based Policies

Although the Christian community has put forth few organized, politically active calls for divorce reform, the Catholic Church, for instance, would welcome and probably actively support a return to fault-based divorce (this would secularize and enforce the Catholic Church's ecclesiastical position). The lack of political participation, so far, may partly be attributed to our constitutional separation of church and state, and also to the fact that legal divorce is an entirely secular affair occurring without consideration of religion. The Catholic Church deals with this secular, legal issue by refusing to recognize

12 Ibid., 190.
the validity of civil divorce in the lives of its parishioners. Because divorce is an unacceptable answer to a troubled marriage, legal divorce is not recognized as valid in the Catholic Church, and Catholic members cannot remarry in the eyes of the church without an annulment or dispensation from the church.

One might assume from this that American Catholics probably divorce in fewer numbers than Americans of other Christian denominations, but studies show that this is not true. For example, Robert D. Shull and Joseph Lee Rodgers reported in a 1995 study that religiosity was not a significant factor in curtailing the divorce rate.

Most surprising here was the finding that the hypothesized negative relationship between Catholicism and the post-no-fault divorce rate was not supported. . . . Thus, the religiosity finding in this study may suggest that belief in the sanctity of marriage and adherence to religious precepts, though perhaps once strong enough to prevent the dissolution of marriages, have weakened.13

Protestant denominations also deplore divorce, but do not have the same strictures as the Catholic Church. According to Kim A. Lawton, writing for Christianity Today, part of the reason Protestant leaders have not been more active in calling for no-fault reform may be due to the fact that many Protestant ministers have experienced divorce themselves. In fact, a 1995 study by Hartford Seminary shows that one-fourth of female and one-fifth of male clergy have been divorced.14 In terms of setting or recommending divorce policy, then, the clergy end-up in the same place as the lawyers who write the


14 Lawton, 86.
legislation: saying people should not divorce is difficult if you are divorced yourself. Or as David Ferguson, executive director of the Center for Marriage and Family Intimacy in Austin, Texas is quoted as eloquently saying: "You're not going to prioritize or emphasize ministry within your church any more than that truth is real in your own home."\textsuperscript{15}

Others, such as Tom McMillen, Executive Director of the Rocky Mountain Family Council, strongly urge a return to fault-based divorce arguing that fault-based divorce protects children and abused wives, strengthens families, helps prevent dads from feeling like they have no say in child support awards, and ultimately seeks justice: "Isn't it time we started talking about justice and roll back the failed social experiment known as no-fault divorce?"\textsuperscript{16}

Finally, a surprising call for a return to fault-based divorce comes from the economic quarter. In his article "The Economic Analysis of the Effect of No-Fault Divorce Law on the Divorce Rate," Martin Zelder makes the persuasive case that easy, no-fault divorces have a negative economic effect by allowing people to divorce who would otherwise stay married under fault-based laws. Using a model based on assumptions of rational, utility-maximizing behavior, Zelder concludes that couples with a greater fraction of spending on children (i.e., a higher investment in non-transferable

\textsuperscript{15} David Ferguson as quoted by Kim A. Lawton, "No Fault' Divorce Under Assault," \textit{Christianity Today}, April 8, 1996: 86.

goods, namely their children) were less likely to divorce under fault-based laws. Zelder concludes that no-fault divorce creates an economic inefficiency (too many divorces), and we should return to fault-based laws which allow the "right" number of divorces to occur. Interestingly, he uses the commentaries of Weitzman, Glendon, Fineman and Jacob to support the validity of his conclusions.17

Modifying No-Fault Divorce

The communitarians (Etzioni, Glendon, Galston, Elshtain et al.) recommend modifying current no-fault law. The communitarians actually recommend changes on three levels: modifying the divorce laws, improving child welfare laws and providing some types of relief that would enable more people to stay married.18

Preeminent communitarian William A. Galston suggests a policy of divorce reform that would institute a two-tier system of divorce: one set of rules for couples who do not have dependent children and another set of rules for those who do. For couples without children, Galston sees no problem with the no-fault divorce laws the way they stand today. For couples with dependent children, however, he recommends eliminating unilateral no-fault divorces with a return to "an updated fault system" with an alternative of a five-year waiting period for a divorce to become final. And even for couples with dependent children who mutually consent to divorce, Galston recommends policy


changes requiring a mandatory waiting period of at least one year that would allow the
couple time for "reflection, counsel and mediation."\(^{19}\)

In addition, Galston supports the "children first" principle recommended by Mary
Ann Glendon, another preeminent communitarian. This principle, according to Glendon
should govern the allocation and distribution of property in divorce law:

\[\text{[T]he judge's main task would be to piece together, from property and}\]
\[\text{income and in-kind personal care, the best possible package to meet the}\]
\[\text{needs of children and their physical custodian. Until the welfare of the}\]
\[\text{children had been adequately secured in this way, there would be no}\]
\[\text{question of, or debate about, "marital property." All property, no matter}\]
\[\text{how or when acquired, would be subject to the duty to provide for the}\]
\[\text{children.}\] \(^{20}\)

Another communitarian supporter, Mary Ann Mason, adds that the "children first"
principle should extend to custody decision-making: she recommends a return to the
legal presumption that mothers are the best custodians for young children. Mason bases
her recommendation on two premises: 1) the high incidence of custody litigation in an
environment where family law offers little if any guidance on securing the "best interests"
of the child; and 2) the belief that women are biologically and emotionally better suited to
providing "mothering" for children. Mason contends that the current "primary caretaker"
presumption forces both parents to vie for custodial rights in court, increases the
likelihood of litigation, and creates the possibility of spousal blackmail where the threat

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of litigation can be used to intimidate the mother into accepting less than reasonable property or child support allocations. Mason argues that under a "maternal presumption," the father would be less likely to litigate because he would have to provide a preponderance of evidence that he in fact provides the "mothering" role in the parent-child relationship.\textsuperscript{21}

Some of the specific reforms to the children's welfare and tax laws the communitarians recommend include creating a more enforceable and straightforward child support system;\textsuperscript{22} disallowing settlements between parents until adequate provisions have been made for their minor children;\textsuperscript{23} tax code changes that favor married families; and credit vouchers for parents who leave school or the workplace for an extended period of time to care for young children.\textsuperscript{24}

The communitarian premise that no parent can divorce a child can be seen as an extension of Mead's comment on a lifelong relationship between two people who have

\textsuperscript{21} Mary Ann Mason, "The De-Regulation of Family Law: In Whose Best Interests?" The Responsive Community, Spring 1993, 48-51.


\textsuperscript{23} Elshtain et al., 31.

\textsuperscript{24} Council on Families in America, 313-314.
children: having children creates an irrevocable bond, like it or not, good or bad, between the parents.  

Call It "No Fault," But Change the Rules

Feminists also want changes in no-fault divorce laws -- or perhaps more appropriately to the portion of the divorce laws that concern the distribution of property and child support and alimony payments. However, feminists are more cautious about recommending radical changes to the unilateral aspect of no-fault divorce. Some of the concern about changing the "easy" divorce laws involves issues of control and spouse and child abuse. Some women’s groups in Michigan have argued that "Dalman’s bills could trap wives into dangerous situations" because the bills require proof of the abuse. However, there is consensus among most women’s groups that the law needs to change at least regarding its economic effects on women and children.

Surprisingly, although feminists have recognized the need for change in this area since Lenore Weitzman completed her study on the effects of divorce on women and children in 1985, women’s organizations seem to have put little political effort into

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25 It is unclear what Mead meant by "will end only with death." She could have meant that in fact the marriage itself should not be allowed to end. In the context of relationships (the law and marriage contracts notwithstanding), one can also assume she meant that the commitment to the children of a marriage brings with it a change in the relationship of the father and mother -- a change that they would not have experienced without the birth of the children; a change that cannot be undone in their lifetimes.

26 Lawton, 85-86. For a more in-depth analysis of the pros and cons of this issue, see "End No-Fault Divorce?" First Things: A Monthly Journal of Religion and Public Life, August/September 1997: 24-30, for an informative debate of the pros and cons of this position.
divorce reform. In 1987, Kay Herma Hill concluded her appraisal of no-fault divorce in the state of California by stating:

As Weitzman has shown in such dramatic detail, women and children have borne the brunt of the transition that took place in California’s legal regulation of the family between 1970 and 1987. Further changes are required to prevent such unfortunate and unnecessary results, but a return to the family law of 1970 is not one of them.27

This underlying caution is still evident among feminists today. According to Martha Fineman this reluctance to change the no-fault laws is an outgrowth of the way feminists have traditionally framed their arguments in order to obtain political support. Fineman observes that feminists have historically used two images to gain access to social institutions: the image of women as victims and the image of equal treatment. In the original reform for divorce these two images worked powerfully together to help advance feminist issues, but unfortunately, the exaggeration of the images had unfortunate consequences.28 Under the guise of neutral fairness, “equality” in property distribution and child custody has acquired legitimacy in the process of the law, but as we have already seen, the consequences of these gender-neutral laws are not equally borne.29

Feminists, then, are fully aware of the problems created by the fault-based divorce reforms, but seem unable to break out of traditional patterns of obtaining political access, i.e., the use of gender-neutral equality as an argument for change.


28 Fineman, 189.

29 Ibid., 174.
In a break with this pattern, Fineman suggests adopting “results-equality” rather than the gender-neutral “rules-equality.” She argues that “to achieve equality of result” in a divorce, it may be necessary to treat spouses dissimilarly when distributing the marital property, including allocation of post-divorce income to ensure adequate care of children. In this regard, she recommends policy changes similar to the communitarians and groups such as the Council on Families in America. Specifically, she recommends adoption of Victor Fuchs’ three general principles:

1. Child-centered policies are preferable to labor market interventions.

2. The child-centered benefits should be widely available — not conditioned on marital status, employment status, or income.

3. The cost of the programs should be borne by the entire society through broad-based progressive taxes, not distributed through arbitrary methods with euphemistic names like “employer provided” day care.

Finally, one of the original voices calling for reform based on the needs of children, Weitzman also recommends changes that include stronger child support rules; alimony for long-married, older housewives with little or no work experience; awards of a greater share of property to the primary caretaker (usually the mother); consideration for full support of mothers of younger children in the early years of the divorce; special considerations for the sale of the family home; recognition that career assets (e.g., enhanced earning capacity, medical insurance, retirement pensions, etc.) are marital assets that should be considered in the division of property; and stronger social and

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30 Ibid., 176.

31 Victor Fuchs, Women’s Quest for Economic Equality (1988), 145-146 as quoted in Fineman, 177.
economic supports for custodial parents. In short, the feminist point of view could be summed up as "leave unilateral, no-fault divorce in place but create an important caveat: a spouse can leave a marriage without cause, but not the responsibilities incurred by the marriage."

Conclusion

Research clearly reveals a need for reform of our no-fault divorce laws — arguments against no-fault reform notwithstanding, no one can successfully argue that the status of children in divorced homes has not significantly changed due to the changes in alimony and child support that the no-fault law brings with it. It is evident, therefore, that reform is necessary and that it should rightfully focus on protecting the interests of minor children who, under the current system, suffer not only economic setbacks, but also psychological ones as they cope with the loss of home, friends, stability and their sense of family.

Communitarian themes strongly identify with the welfare of children and promote the belief that the rules involving the treatment of children in divorce cases should change. In the instance of divorce policy, the communitarians advocate reform that puts children first:

There is a need for changes in divorce laws to favor children and slow the rush to divorce ... For divorces where children are involved there should be a new set of rules based on the principle of 'children first.' ... A parent

should be able to divorce a spouse if a marriage has irretrievably broken down, but a parent should never be allowed to divorce a child.33

To protect the rights of children, communitarians advocate laws that would systematically increase child support and effectively enforce its collection, thus invoking the power of the government on behalf of children. This shift to a focus on children also significantly changes the other two rights commonly associated with divorce: the right to be married and the right to divorce.

The communitarians and others who call for modifying the no-fault divorce law in favor of children's welfare would re-frame the issue to place primary importance on a child's right to family and well being. One might term this the "right to have responsible parents." This indeed would cause a radical change in the application of current family law!

The challenge, then, is to create a policy that will achieve the end of protecting children of divorce while most effectively satisfying the diversity of interested parties whose opinions on the best means for success vary widely. To a large extent, meeting this challenge will depend on applying the right methodology, focusing on a systemic analysis of the problem, and implementation of solutions that can identify and avoid the kinds of unintended, negative results that accompanied the reform in the 1970s.

33 Elshtain, et al., 30-31.
There are some constants in the analysis of the rise in America’s divorce rates: Americans place a high value on individual rights (thus the popularity of unilateral divorce), they believe in the pursuit of happiness in both its political and personal applications, and the unexpected rise in divorce rates since the 1970s has brought a concomitant rise in the number of single mothers and their children living in poverty. While this last has stirred a tremendous resurgence of interest in reinstating fault-based divorce laws, all efforts at reform have failed to produce significant changes to date.

In an article for First Things, Barbara DaFoe Whitehead cites many of the often-heard arguments against reinstating fault based divorce laws: fault barriers will only lengthen the process for most couples who, in the end, will not stay together; litigation and its attendant costs to society will increase; many of our young people will decide to cohabitate rather than marry; and fault-based laws entrap abused women and children in family situations they can more readily escape under no-fault divorce laws. In this article, however, she also cites a fundamental reason for no-fault divorce being so widely
accepted that reform of no-fault has not been addressed: "the divorce revolution was a cultural rather than a legal phenomenon."\(^1\)

In addition to this crucial observation, Whitehead also reminds us that while very few would argue that no-fault has been good for us, neither will many support a return to fault-based laws. In fact, no laws proposing reforms that include re-instituting fault have passed any state legislature, and the resistance to the reforms seems specific to fault. For Whitehead, the answer comes down to a disconnect between the cultural norm and the proposed legislative reforms.

As long as Americans continue to view divorce as an individual and psychological event, ungovernable by any outside institutions or norms, fault law will be rejected . . . Of course, political failure is not always a compelling reason to give up on a worthy cause, but it may recommend a rethinking of tactics.\(^2\)

To counter this cultural disconnect in our search for relief from the woes of divorce without the social backing to legally prevent easy divorces, Whitehead specifically calls for a renewed commitment to marriage by women and the clergy along with a marriage-saving bias on the part of marriage and family counselors. While this tack obviously leads in the direction away from divorce in the long term, it is does nothing to alleviate the worst outcomes of unilateral divorces in the short term, namely the economic abandonment of mothers and their children.


\(^2\) Ibid.
Consequently, some form of divorce reform acceptable to the public at large must be crafted as a stop gap measure until our culture embraces a "divorce is bad for you" norm. The challenge now becomes creating a policy that will negate the consequences of unilateral no-fault divorce, while most effectively satisfying the diversity of interested parties whose opinions on the best means for success vary widely.

The Failed Call for No-Fault Divorce Reform

In analyzing the recent pushes, both academic and political, for divorce reform, it is easy to see why so much of the effort of the 1990s failed if we regard no-fault divorce reform of the 1970s as a cultural phenomenon. While most groups have initiated their efforts in behalf of children, a large part of their emphasis has often been on a return to fault which is unpalatable to the public. For instance, in his bleak article, "The Family: Where Do We Go from Here?" Allan Carlson recommends radical changes in both no-fault divorce and family law, some of which might be acceptable if he did not also call for making divorces extremely hard to obtain. His recommendations include:

1. Pro-family tax reform. Carlson favors larger per capita tax exemptions per family member; a reestablishment of income splitting for married couples; and greater progressivity in income tax rates.

2. An end to federal efforts to "reengineer gender roles" at home and in the workplace.

\[3\] Carlson, 63.
3. A caveat for employers to pay a higher family wage to employees who are heads of households.

4. Repeal of no-fault divorce laws which have "destroyed the sanctity of marriage." Divorce should be difficult to obtain, and the state should protect the party working to preserve the marriage.

5. Provisions that protect parental rights.

6. Deregulation of family economy by eliminating zoning restrictions on home businesses.

Though their outlook is not as gloomy nor as strident as Carlson's, the Council on Families in America makes some very similar recommendations to federal, state and local legislators:

1. Reform no-fault divorce laws to emphasize the importance of marriage especially where children are involved; give support of the law to the partner trying to save the marriage.

2. Formulate vision statements that establish goals to strengthen marriage and denounce out-of-wedlock childbirths.

3. Change the tax code to favor marriages, e.g., by eliminating the marriage penalty, increasing the personal exemption, and creating a $1,000 per child refundable tax credit.

4 Ibid., 64.

5 Ibid.
4. Provide funds (credits or vouchers) for parents who leave school or the workplace for an extended period of time to care for young children.

5. Replace the welfare system with approaches that discourage unwed motherhood and that empower families, e.g., mandatory identification of fathers before benefits can be used, programs that encourage unwed teenage mothers to place their children up for adoption, favor marriages-with-children in the allocation of subsidized housing, and create a poverty tax credit whereby taxpayers could directly allocate a portion of their taxes to nonprofit organizations that work to reduce child poverty and strengthen families.

6. Reassess state and federal child support enforcement programs and foster more marriage and more fatherhood.

7. Provide an annual measurement of the nations' marital health using the following statistics: percent of adults married, percent of first intact marriages, numbered of births to married parents, percent of children living with their natural parents, and percent of children living with two married parents.⁶

Within these two examples alone, it is possible to see common threads beyond a return to fault-based divorce that can be explored to fashion a reform of policy that could help mitigate some of the worst effects of divorce without returning to a fault-based system.

The larger problem, however, remains: Americans still want easy divorces, and children will still be the victims of those divorces unless policies are instituted specifically to protect them. It is imperative, then, to create a policy that protects children from the worst consequences of divorce as we continue to search (through social, political and legal means) for a culturally acceptable divorce reform that will reduce the divorce rate.

Policy Recommendations

It is apparent that, at least to some degree, civic character and what it means to be a good citizen are a part of the theories underpinning the case for fault-based divorce policy. Supporters of fault-based divorce (both prior to 1970 and in the current debate to reform no-fault divorce) talk about the need to stem the rise in divorce rates because children of divorce have more difficulty in becoming responsible citizens of society.

During the 1970s reform movement, proponents of traditional divorce law saw these obstacles to divorce as representing society's "valid interest in promoting family stability, pointing to statistics correlating broken homes with higher crime rates and increased welfare payments, as well as less tangible moral values." Today, the Republicans, the Democrats, the communitarians and other groups all use the same type of argument in calling for reform of no-fault divorce. Galston points out that a key function of families in a democracy is to provide the training of civic character for our children, and divorce in families with children creates environments where this type of

7 Wheeler, 8.
training often does not occur. According to Galston teenage boys being raised without fathers "contributes to the low self-esteem, anger, violence and peer-bonding through gang lawlessness characteristic of many fatherless boys."\(^8\) Additionally, Galston and Mason both argue that the negative effects of divorce on children are long-lasting and serious, and that children of divorce have more difficulty than the average in forming relationships and developing bonds of trust.\(^9\) Correspondingly, Glendon summarizes a Times Mirror study that finds that our current group of young people "knows less, cares less, [and] votes less" than anytime during this century.\(^10\)

While the initial supporters of no-fault divorce purportedly focused on the issue of civic good, there is reason to doubt a firm commitment behind their arguments. For instance, in 1970, then-Governor Brown appointed his Commission on the Family to proceed in a "concentrated assault on the high incidence of divorce and its tragic consequences" in an attempt to right the social and economic ills of divorce, namely juvenile delinquency, crime, alcoholism, and welfare dependency.\(^11\) This argument underlines the same basic principles as the proponents of fault-based divorce champion; however, it is clear the commission did not follow Governor Brown's adjuration, causing

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\(^8\) Galston, 273.

\(^9\) See Galston, 274; Mason 45.


\(^11\) Weitzman, 18.
some doubt that his reasons for appointing the commission were part of the real motivation propelling the reform movement.

Rather, it appears that the motive behind the reform of the fault-based divorce laws was one based more closely on equality and individual rights issues. According to Weitzman, society had presumably recognized that the high divorce rates were a part of life: divorce was inevitable. The real thrust of the movement was to end the adversarial process, and to provide more equal treatment for both men and women in considerations of child custody, and awards of child support and alimony.\textsuperscript{12} It does not appear that reducing the high divorce rates could have possibly been a realistic motive for the reform. As David Blankenhorn, from the Institute for American Values, is quoted as saying, "When you change the laws to make divorce quick and easy, you don't need a Ph.D. to know what will happen. You'll erode the American family."\textsuperscript{13}

The failure of states to implement divorce reform during the 1990s makes it obvious that our culture is not willing to support policies that return the nation to a divorce system based on fault. Consequently, framing the question in terms of the welfare of children sets the stage for a very different look at whether or not reforming divorce policy itself (i.e., making divorce more difficult to obtain) is in fact the best answer to mitigating the effects of divorce.

At this point, consideration for cultural norms is vitally important in the analysis and to the success of any subsequent policy. For instance, while an objective for the

\textsuperscript{12} Ibid., 16-17.

problem might be to lower the divorce rate so that children grow up in intact families, the cultural norm clearly will not support a return to older systems that made divorce more difficult to obtain. To be effective, points of legislation must reconcile with the cultural norm as it exists, not as we wish it to be.

Furthermore, the argument can be made that there are contending goals from at least three basic theories strongly affecting the formulation of any effective divorce reform policy: the goal of personal happiness (from rights-based theories), the goal of equal treatment (from duty-based theories), and the goal of reducing the adverse impact of divorce on society (from goal-based theories).

With this in mind, it becomes possible to see ways of opening new avenues of discourse in the debate over divorce reform by determining where the values of these theories overlap. For instance, only extreme individualists would argue that good citizenship (civic virtue) has no place in society; few people would consider it desirable to have a large culture of children growing up in poverty; and most people would agree that children should not be treated as means (i.e., pawns that parents use in hurting each other, or for obtaining larger shares of property distribution) but are ends in and of themselves.14

Consequently, future endeavors at policy reform should focus on protecting children’s rights leaving fault and no-fault arguments out of the debate entirely. Additionally, divorce is a nationwide problem, and divorce reform should be crafted at

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14 Other aspects not considered in this thesis include goals to maintain the power structure (men over women); goals to alter the status of the welfare state (tax reform initiatives to lessen welfare dependency of divorced mothers); and goals reflecting the proper function of government.
the national level to set a minimum standard for all states through a uniform divorce act, or perhaps even better, through a uniform children-of-divorce protection act.

We are beginning to see an acceptance of this at the national level already. In August, 1996, Congress passed the Personal Responsibility and Work Opportunity Act into public law.\textsuperscript{15} This law requires states to:

- operate child support enforcement programs in order to receive federal welfare funds;
- reduce welfare benefits by at least 25\% for mothers who refuse to help establish paternity;
- streamline the process for establishing paternity and expanding the in-hospital paternity establishment program;
- implement expedited procedures for child support enforcement; establishing a Federal Case Registry and a National Directory of New Hires to track "deadbeat" parents who cross state lines to avoid paying child support;
- develop uniform rules, procedures, and forms for interstate child support cases; and
- to increase child support collections by revoking driver's and professional licenses, garnishing wages, and seizing assets.\textsuperscript{16}


\textsuperscript{16} Ibid.
The 1996 act is a recognition of the consequences of divorce as a national problem, and demonstrates a willingness to act at that level, making it easier to create a uniform act to protect children before a divorce occurs.

Implementing a uniform act to protect children would not change current divorce laws for couples without children, but would protect the interests of the children of divorcing parents. The provisions of this hypothetical act would include mandates such as:

- A written plan (to which both parents agree) that clearly outlines custody and visitation arrangements.
- Property and other asset settlements that focus on the welfare of the children first.
- Consideration of the non-custodial parent’s potential for earnings in determining amounts of child support.
- Avenues for family courts to direct that child support payments be distributed directly and automatically from wages or bank accounts.
- Language and strategies that explicitly enforce the non-custodial parent’s obligation for child support regardless of new familial responsibilities that parent might choose (i.e., starting a new family with another partner, or assuming responsibility for a new partner’s children by a previous spouse).
- Counseling both before and after the divorce that provides parenting advice and support for divorcing parents and their children. (While this counseling
might be subsidized by the government, most of the cost should be defrayed by the divorcing couple.)

These mandates would hold for any divorce, no-fault or fault-based alike, and would not impede a unilateral divorce action, except to the extent that the above conditions are met before the divorce is finalized.

We can use Fineman's argument for "results-equality" as opposed to "rule-equality" in evaluating these proposals. Rather than evaluating the policy reform from the standpoint of individual equality, she asks whether the objectives of no-fault reform were met in terms of equity. In this way, she addresses the negative ramifications of the fault-based reform that so adversely affected women. Fineman's point is that while individual equality for women is desirable in most situations, equity in terms of financial awards and property distributions is much more relevant in the case of divorce involving dependent children.17

Conclusion

In hindsight, it is easy to see that the initial divorce reform of the 1970s was destined to engender devastating although unintended outcomes for so many of the children of divorce. It also is clear that the underlying theories that motivated that reform – the emphasis on the right to the pursuit of happiness that extends to the belief that divorce should be available to unhappy couples and should be easy to obtain – are still with us as a society today. Clearly, with the failure of the reform efforts in the 1990s,

17 See Fineman, Chapter 10.
America has shown it is not interested in divorce reform that affects the terms of divorce, per se, and it has become apparent that there is really no cultural basis for returning to fault-based divorce. Consequently, it is imperative to find other means of mitigating the effects of divorce policies as they stand today.

The welfare of children of divorce, the one inescapable consequence of divorce that must be dealt with, provides an avenue for drawing all factions closer to consensus on reform to current policies. By building on whatever consensus can be achieved, it should be possible to draft a policy which minimizes the polarization of thought that the current debate engenders; which keeps the responsibility for the children where it belongs — with their natural parents; and which avoids most, if not all, unforeseen outcomes of policies that have not been well-planned and analyzed at the outset.

For our policy makers, the dilemma in creating divorce reform or child protection policies will continue to be one of balancing the demands of a cultural norm based predominantly on individual rights with the need to preserve and nurture the future of our society. Given that Americans are not ready to accept divorce reform that significantly curtails their freedom to divorce, the issue clearly becomes the protection of our children: for their own sakes and for the sake of our community as a whole.
REFERENCES


VITA

Graduate College
University of Nevada, Las Vegas

Mary Jane Watson Brick

Home Address:
510 Elderberry Lane
Pearland, Texas 77584

Degrees:
Bachelor of Arts, Communication, 1981
California State University, Fullerton

Thesis Title: Divorce: A Matter of Rights and Responsibilities

Thesis Examination Committee:
Chairperson, Dr. Alan Zundel, Ph. D.
Committee Member, Dr. Craig Walton, Ph. D.
Committee Member, Dr. Barbara Cloud, Ph. D.
Graduate Faculty Representative, Dr. Shirley Emerson, Ph. D.