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UNTying the knot: the course and patterns of divorce reform

Marriage is often viewed as a contractual relationship between freely consenting individuals. Paradoxically, however, the state, through its extensive regulation of the marital relationship, has traditionally maintained a status as mandatory third-party beneficiary to this most private of all "contractual" arrangements. State regulation of marriage may be categorized as follows:


Marital Obligations. The state imposes several duties upon both husband and wife during marriage. "The husband is to provide the family with food, clothing, shelter and as many of the amenities of life as he can manage." H. Clark, The Law of Domestic Relations in the United States § 6.1 (1968) [hereinafter cited as Clark]. The wife must maintain the home and care for the children. Id. The husband is primarily responsible for financial support of the children, although the wife may assume this responsibility in the event of her husband's default. See, e.g., N.Y. Dom. Rel. Law § 32 (McKinney 1964).

Termination of Marriage. States commonly profess concern over maintaining the permanence of the marital relation and thus impose procedural and substantive impediments to divorce. See, e.g., Martin v. Martin, 102 So. 2d 887 (Fla. Dist. Ct. App. 1958); People ex rel. Doty v. Connell, 9 Ill. 2d 390, 137 N.E.2d 849 (1956); Dionne v. Dionne, 155 Me. 377, 156 A.2d 393 (1959). Extensive state regulation of divorce has resulted in a number of legal and social problems (notes 25-34 and accompanying text infra), and some states have recently embraced new approaches and attempted solutions (notes 35-67 and accompanying text infra).


Although marriage is a religious as well as a civil institution, American courts have regarded it as ultimately subject to civil control. Clark § 2.2. The American legal posture is evident in such decisions as Maynard v. Hill, 125 U.S. 190 (1888), in which the Supreme Court upheld the legislative propriety of granting divorce where various causes would render the continuance of the marriage relation intolerable to the other party and productive of no possible benefit to society. When the object of the relation has been thus defeated . . . it is not perceived that any principle should prevent the legislature itself from interfering and putting an end to the relation in the interest of the parties as well as of society.

Id. at 205-06. See also Helfond v. Helfond, 53 Misc. 2d 974, 280 N.Y.S.2d 990 (Sup. Ct. 1967). Thus, despite traditional religious emphasis on the indissolubility of the marital union (see, e.g., Mark 10:9), the Supreme Court in Maynard indicated that marriage should
the marital relationship has most often been justified in terms of social stability. Marital stability is viewed as a component of political and economic stability, the harmonious family unit seemingly the micro-cosmic analogue to an internally stable and thus externally invulnerable state. Carried to its logical conclusion, such a view dictates rigid state regulation and protection of the marital union, and the erection of substantial legal obstacles to marital dissolution.

Today the propriety of extensive state control over marriage is under increasing attack. Striking down Virginia's antimiscegenation statute, the Supreme Court in Loving v. Virginia established the constitutional status of marriage as a basic civil right, thereby subjecting all state restrictions on marriage to new and potentially severe constitutional scrutiny. The reach of the Loving rationale has not yet been determined and substantial problems of interpretation remain. For example, when the Court gave constitutional protection to "marriage," apparently it was using the word with its traditional cultural connotations—as the monogamous, heterosexual, familial, and permanent relationship that state regulations universally promote. Moreover, some language in the case seemingly reaffirms the traditional view of the propriety of state regulation. In any event, although Loving ele-

not continue when it no longer serves the interests of the parties or society. Cf. P. Jacobson, American Marriage and Divorce 89 (1959). The difficult problem, of course, is to determine those situations in which social and private interests are no longer served by marital continuation.

4 See W. Friedmann, Law in a Changing Society 210 (1959) (the family as a "community in miniature"); see also Note, Marriage, Contracts, and Public Policy, 54 Harv. L. Rev. 473 (1941).

5 In Maynard v. Hill, 125 U.S. 190, 205 (1888), the Court noted that "[m]arriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature."


7 388 U.S. 1 (1967).

8 Marriage is "a social relation subject to the State's police power." Id. at 7, citing Maynard v. Hill, 125 U.S. 190 (1888). The Court might have based its decision solely on the racist motivation behind the antimiscegenation statute. See Drinan, supra note 6, at 358-59. Rather, the Court declared that marriage was a "basic civil right of man," and that the state must therefore show a "legitimate, overriding" state interest furthered by the statute to avoid violating equal protection and due process. Loving v. Virginia, 388 U.S. 1, 11-12 (1967). Cf. Griswold v. Connecticut, 381 U.S. 479, 497-98 (1965) (Goldberg, J., concurring).
vated the right to marry to the status of a constitutionally protected liberty, termination of an unsuccessful marriage has never been regarded as a fundamental or basic civil right.9

A more severe threat than Loving to the present structure of state regulation is posed by actual patterns of social and sexual behavior in contemporary American society—patterns which evidence the failure of state regulation to achieve its goals. While states seek to promote heterosexual monogamy, some Americans are finding the emotional and psychological comforts which marriage has traditionally provided in communal10 or homosexual11 arrangements. While states seek to promote stable "family units," the problems of overpopulation have convinced many Americans that the real goals of any marriage should be interpersonal rather than familial.12 Finally, while states seek to promote the permanency of marriage, an ever-increasing number of Americans have shown a preference for terminating, rather than prolonging, unsuccessful arrangements.13 Traditional state regulations, promoting goals that are out of harmony with contemporary cultural mores, are being avoided by both citizens and the judiciary and should be legislatively adjusted to reflect current social needs.14

9 "There can be no such thing as a 'legal right' to a divorce vested in any married person." Allen v. Allen, 73 Conn. 54, 46 A. 242 (1900). See Rogers v. Rogers, 399 S.W.2d 606 (Mo. Ct. App. 1966); Worthington v. District Ct., 37 Nev. 212, 142 P. 230 (1914).


11 In a recent case a Minnesota court refused to allow two males to marry. Baker v. Nelson, — Minn. —, 191 N.W.2d 185 (1971). One of the homosexuals, however, was allowed to "adopt" his lover to establish a legal tie. See Time, Sept. 6, 1971, at 50.


As human relationships grow more transient . . . , the pursuit of love becomes, if anything, more frenzied . . . . As conventional marriage proves itself less and less capable of delivering on its promise of lifelong love . . . we can anticipate open public acceptance of temporary marriages.

A. Toffler, supra note 6, at 223. For an analysis of economic and political reasons for increased marital break-ups in the western world, see Davis, Statistical Perspective on Marriage and Divorce, 272 Annals 9, 15-17 (1950).

14 "[If] statutory law does not meet the current demand and need, it will be twisted and circumvented, adapted and interpreted, so that its application suits the spirit of our people rather than the letter of the law." Foster, Divorce Law Reform: The Choices for the States, 42 State Gov't 112, 113 (1969). See generally Jones, The Creative Power and
Marriage is the most human of our institutions and is obviously subject to human frailty and error. Although marriage involves a great deal more than Kant's "reciprocal possession" of the sexual organs, it is also something less than the relationship Tennyson saw as "made in Heaven." In many cases marriages simply fail, either through discord or disinterest; and when failure occurs termination is the only recourse. Recognizing the unhealthy discrepancy between law and practice in this area, some state legislatures have recently attempted to reform their states' divorce laws. Unfortunately, they have been loath to relinquish fully the ultimate control over the dissolution process they have traditionally exercised.

A corollary of Loving's constitutional right to marry, however, should necessarily be the right to terminate an unsuccessful marriage without unreasonable state delay, impediment, or moralism.

I

FAULT DIVORCE

That divorce is sometimes unavoidable has long been recognized; the problem has been to define the justifying circumstances.


15 I. Kant, The Philosophy of Law 110 (W. Hastie transl. 1887).

16 A. Tennyson, Aylmer's Field, in Complete Works 191, 193 (1878).

17 Law loses its power and abdicates its ordering function when it loses touch with the dynamics of social life. In aggravated situations, as when the essential rules of a whole legal system are outmoded and the body of ordinary people denied effective opportunity to change them, uncompromising opposition to change can lead to political revolution and so to the loss of all stability in the society.

Jones, supra note 14, at 140. See also Rheinstein, Trends in Marriage and Divorce Law of Western Countries, 18 Law & Contemp. Prob. 3, 19 (1953).


19 See generally notes 35-63 and accompanying text infra.

20 There are veiled signs in recent cases that the judiciary may someday grant divorce a constitutionally protected status. In Boddie v. Connecticut, 401 U.S. 371 (1971), the Supreme Court held invalid as applied to indigents a Connecticut statute (Conn. Gen. Stat. Rev. § 52-259 (1968)) requiring payment of court costs and fees as a condition of access to the state's divorce courts. The Court based its decision largely on the individual's due process right to settle claims through the judicial process and on the due process guarantee of a meaningful opportunity to be heard. Id. at 376-79. The Court also held that "a State may not . . . pre-empt the right to dissolve [the marital] . . . relationship without affording all citizens access to the means it has prescribed for doing so," since such right of access "is the exclusive precondition to the adjustment of a fundamental human relationship." Id. at 383. In Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971), a federal district court invalidated a Wisconsin statute requiring two years residence for access to the state's divorce courts. These decisions may further restrict the constitutional scope of state impediments to marital dissolution.

21 Maynard v. Hill, 125 U.S. 190 (1888); Braden v. Braden, 178 Cal. App. 2d 481, 3
Since the state's traditional goal has been to preserve marriages, most state divorce laws specify that only particular and demonstrable kinds of acts will constitute "grounds" for divorce. A divorce may be granted only if a party can prove statutorily proscribed conduct by his spouse while avoiding a finding of misconduct in his own activities.

Thus state divorce laws are generally "fault" oriented. By narrowly defining the category of acts justifying dissolution, the state seeks to prevent divorce and thus to promote "stable" marital unions. Unfortunately, in both theory and practice the state's chosen means are unsuited to its implicit goals. Fault-oriented divorce law has been called "obsolete, unrealistic, discriminatory, and sometimes immoral." Objections to the fault system may be summarized as follows.

Statutory categories cannot possibly encompass all events that may destroy a marital relationship nor, conversely, does the specified conduct per se necessarily evidence a need for the dissolution of a marriage. Specific acts such as adultery are often merely symptomatic of other, more personal differences between dissatisfied marital partners. Allocating fault in marital discord is a ridiculously simplistic approach and totally irrelevant to the consequences of marital dissolution.

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23 The most common grounds are adultery, desertion, and cruelty. E.g., N.Y. DOM. REL. LAW § 170 (McKinney Supp. 1971). See CLARK §§ 12.2-12.4.

24 See, e.g., Moore v. Moore, 101 Ariz. 40, 415 P.2d 568 (1966). "[A divorce may be granted only] when one party is guilty . . . . Guilt is made the cause of divorce. What form of guilt is specified by the 'grounds,' the overt acts or omissions which the law says shall be sufficient cause—things we used to call sin." Alexander, The Follies of Divorce: A Therapeutic Approach to the Problem, 36 A.B.A.J. 105, 107 (1950). An interesting corollary to the notion that unilateral fault is necessary to dissolve a marriage is the idea that bilateral fault will not justify dissolution. This is the doctrine of "recrimination." See Lewis v. Lewis, 248 Ark. 261, 455 S.W.2d 22 (1970); Matakieff v. Matakieff, 246 Md. 23, 266 A.2d 887 (1967); see generally CLARK § 12.12.

25 Foster, supra note 14, at 112.

tion. Divorce should not be a retributive process.²⁹ The fault system not only encourages perjury and hypocrisy, but also alienates the citizen from the law by demanding in some instances a public revelation of intimate marital details.³⁰ The state’s refusal to grant a divorce without a showing of fault does little to ameliorate the preexisting tension in the marital relationship or to negate the reasons for which at least one of the parties originally sought to dissolve the marriage. By demanding that the parties assume the posture of combatants, the fault system merely exacerbates the discord that first prompted the divorce effort.³¹

These objections are largely directed towards the administration and consequences of the fault system; equally objectionable is its basic theory. The fault system is premised on an unwarranted governmental assumption of power. The state presumes to tell unhappy spouses that termination of their marriage is never justified unless one spouse has committed a specified offense against the marriage.³² Moreover, the offense must be proven to the satisfaction of a state judicial tribunal, when it may well be that the parties themselves can most ably judge the viability of their relationship.³³ Fault-oriented divorce structures are not only outmoded but also represent arrogant state intrusion into private areas of interpersonal decision making. States should eschew such involvement for a more humane, sophisticated role.³⁴

II

REFORM WITHIN THE FAULT SYSTEM

In recent years several states have attempted to modernize their law of divorce by specifying certain theoretically “no-fault” grounds for the dissolution of a marriage. An example is the ground of “in-

²⁹ See Goldstein & Gitter, supra note 26, at 79-80.
³⁰ Id. at 82; Note, supra note 26, at 628.
³¹ Goldstein & Gitter, supra note 26, at 81.
³² See notes 23-24 and accompanying text supra.
³³ This is not to say that such ancillary matters as alimony, support, child custody and visitation, and property settlement are not within state judicial purview; only the fundamental decision that a marriage is no longer viable seems outside the state’s competence or moral authority. The state’s regulation of divorce per se is the sole focus of this note.
³⁴ One observer suggests that stability in social relationships could perhaps be achieved most effectively not by restricting divorce, but by preventing what will likely turn out to be unhappy marriages. He would emphasize increased state premarital regulation as a possible means of increasing the chances of marital success. Couch, Marriage Law Reform—A Comment, 44 Tulane L. Rev. 251, 252 (1970). After Loving such a state program might undergo careful constitutional scrutiny.
patterns of divorce reform compatibility." However, integrating a theoretically no-fault ground such as incompatibility into what remains fundamentally a fault system is somewhat inconsistent, and may give rise to substantial problems. In addition, incompatibility statutes have not been uniformly given a no-fault interpretation, since the judiciary frequently seems reluctant to eliminate fault from consideration. This reluctance is understandable in view of the problems in defining incompatibility and the clear fault orientation of the remaining divorce grounds. Needless to say, if incompatibility were given a liberal definition, all other grounds for divorce would become superfluous. Courts have, therefore, often imposed an onerous burden of proof on a party alleging incompatibility.

A more common no-fault ground for divorce is exemplified by

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35 E.g., NEV. REV. STAT. § 125.010 (1969); N.M. STAT. ANN. § 22-7-1(8) (1953); OKLA. STAT. ANN. tit. 12, § 1271 (1961); TEX. FAM. CODE ANN. § 3.01 (1971).

36 For a discussion of underlying assumptions of the fault system, see notes 21-26 and accompanying text supra.

37 The doctrine of recrimination, for example, allows a court to deny divorce on the ground that the parties are equally at fault. See note 24 supra. Thus, where the doctrine is recognized in a particular jurisdiction, "incompatibility" would logically be a defense to a suit for divorce based on the ground of "incompatibility." In Cate v. Cate, 53 Ark. 484, 14 S.W. 675 (1890), the court noted that "[u]nhappiness sufficient to render the condition of both parties intolerable may arise from the mutual neglect of the conjugal duties; but when the parties are thus at fault, the remedy must be sought by them, not in the courts, but in the reformation of their conduct." Id. at 487, 14 S.W. at 675.


38 See, e.g., Paddock v. Paddock, 240 F.2d 926 (9th Cir. 1959), where a divorce was "granted to the wife based upon incompatibility of the parties due to the fault of the husband." Id. at 928.

"[M]any courts simply cannot conceive of eliminating fault from consideration . . . . [T]he main difficulty is the impossibility of introducing incompatibility into the existing fault-oriented framework . . . . since to a large extent they cannot stand together." Wadlington, supra note 26, at 52.

39 See, e.g., Burch v. Burch, 195 F.2d 799, 807 (8th Cir. 1952) (incompatibility not "those petty quarrels and minor bickerings which are but the evidence of that frailty which all humanity is heir to"); Hines v. Hines, 64 N.M. 377, 378, 328 P.2d 944, 945 (1958) (incompatibility results from a "total variance in taste, dispositions, ambitions, mental attitudes and ideals"); Hughes v. Hughes, 363 P.2d 155, 158 (Okla. 1961) (incompatibility "imports more than a mere mental process or an after-thought conceived and nurtured in the psyche of the complaining spouse").

the increasing number of separation, or "living apart," statutes. Based on the assumption that separation for a prescribed period of time is sufficient evidence of marital breakdown to justify divorce, such statutes grant relief to spouses who are unwilling to demonstrate, or fabricate, other grounds. In divorce proceedings based on separation, the court accepts as determinative the decision of one or both of the parties, as objectively evidenced by their physical separation, that the marriage should be dissolved, without forcing them to justify that decision in any degree to the state.

Unfortunately, because of problems of application and their status as addenda to existing fault structures, separation statutes do not constitute a satisfactory solution to the problem of divorce reform. Inevitably there is a judicial disposition to inject fault notions into theoretically no-fault proceedings. There are diverse interpretations


This discussion does not include the "desertion" ground which appears in various state codifications, since that ground is generally construed to require "willfull" and "obstinate" abandonment on the part of a spouse. See Antrim v. Antrim, 169 Md. 418, 181 A. 741 (1936); Warner v. Warner, 54 Mich. 492, 494 (1884); Bond v. Bond, 252 S.C. 363, 166 S.E.2d 302 (1969). Some separation statutes make a divorce action available only to the "innocent" partner, although the parties have lived apart for the specified period. See, e.g., Wyo. Stat. Ann. § 20-47 (1959). Usually, however, either spouse may bring the action and the separation need not have been voluntary on the part of both spouses. See, e.g., Mason v. Mason, 209 Va. 528, 165 S.E.2d 392 (1969). For a discussion of state variations of living apart statutes and an analysis of the degree to which such enactments reflect no-fault criteria, see Wadlington, supra note 26, at 57-64.

42 There are no adequate statistics on the number of divorces based on collusion between the parties, since the deceit is usually uncovered only when one of the spouses wishes to stop the action.

43 The degree of judicial interference in a separation divorce may, however, vary. For example, many separation statutes allow for divorce at the request of either spouse, and do not mention fault as a possible defense to the action. See, e.g., Vt. Stat. Ann. tit. 15, § 551(7) (Supp. 1971). Under such statutes most courts have held that the fault of the party seeking the divorce is irrelevant if the parties have lived apart for the statutorily prescribed period; other courts have held that although a party has conformed to the living apart requirement, he may still be denied a divorce if the separation may be considered to be his "fault." See Annot., 14 A.L.R.3d 502 (1967).

44 For example, the North Carolina living apart statute allows for the dissolution of a marriage "on the application of either party, if and when the husband and wife have lived separate and apart for one year," with no specific requirement that the separation be voluntary or that the party seeking dissolution be without fault. N.C. Gen. Stat. § 50-6 (1966). However, although the party seeking divorce need not establish that he is in any way an injured party (see, e.g., Overby v. Overby, 272 N.C. 626, 158 S.E.2d 799, 802 (1966) (dictum)) and in some cases has not been denied a divorce despite his own fault (see, e.g., Long v. Long, 206 N.C. 706, 175 S.E. 85 (1934)), North Carolina courts still maintain that "abandonment" is an affirmative defense to an action for divorce under the section. E.g., Eubanks v. Eubanks 273 N.C. 189, 159 S.E.2d 562 (1968). Cf. notes 38 & 41-43 supra.
as to what constitutes "living apart" and "continuous separation,"\textsuperscript{45} and a requirement that the separation be without cohabitation may have the effect of actually hindering attempts at reconciliation.\textsuperscript{46} Furthermore, the specified duration of the separation period\textsuperscript{47} presents problems to those who desire to terminate their marriage immediately. Although there seems to be a general tendency in recent years to shorten the required separation period,\textsuperscript{48} variances among state statutes may promote "migratory divorce" as a means to avoid prolonged continuation of an otherwise indissoluble marriage.\textsuperscript{49} Alternately, where both separation and fault grounds are available in a jurisdiction, a party may elect to proceed on a fault ground, real or fabricated, to expedite the dissolution process.\textsuperscript{50}

Incompatibility and separation statutes reflect a shift in the state's conception of marriage. No longer are many states insisting that only a finding of specific fault will justify the dissolution of a hollow legal relationship which has outlived the personal relationship upon which it was founded. Unfortunately, the piecemeal process of attaching no-fault legislation to existing fault structures has weakened the effective-


\textsuperscript{46} Wadlington, supra note 26, at 75-76. Some living apart statutes specify that separation must be without cohabitation. See, e.g., Md. ANN. CODE art. 16, § 24 (Supp. 1971). Since such a requirement would cover a single act of intercourse as well as a lengthy resumption of the marital relationship, it would seem to discourage attempts at reconciliation. See Smith v. Smith, 257 Md. 263, 262 A.2d 762 (1970). A meaningful interpretation of cohabitation would perhaps consider the parties' intent and the ultimate duration of the attempted reconciliation before holding that the required statutory period is interrupted. Wadlington, supra note 26, at 76.

\textsuperscript{47} In no state is the statutory period less than one year. Wadlington, supra note 26, at 77-78.

\textsuperscript{48} See, e.g., Tex. FAM. CODE ANN. § 3.06 (1971). This reduced from seven to three years the statutory separation requirement.

\textsuperscript{49} See generally CLARK § 11.1, at 285. Various state laws, because of their rigidity or narrowness, may prompt individuals to seek divorce in other jurisdictions. In 1965 it was estimated that approximately 11% of American divorces were "migratory." Drinan, What Are the Rights of the Involuntary Divorcee? Reflections on Divisible Divorce, 53 KY. L.J. 209, 213 (1965). Attempts by jurisdictions to deny access to their divorce courts to short term residents are of questionable constitutionality. For example, in Wymelenberg v. Syman, 328 F. Supp. 1353 (E.D. Wis. 1971), the court applied the "right to travel" rationale of Shapiro v. Thompson, 394 U.S. 618 (1969) and struck down a two-year residence requirement for access to the divorce courts of that state. See note 20 supra.

\textsuperscript{50} "Of the jurisdictions having a combination of separation period grounds and fault grounds without separation periods, most have a much higher percentage of decrees granted on the basis of fault than on separation periods." Comment, Divorce Reform—One State's Solution, 1967 DUKE L.J. 955, 965 n.58. See generally Bodenheimer, supra note 26, at 208.
ness of this conceptual shift and has resulted in cumbersome and inconsistent divorce laws. For these reasons, the California and Iowa legislatures have totally revised their states’ divorce laws, attempting not only to eliminate all taint of fault from the proceedings but also to incorporate a more realistic view of the marital relationship.

III

THE BREAKDOWN STANDARD

California couples desiring a divorce now need only show “irreconcilable differences” which have caused an “irremediable breakdown of the marriage.” As a general rule, specific acts of misconduct, so critical under the fault system, may not be pleaded or introduced into evidence. Iowa couples may dissolve their marriage by showing that there has been a sufficient “breakdown” of the relationship so that “the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved.”

The recent enactments in California and Iowa evidence a new degree of governmental respect for the difficult interpersonal decision of the parties and an awareness of the sociological and psychological subtleties involved in marital failure. The comprehensive reforms of these states have avoided, at least to some degree, the pitfalls inherent in incorporating no-fault grounds into a fundamentally fault-based structure. However, disturbing vestiges of the fault system are evident in both states’ reforms. For example, neither state has been willing to abandon the adversary format in divorce proceedings; the marital partners retain their gladiatorial roles. In addition, judicial determination of the existence of “irreconcilable differences” or of “a

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51 CAL. CIV. CODE §§ 4000-5138 (West 1970).
52 IOWA CODE ANN. §§ 598.10-.34 (Supp. 1971).
53 For a comparison of the new laws with former divorce statutes in these states, see CAL. CIV. CODE § 4505 (West 1970) (historical note); IOWA CODE ANN. § 598.1 (Supp. 1971) (table).
55 Id. § 4509. But see note 60 and accompanying text infra.
57 For example, neither California nor Iowa use the word “divorce” in their reform statutes, but instead use the phrase “dissolution of marriage,” presumably in an effort to avoid “fault” connotations.
58 See CAL. CIV. CODE §§ 4508-09 (West 1970); IOWA CODE ANN. §§ 598.7, .10, .17 (Supp. 1971).
breakdown of the marriage” may often involve an analysis of the same types of conduct that would have constituted grounds for divorce under the old fault system. Under the California Code, “evidence of specific acts of misconduct” are “improper and inadmissible.” This provision, however, does not apply when such evidence is deemed necessary by the court to “establish the existence of irreconcilable differences.”

The emphasis of both the California and Iowa reforms is clearly on the existence of marital failure rather than upon its underlying reasons. Yet both states have consciously retained the authority to obstruct divorce and have thus remained the final arbiters of the considered decision of the parties. The Iowa reform provides for minimum waiting periods and for marital counseling in an effort toward reconciliation. California courts are authorized to continue the proceedings if there is a “reasonable possibility of reconciliation.” Indeed, the drafters of the California statute specifically stipulated that the reform was not intended to allow the termination of a marriage “without any effective intervention by society.”

Although theoretically the breakdown standard underscores the uniqueness of each marital relationship, there is a danger that its application may entail serious state intrusions into the privacy of the

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50 For example, an Iowa judge experienced in the preexisting fault structure might well consider adultery or cruelty by one spouse as a relevant fact indicating an irretrievable “breakdown” of the marriage. Cf. notes 38 & 41-43 and accompanying text supra. Arguably, because “breakdown” statutes represent a totally new concept in the area of divorce, there will be less tendency on the part of judges to read fault notions into their administration.

51 CAL. CIV. CODE § 4509 (West 1970). California has specifically defined “irreconcilable differences” as “those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved.” Id. § 4507. One California judge, however, has indicated that he intends to ignore that portion of section 4509 which allows the court discretion to hear testimony regarding fault. Saul, Proof of a No-Fault Divorce Case, 45 L.A.B. Bull. 99, 126-27 & n.42 (1970) (remarks of Judge MacFaden).

52 CAL. CIV. CODE § 4508(a) (West 1970). See also id. § 4505.


54 By substituting the subjective “breakdown” criterion for objective fault criteria, Iowa and California have imposed upon the judge the duty to investigate individually the details of each marriage. Individualized treatment, however, does not necessarily equal just treatment. See notes 66-67 and accompanying text infra.
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marriage. Commentators have pointed to the nonjusticiability of the breakdown standard. Even assuming that a court can determine when breakdown has occurred, the investigation accompanying such a subjective determination may involve an examination of marital intimacies unparalleled under traditional divorce laws. In addition, there are no integral limitations on judicial discretion as there are under living apart statutes or traditional fault systems. The emphasis onconciliation procedures may result in a well meaning judge needlessly thwarting the express desire of the parties to terminate their marriage immediately, while the judge predisposed to deny divorce has ample latitude to do so. Moreover, diverse judicial interpretations of the breakdown standard at the trial court level may result in the formulation of a set of appellate court rules on permissible indices of breakdown. Parties may again, as under traditional divorce laws, be forced to allege and prove specific acts of misconduct or even tailor circumstances to fit judicially defined breakdown situations.

While it is perhaps premature to speculate on the exact consequences of breakdown reforms, it seems clear that they do not constitute a complete departure from the fault tradition or from the concept of the state as final arbiter of the divorce decision. The California and Iowa reforms, although praiseworthy, fail to provide the ultimate accommodation of individual needs and state authority and may in practice even perpetuate the intrusive state role that has characterized previous divorce systems.

65 "To determine whether or not a marriage [has] completely broken down is really not a triable issue. If the case were undefended and the petitioner maintained that he would never go back to his spouse, and that the marriage was dead . . . we do not see how the court could do otherwise than accept what he said and grant a divorce."

MacKenna, Divorce by Consent and Divorce for Breakdown of Marriage, 30 Modern L. Rev. 121, 128 (1967), quoting Royal Comm'n on Marriage & Divorce, Report (1951-55), at 21. See also MacKenna, supra at 130.

66 For example, the California Governor's Commission recommended that when either party files a petition requesting the court to "inquire into the continuation of the marriage," an "initial evaluative interview" should be held with the professional staff "for the purpose of helping the parties to assess and understand their situation." California Governor's Comm'n on the Family, supra note 65, at 507. One of the stated goals of such an interview is to amass "raw data about the real causes of marriage failure." Id. at 508.

67 The California Governor's Commission apparently recognized the possibility of judicial delay and thus recommended that despite court advisements those parties who maintain their intention to divorce must eventually be granted a decree. Id. at 509. But see Cal. Civ. Code § 4508(a) (West 1970) which arguably leaves the ultimate question of dissolution up to the discretion of the judge, regardless of the desires of the parties.
A. Contract Marriages

State courts have traditionally refused to enforce private marital contracts that might "change the essential incidents of marriage" or "facilitate a divorce." Some courts have increasingly allowed the parties to negotiate certain matters, such as property settlements and, to some extent, alimony and other personal rights, in connection with a divorce, notwithstanding that such agreements may "facilitate" marital dissolution. No private agreement, however, providing for the automatic termination of the marriage after a specified interval or upon the mere desire of one or both of the parties has yet been upheld. The only attempt to create by legislation such contractual freedom was not only abortive but fraught with some of the


69 Courts have often allowed parties to enter into ante- and post-nuptial contracts that specify property settlement rights in the event of divorce. In most cases the only restrictions put on these contracts are that the parties be fully aware of the legal ramifications of the agreement and that there be full disclosure of the properties involved. See, e.g., Wright v. Wright, 148 Cal. App. 2d 257, 306 P.2d 536 (2d Dist. 1957); Hartz v. Hartz, 248 Md. 47, 284 A.2d 865 (1957); Kosik v. George, 253 Ore. 15, 452 P.2d 560 (1969).

Except in cases where the provision for the wife is grossly disproportionate to the husband's means, or where the relationship between the parties is so confidential as to give rise to suspicion, the burden of proof of fraud, duress, or inequity in the contract is generally upon the party seeking to invalidate the agreement. See, e.g., Lightman v. Magid, 54 Tenn. App. 701, 394 S.W.2d 151 (1965). For example, the courts have distinguished between contracts of young couples "in love," and of older couples whose acumen and judgment are presumably less likely to be clouded by the emotions of tenderness and trust. See, e.g., In re Davis, 20 N.Y.2d 70, 228 N.E.2d 768, 281 N.Y.S.2d 767 (1967).


71 "Even where all substantive requirements are conceded met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage . . . without invoking the State's judicial machinery." Boddie v. Connecticut, 401 U.S. 371, 376 (1971). See note 68 supra.

Perhaps the closest a court has come to enforcing an agreement providing for the automatic termination of marriage is Davis v. Davis, 191 A.2d 138 (D.C. 1963). The court in Davis upheld an antenuptial agreement specifying that the sole purpose of the marriage was to give a child a name and that if the parties were not satisfied with the marriage they could obtain a divorce. The court said that the agreement was only a recognition of legal rights given by statute and granted the divorce on the grounds that the parties had satisfied the requirements of a "living apart" statute.
same undesirable attributes of state regulation that have characterized other divorce laws and reforms.\textsuperscript{72}

In 1971 a proposal for the creation of three-year renewable “contract marriages” was introduced in the Maryland House of Delegates.\textsuperscript{73} This proposal would, in effect, have reversed the polarities of traditional divorce law, requiring affirmative acts to continue a marriage rather than to terminate it.\textsuperscript{74} It would have created a right marital partners have never before possessed—the right to dissolve a marriage, at least at specified intervals, without state interference.\textsuperscript{75}

The Maryland proposal is interesting in its contemplated reduction of the state’s adjudicatory role in divorce and in its inventiveness in applying contractual notions of a limited nature to the problems of marital dissolution. Nevertheless, the proposal contained severe faults. The specific proposal was poorly drafted and ambiguous.\textsuperscript{76} In addition, its overall thrust was authoritarian and presumptuous. Although the present fault system unfairly requires affirmative adversary conduct to dissolve a marriage, it is equally unfair to require that the parties take affirmative action at arbitrarily specified times to avoid marriage termination. In both systems the state has neither shown much respect for individual needs nor retreated from the premise that it must

\textsuperscript{72} See notes 73-78 and accompanying text infra.

\textsuperscript{73} (1971) H. No. 633 (Mss. Lee & Boswell) [hereinafter cited as Marriage Bill] was introduced on February 29, 1971 and referred to the judiciary committee. The proposal died in committee.

\textsuperscript{74} The central provision of the proposal stated:

Any marriage performed in this State . . . may be a contract of marriage for the term of three (3) years. The contract at the end of that period of time shall be subject to renewal for an additional three (3) year period.

\textit{Id.} § 31A(b).

\textsuperscript{75} See note 71 and accompanying text supra.

\textsuperscript{76} The proposal was unclear as to whether a party could unilaterally terminate the marriage. It stated that if one party refuses to renew at the end of any three-year interval, the other “agreeable” party may obtain a judicial determination of such specified matters as alimony and child support. Marriage Bill §§ 31A(b) (1), (2). Although not specifically stated, by implication the other party could not prevent the termination of the marriage, but might only petition for a determination of collateral matters.

If the proposal was in fact intended to require mutual consent before nonjudicial dissolution were available, in cases of unilateral refusal to renew the parties would be relegated to Maryland’s existing divorce procedures. The bill specifically stated that it would supplement Maryland’s existing divorce law (Md. AN.


Assuming the proposal allows for unilateral dissolution, it inferentially and arbitrarily assigns fault to the nonrenewing spouse by divesting him or her of any right to alimony, maintenance, or other support. \textit{Id.} §§ 31A(b)(1), (2). The “fault” in this system is thus not a specific offense against the marriage, but rather the initial desire to terminate the marriage. It seems slightly incongruous to advocate a system of periodically renewable marriages only to punish a failure to renew.
necessarily play an active role in determining when a marriage may be dissolved. A statutory prescription of marital duration, no matter what the specified term, will be arbitrary in individual cases. A marriage should be legally terminated when its emotional underpinnings no longer exist, not when the state or the parties predict that those underpinnings will—or should—have dissolved. A state-imposed marital contract of arbitrary duration provides no rational alternative to antiquated divorce laws.

B. Registration Divorce

Registration divorce, or "divorce on demand," which includes both unilateral and consensual dissolution, is regarded as the most radical of possible divorce reforms. Although a registration divorce system may make provision for the separate judicial or administrative determination of matters collateral to the divorce (and indeed must do so to avoid inequity), its central concept is that the divorce itself will be granted if one or both of the parties formally requests it. The

77 The force of these objections may be undermined by the language of another marriage bill introduced in 1972, (1972) H. No. 42 (Ms. Lee). Although substantially duplicating the language of the 1971 proposal and suffering from some of the same ambiguity (note 76 supra), the 1972 bill makes clear that although Maryland marriages may be three-year contract marriages, they are not required to be. (1972) H. No. 42, § 31A(b). In other words, the three-year marriage would be optional rather than mandatory.

78 Indeed, it may be that contractual concepts are inapplicable in the area of divorce. Concepts of duress, waiver, breach, and damages, for example, would necessarily assume new meanings if removed from a commercial setting and applied to the subtle, emotional problems of marital dissolution.

79 A detailed treatment of this system is found in Goldstein & Gitter, supra note 26.


Proponents of registration divorce contend that it would only reflect in law what occurs in reality, since most divorce actions are uncontested. See generally Goldstein & Gitter, supra note 26, at 80; see also Foster, supra note 14, at 118. This assertion is perhaps misleading. An uncontested divorce may indicate that both parties in fact desire to terminate the marriage. However, it may also be the result of prolonged bitter negotiations in which a reluctant partner threatens to contest the action in order to extort a favorable financial settlement. The adjudicatory tenor of divorce proceedings encourages such "bargaining." In other words, the prevalence of uncontested divorce actions does not necessarily mean that one party customarily accedes to the other's wishes or that registration divorces would duplicate present reality for the reluctant spouse.

81 The concept of a "divisible divorce," in which matters such as alimony, child support, and property settlement are determined independently of the divorce proceeding, is not novel. See, e.g., May v. Anderson, 345 U.S. 528 (1953); Estin v. Estin, 394 U.S. 541 (1948).
system thus reserves no adjudicatory role for the state; the state performs a mere clerical function, formalizing the death of a marriage rather than deciding whether or when to permit it. Registration divorce has so far failed to obtain the serious consideration of either commentators or lawmakers, yet, considering the present status of divorce reform and social mores in this country, it is emerging as a defensible, if not yet politically acceptable, divorce reform alternative.

The criticisms of a "divorce on demand" system stress its potentially harmful effects both on the marital partners and society. Any attempt at divorce reform, however, is invariably countered by arguments that the removal of legal barriers to dissolution will necessarily increase the incidence of divorce, even when both parties consent, registration divorce is anathema to most reformers. The Archbishop of Canterbury's divorce reform group stated that the "breakdown" system which it proposed "would not involve 'divorce by consent' in the sense of divorce granted automatically on proof that the parties agree in wanting it." 

There is considerable justification for the view that the availability of divorce by consent would tempt married couples to magnify temporary disagreement, discomfort or other difficulties into basic failure. There is much experience to show that patience, continuous effort and growing maturity can remedy many situations which, in the agony of the moment, appear beyond repair.

The traumatic effect of divorce on children as contrasted to the negative effects of continual marital discord has been examined extensively. See generally Burchinal, Characteristics of Adolescents from Unbroken, Broken, and Reconstituted Families, 26 J. Marriage & Family 44 (1964); Nye, Child Adjustment in Broken and Unhappy Unbroken Homes, 19 Marriage & Family Living 356 (1957).

For example, approximately 30% of those who file divorce petitions withdraw them before the divorce becomes final. Foster, Procrustes and the Couch, 2 J. Family L. 85, 91 (1962). Under a registration system, however, there would be no opportunity for reflection and withdrawal. But cf. Irvine, Report of the Mortimer Group on Divorce Law, 30 Modern L. Rev. 72, 73 (1967):
tion, discourage alternate and more constructive methods for solving marital problems, and generally weaken the marital bond and cheapen the status of being married. Speculation about the social effects of divorce reform seems as inconclusive as it is endless.

The faith of the reformer, however, rests on a series of simple premises. (1) The viability of marital relationship and the possibility of reconciliation can most validly and least offensively be explored and determined by the parties themselves. (2) The majority of those who marry intend, at least initially, that the relationship will be "for life." This intention is not likely to be altered by divorce reform. Couples today are certainly aware that divorce is available, but only rarely do they consider the specifics of divorce law until after an intention to dissolve the marital bond has been solidly embraced. (3) Since the preservation of unsuccessful marriages can have little beneficial effect on the parties, their children, or society in general, social interests are in fact injured rather than served by divorce restrictions. (4) Whatever the undesirable changes in individual behavior that may be encouraged by liberalized divorce laws, they must be measured against

broken homes has risen markedly over the years. A question that cries out for inquiry is whether the availability of a particular divorce remedy is ever the cause of the breakdown of a marriage, or no more than the means of release from a marriage that has broken down.

A registration divorce system admittedly might facilitate one partner's efforts to intimidate or dominate the other, or to mold the marriage to his own desires by constantly threatening divorce. On the other hand, the present fault system clearly encourages one partner to intimidate the other by threatening to contest a divorce. Psychological intimidation is thus a threat in both systems and to some degree unavoidable in any dependency relationship such as marriage.

"If it is argued that if divorce were made easier there would be much less incentive to overcome such difficulties as arise in most married lives." MacKenna, supra note 65, at 133. For a criticism of this view, see Note, supra note 26, at 625.

Conciliation procedures, such as those established in Iowa (IOWA CODE ANN. § 598.16 (Supp. 1971)), allow the court to require the parties who wish a divorce to attend counseling sessions to attempt resolution of their differences. The value of such conciliation services is debatable. Compare Seidelson, Systematic Marriage Investigation and Counseling in Divorce Cases: Some Reflections on Its Constitutional Propriety and General Desirability, 36 GEO. WASH. L. REV. 60, 89-94 (1967), with Foster, Conciliation and Counseling in the Courts in Family Law Cases, 41 N.Y.U.L. REV. 353, 381 (1966).

"Fairly easy availability of divorce has become part of the consciousness of the people." Bodenheimer, supra note 26, at 187.

See generally Note, supra note 26, 1970 LAW & SOCIAL ORDER at 624-25.

One British sociologist questions what effect, if any, divorce law has on individual behavior: "In the areas of sexual and familial life it is reasonable to assume that the law has far less effect on behaviour than lawyers appear to think." MacKenna, supra note 65, at 131, quoting PUTTING ASUNDER app. F, ¶ 10 (statement of Prof. Donald MacRae, University of London). See W. FRIEDMANN, supra note 4, at 225, where the author states that there is not "the slightest evidence in the social or economic moral state of con-
the benefits of eliminating the evils of the current divorce system and against the salutary effect of closing the gap between legal theory and social practice in contemporary divorces.

These tenets, to varying degrees, constitute the rationale of all modern divorce reform. Logic, however, compels a more drastic re-structuring than has actually been implemented in recent reforms. Registration divorce seems to achieve the reformer's goals while avoiding the pitfalls which characterize existing reforms. Both incompatibility and breakdown statutes involve substantial problems. In practice, increased judicial discretion may lead to increased state interference in the divorce process. Yet narrowly defined criteria for divorce, as in the fault system and separation statutes, overlook the uniqueness of each marital relationship and inevitably lead to parties tailoring circumstances to fit legislatively or judicially defined criteria.

The volitional element in registration divorce, however, is regarded by many as the system's fatal flaw. "Divorce by consent," as well as the more radical concept of unilateral divorce by registration, has traditionally been strongly condemned in domestic relations law. In practice, however, consensual divorces are not prevented temporary Western society to assume that the maintenance of a strict law would lead to a change in social facts. See also Irvine, supra note 85.

91 "The law of divorce has . . . become a mockery throughout the modern Western world." W. FRIEDMANN, supra note 4, at 223. See also notes 25-34 and accompanying text supra.

92 See notes 14 & 17 supra.

93 See notes 35-40 & 54-67 and accompanying text supra.

94 See notes 10-14 and accompanying text supra.

95 The feared situation, perhaps atypical, involves an aging, financially dependent wife of many years powerless to prevent her husband (usually adulterous) from obtaining a divorce. Yet the wife's situation may not be one deserving sympathy. To a degree, emotional injury is an inevitable risk in any personal relationship. In addition, a unilateral volitional divorce is not really "unfair" to the unconsenting spouse. If one marital partner makes the considered decision that the relationship should be terminated perhaps it may properly be said that the marital relationship has broken down. There seems no inequity in depriving the wife of a right to continue legal formalities as long as she has collateral recourse to retain the substantive incidents of the relationship, such as financial support, after the relationship per se has been terminated. See note 81 supra.

The law cannot force a husband to cohabit with his wife; a wife's loss in a unilateral divorce system would be only of her legal status, not necessarily of the emotional and physical incidents of that status, and likewise not necessarily of the financial incidents of that status if collateral procedures are available. Admittedly the loss of legal status may, in some cases, also be an emotional loss, but the husband also suffers an emotional burden of sorts when a marriage he desires dissolved is preserved.

In addition, there is an inconsistency between this nearly universal aversion to unilateral divorce and the substantial number of separation statutes which in effect allow delayed unilateral dissolution.

96 See notes 82-86 and accompanying text supra.
when the grounds for marital dissolution are rigidly prescribed by law; rather, such divorces merely bear a higher price tag and sometimes require minimal ingenuity on the part of the spouses in fabricating "grounds." Moreover, modern no-fault living apart statutes make the consent of the parties—to live apart for the prescribed time to satisfy the statutory requirements for divorce—a valid basis for a divorce decree.  

Building on the living apart concept, it is but a short step, in theory at least, to substitute either the unilateral or consensual act of filing for divorce for that of living apart for a specified time as sufficient evidence of marital breakdown to justify divorce. The uniqueness of each marriage would be recognized, the decisions of the parties with regard to the viability of their relationship respected, and the investigatory problems involved in the administration of any system based on specific criteria, narrowly or broadly defined, obviated.

CONCLUSION

Domestic relations constitutes one of the most important and complex legal areas, involving as it does both legal rights and duties and strong personal interests and emotions. Divorce reform must seek to consider fully the emotional complexities of the marital relationship. Admittedly the objectionable features of present divorce law are not subject to easy remedy. Registration divorce, even if not currently politically acceptable, may constitute an enlightened and rational accommodation of state authority and individual marital freedom. The groundwork for its eventual implementation has, in part, been laid, since some existing reforms reflect an underlying theory that is perfectly compatible with a registration divorce system. Only actual experimentation can prove—or disprove—the claims of its detractors.

Donna J. Zenor

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97 See note 41 and accompanying text supra.

98 The relationship between living apart statutes and registration divorce schemes becomes more obvious when, as was proposed by Goldstein and Gitter (Goldstein & Gitter, supra note 26), a waiting period aimed at preventing precipitous divorce decisions is imposed between the filing of a divorce petition and the issuance of the divorce decree. Goldstein and Gitter propose a six-month waiting period with a reduction to three months if the parties agree on ancillary matters such as alimony, property settlement, and child custody. Id. at 90. Such a period admittedly might promote deliberation and reconsideration on the part of the spouses. However, to a degree the imposition of a waiting period is contrary to the basic assumptions of the registration divorce concept. Furthermore, the inequities of "migratory divorce" may be overcome only if the waiting period is no longer than the shortest state residency requirement for obtaining a divorce.