No Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary

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   D. "Dissolution of marriage shall mean the termination of a marriage by decree of a court of competent jurisdiction upon a finding that the marriage is irretrievably broken."
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      3. Does No Fault Divorce Permit Divorce by Consent?
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      5. Are More Objective Standards for Irretrievable Breakdown Needed?

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*** Assistant Professor, Department of Psychology, Saginaw Valley State College. B.A. 1967, San Luis Rey College; M.A. 1971, San Jose State College; Ph.D. 1976, University of Nebraska.
E. "No decree shall be entered... unless the court finds that every reasonable effort to effect reconciliation has been made."

1. Waiting Periods
2. Reconciliation Attempts

F. "It is the intent of the legislature that a spouse who has been handicapped socially or economically by his or her contribution to a marriage shall be compensated for such contribution at the termination of the marriage...

VII. CONCLUSION

Purpose (1) It is the intent of the legislature to emphasize the present and future needs of the parties to actions affecting marriage and of their children, if any; to move away from assigning blame for a marriage failure; and to promote the settlement of financial and custodial issues in a way which will meet the real needs of all concerned persons as nearly as possible.

(4) This act is not intended to make a divorce, annulment or legal separation easier to obtain.

—1977 Wisconsin Assembly Bill 100

I. INTRODUCTION

With the addition of Wisconsin in February, 1978, there are now seventeen American jurisdictions that permit a marriage to be dissolved exclusively because the marriage has become irretrievably broken, because irreconcilable differences have caused the irremedial breakdown of the marriage, or because the legitimate objects of matrimony have been destroyed and there remains no reasonable likelihood that the marriage can be preserved. Fifteen other states have added similar "no fault" grounds to pre-existing fault bases for divorce.

When, in 1972, the Nebraska Legislature passed L.B. 820, "an act . . . to provide procedures for the dissolution of marriage," Nebraska became one of the first states to adopt an exclusively no fault divorce proceeding.Previously a divorce was ostensibly available only to a party who could prove that his or her spouse had committed acts ranging from adultery to extreme mental cruelty, provided that the complaining spouse had not himself or herself committed adultery or extreme mental cruelty.


9. Divorce; grounds. A divorce from the bonds of matrimony may be decreed by the district court of the county where the parties, or one of them, reside, on application by the aggrieved party, (1) when adultery has been committed by any husband or wife; (2) when one of the parties was physically incompetent at the time of the marriage; (3) when one of the parties has been sentenced to imprisonment in any prison, jail or house of correction for three years or more; and no pardon granted, after a divorce for that cause, shall restore such party to his or her conjugal rights; (4) when either party shall willfully abandon the other without just cause for the term of two years; (5) when the husband or wife shall have become an habitual drunkard; (6) when either party shall be sentenced to imprisonment for life, and no pardon shall affect a decree of divorce for that cause rendered, or (7) when one of the parties is incurably insane and has been legally confined in a hospital or asylum for the insane for a period of at least five years immediately preceding the date of the filing of the petition for divorce, and this ground shall be available where the insanity existed wholly or partially before the passage of this act as well as where it accrues entirely subsequent thereto.


Divorce; grounds, extreme cruelty. A divorce from the bonds of matrimony, or from bed and board, may be decreed for the cause of extreme cruelty, whether practiced by using personal violence, or by other means; or for utter desertion of either party for the term of two years. A like divorce may be decreed, on complaint of the wife, when the husband, being of sufficient ability to provide suitable maintenance for her, shall grossly or wantonly and cruelly refuse or neglect so to do.


The previous law was not entirely fault based. A divorce could be granted if one of the parties was incurably insane, a fact which had to be attested to by three court-appointed physicians. Act of April 12, 1945, ch. 101, § 3, 1945 Neb. Laws 329 (most recently codified at Neb. Rev. Stat. § 42-302.01 (Reissue 1968)).
self engaged in similar misconduct. Under the new law a marriage dissolution would be attainable by anyone who could show that his or her marriage was irretrievably broken and that "every reasonable effort to effect reconciliation ha[d] been made."

In repealing its previous law, Nebraska was rejecting the traditional conceptualization of marriage as a permanent, lifelong relationship, dissolvable only when morally justified, i.e., only in extraordinary situations in which a person needed protection from the wrongdoings of his or her spouse. In its stead the state embraced the view that

> ... when a personal relationship with another under the institution of marriage has deteriorated to the point that the parties can no longer live together and provide our society with the sort of stable socio-economic unit on which this country so depends, it is time to . . . dissolve it without acrimony, moral judgments or benedictions.

While this new approach has been warmly praised for dealing effectively with the realities of the matrimonial experience, it is not without its critics. Specifically Nebraska's no fault divorce law has been accused of being "an enticement to divorce, an encouragement to the destruction of marriage as both a personal commitment and a civil institution, and a provision for rewarding those who injure others."

Aided by an analysis of Nebraska divorce statistics over an eight-year span and a survey of the state's district court judges,
this article will examine Nebraska’s first four and a half years of no fault divorce. In particular, it will explore, in the words of Wisconsin Assembly Bill 100, whether the Nebraska legislation, in moving away from assigning blame for a marriage failure, has succeeded in emphasizing the present and future needs of the parties and their children while not making divorce easier to obtain.

II. THE DIVORCE RATE

Raw statistics have provided the critics of no fault divorce with impressive support for their claim that modern divorce reforms have made marriages far easier to dissolve and concomitantly caused the divorce rate to skyrocket. In the United States, the rate of divorces and annulments has soared from 3.5 divorces per thousand population in 1970, when California’s no fault law became effective, to 5.1 per thousand in 1977, an increase of more than 45%.

*TABLE I*

Rates of Divorce per Thousand Total Population: Selected Countries, 1976

<table>
<thead>
<tr>
<th>Country</th>
<th>Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>5.0</td>
</tr>
<tr>
<td>Australia</td>
<td>4.3</td>
</tr>
<tr>
<td>USSR</td>
<td>3.4</td>
</tr>
<tr>
<td>Sweden</td>
<td>2.7</td>
</tr>
<tr>
<td>Denmark</td>
<td>2.5</td>
</tr>
<tr>
<td>Canada (1975)</td>
<td>2.2</td>
</tr>
<tr>
<td>Finland</td>
<td>2.1</td>
</tr>
<tr>
<td>Egypt</td>
<td>2.0</td>
</tr>
</tbody>
</table>


than forty-five percent. In California the number of divorces jumped forty-six percent in the first year under that state's new law. The increase in divorces in Nebraska, while not as swift as in California, has been equally pronounced. In the six years since 1971, the last full year under the fault system, the number of divorces in Nebraska has increased by more than fifty-three percent, while the divorce rate per thousand estimated population has increased fifty percent. In England, too, a conversion to a system which ostensibly allows a marriage to be dissolved when it has broken down irretrievably has been accompanied by a rapid increase in the number of divorce decrees. During the first two years that the Divorce Reform Act of 1969 was in operation, the number of English divorces more than doubled.

As dramatic as these figures are, other data should be considered before concluding that replacing the concept of fault with that of irretrievable breakdown is the sole or even the primary reason for the current high incidence of divorce. Nationally the recent

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20. The increase in absolute numbers of divorces and annulments from 1970 to 1977 was slightly less than 55%. Data extrapolated from STATISTICAL ABSTRACT 1977, supra note 19, tbl. 74, at 55, and MONTHLY VITAL STATISTICS REPORT, No. 12, supra note 19, at 12.


22. Data extrapolated from BUREAU OF VITAL STATISTICS, NEB. DEP'T OF HEALTH, STATISTICAL REPORT 1977, at 2 [hereinafter cited as NEB. STATISTICAL REPORT 1977]. There were 3,946 divorces in Nebraska in 1971 and 6,047 in 1977. Id.

23. Data extrapolated from id. The divorce rate was 2.6 per 1000 estimated population in 1971 and 3.8 per 1000 estimated population in 1977. Id.


25. What is not disputable is that, until very recently, the divorce rate has been climbing at what some consider an alarming rate. In addition to the data presented at notes 18-24 & accompanying text supra, the following should be noted.

In 1973 when only 12% of the women in their late sixties or early seventies had ended a marriage in divorce, it was estimated that 18-21% of the women then in their forties or early fifties and 25-29% of those in their late twenties or early thirties were likely to be divorced sometime in their lives. Glick & Norton, Perspectives on the Recent Upturn in Divorce and Remarriage, 10 DEMOGRAPHY 301, 308 (1973). In 1977 these projections were revised upward to estimate that approximately 40% of all marriages among women then in their late twenties could well end in divorce. Glick & Norton, supra note 18, at 18. The number of children under 18 involved in divorce doubled between 1960 and 1970 even though the birthrate had declined. W. JOHNSON, MARITAL DISSOLUTION AND THE ADOPTION OF NO-FAULT LEGISLATION 28 (1975).
upswing in divorce began in the late 1960's, more than three years before California's initial no fault law.\textsuperscript{26} Similarly, in Nebraska, in recent months, however, the divorce rate appears to be leveling off. In the 26 months through May, 1978 (the latest data available at this writing), the 12-month divorce rate has changed very little. 27 U.S. DEP'T OF HEALTH, EDUCATION & WELFARE, MONTHLY VITAL STATISTICS REPORT, No. 5, at 3 (Aug. 11, 1978). In California the divorce rate actually has dropped, falling to 6 per thousand in 1977 from 6.2 in 1976. Divorce Rate Is Leveling Off and May Even Fall, Population Experts Say; Reasons Are Unclear, Wall St. J., June 27, 1978, at 40, col. 1. One reason for this might be the drop in the marriage rate, which has fallen 10\% from its 1972 peak. Thus there are fewer vulnerable young marriages potentially subject to dissolution. Another explanation is that people are more aware of the expense, bitterness, and depression that often accompany divorce and are proceeding more cautiously. \textit{Id.}

\textsuperscript{26} "The divorce rate more than tripled between the Civil War and 1910, when it reached about one per thousand population. Then it rose to around 2.2 by 1960, stayed more or less level until 1967, and now has increased sharply again, attaining a level of 4.0 in 1972." C. FOOTE, R. LEVY & F. SANDER, CASES AND MATERIALS ON FAMILY LAW 1074 (2d ed. 1976).

Data regarding divorces in the United States since 1960 are collected in Table II.

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Year & Number & Percent change in number & Rate Per 1000 total population & Percent change in rate \\
\hline
1977 & 1,097,000 & +1.9 & 5.1 & +2.0 \\
1976 & 1,077,000 & +5.0 & 5.0 & +4.2 \\
1975 & 1,028,000 & +5.0 & 4.8 & +4.3 \\
1974 & 977,000 & +6.2 & 4.6 & +4.5 \\
1973 & 915,000 & +6.3 & 4.4 & +7.3 \\
1972 & 845,000 & +6.3 & 4.1 & +10.8 \\
1971 & 773,000 & +9.2 & 3.7 & +5.7 \\
1970 & 708,000 & +10.8 & 3.5 & +9.4 \\
1969 & 639,000 & +9.4 & 3.2 & +10.3 \\
1968 & 584,000 & +11.7 & 2.9 & +11.5 \\
1967 & 523,000 & +4.8 & 2.6 & +4.0 \\
1966 & 499,000 & +4.2 & 2.5 & — \\
1965 & 479,000 & +6.4 & 2.5 & +4.2 \\
1964 & 450,000 & +5.1 & 2.4 & +4.3 \\
1963 & 428,000 & +3.6 & 2.3 & +4.5 \\
1962 & 413,000 & +0.2 & 2.2 & — \\
1961 & 414,000 & +5.3 & 2.3 & +4.5 \\
1960 & 393,000 & — & 2.2 & — \\
\hline
\end{tabular}
\caption{Estimated Number of Divorces and Annulments and Rates With Percent Changes From Preceding Year: United States 1960-1977}
\end{table}


Part of the increase in 1967 and 1968 probably can be attributed to New York's adding, as of September 1, 1967, cruelty, abandonment, and separation grounds to the law which previously had made adultery the sole ground for
the divorce rate started to climb significantly well before the 1972 no fault legislation was enacted and has continued to rise steadily ever since.27 Furthermore, the increase in divorce has not been a phenomenon restricted solely to states that have adopted a breakdown standard. For instance, from 1970 to 1974 divorces climbed at a greater rate in Arkansas, Mississippi, Rhode Island, and South Dakota, none of which made major changes in their divorce statutes, than in Nebraska, which adopted the irretrievable breakdown divorce. N.Y. Dom. Rel. Law § 170 (McKinney 1977). However, excluding New York entirely, the number of divorces and annulments still increased by more than 10% in 1968. Data extrapolated from U.S. Vital Statistics 1970, supra note 21, tbls. 2-1 & 2-2, at 2-5 & 2-6.

27.

### TABLE III

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
<th>Percent change</th>
<th>Rate per 1000</th>
<th>Percent change in rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>6,047</td>
<td>+4.5</td>
<td>3.9</td>
<td>+5.4</td>
</tr>
<tr>
<td>1976</td>
<td>5,788</td>
<td>+5.2</td>
<td>3.7</td>
<td>+2.8</td>
</tr>
<tr>
<td>1975</td>
<td>5,504</td>
<td>+7.6</td>
<td>3.6</td>
<td>+9.1</td>
</tr>
<tr>
<td>1974</td>
<td>5,114</td>
<td>+5.5</td>
<td>3.3</td>
<td>+6.5</td>
</tr>
<tr>
<td>1973</td>
<td>4,849</td>
<td>+12.0</td>
<td>3.1</td>
<td>+10.7</td>
</tr>
<tr>
<td>1972</td>
<td>4,326</td>
<td>+9.6</td>
<td>2.8</td>
<td>+7.7</td>
</tr>
<tr>
<td>1971</td>
<td>3,946</td>
<td>+8.7</td>
<td>2.6</td>
<td>+8.3</td>
</tr>
<tr>
<td>1970</td>
<td>3,629</td>
<td>+13.6</td>
<td>2.4</td>
<td>+9.1</td>
</tr>
<tr>
<td>1969</td>
<td>3,184</td>
<td>+8.6</td>
<td>2.2</td>
<td>+10.0</td>
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<tr>
<td>1968</td>
<td>2,940</td>
<td>+4.0</td>
<td>2.0</td>
<td>—</td>
</tr>
<tr>
<td>1967</td>
<td>2,825</td>
<td>+11.6</td>
<td>2.0</td>
<td>+17.6</td>
</tr>
<tr>
<td>1966</td>
<td>2,531</td>
<td>+3.4</td>
<td>1.7</td>
<td>—</td>
</tr>
<tr>
<td>1965</td>
<td>2,448</td>
<td>—</td>
<td>1.7</td>
<td>—</td>
</tr>
<tr>
<td>1964</td>
<td>2,455</td>
<td>—</td>
<td>1.7</td>
<td>—</td>
</tr>
</tbody>
</table>


Consistent with the national trend, see note 25 supra, figures from Lancaster County (Lincoln) indicate a leveling off in the divorce rate after 1976, as Table IV shows.

### TABLE IV

<table>
<thead>
<tr>
<th>Year</th>
<th>Number</th>
<th>Year</th>
<th>Number</th>
</tr>
</thead>
<tbody>
<tr>
<td>1978</td>
<td>451</td>
<td>1973</td>
<td>424</td>
</tr>
<tr>
<td>1977</td>
<td>479</td>
<td>1972</td>
<td>497</td>
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<tr>
<td>1976</td>
<td>491</td>
<td>1971</td>
<td>397</td>
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<td>1975</td>
<td>418</td>
<td>1970</td>
<td>297</td>
</tr>
<tr>
<td>1974</td>
<td>341</td>
<td></td>
<td>300</td>
</tr>
</tbody>
</table>

Data obtained from Clerk of Court, Third Judicial District, Lincoln, Nebraska.
standard in 1972.28

Taken as a whole these statistics are inconclusive, neither supporting nor refuting the hypothesis that removing fault as a criterion for the awarding of a divorce is a major factor in the mounting divorce rate. Whether the hypothesis is true, as no fault's critics maintain,29 or whether the increase is better attributable to other factors,30 as others contend,31 is a question in need of systematic assessment.

Before undertaking such an assessment by more closely examining Nebraska divorce statistics, one important caveat should be

<table>
<thead>
<tr>
<th>State</th>
<th>Year</th>
<th>Number</th>
<th>Percent change in number</th>
<th>Rate per 1000 total population</th>
<th>Percent change in rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nebraska</td>
<td>1974</td>
<td>3,700</td>
<td>+41</td>
<td>3.4</td>
<td>+36</td>
</tr>
<tr>
<td></td>
<td>1970</td>
<td>5,200</td>
<td></td>
<td>2.5</td>
<td></td>
</tr>
<tr>
<td>Arkansas</td>
<td>1974</td>
<td>15,800</td>
<td>+70</td>
<td>7.7</td>
<td>+60</td>
</tr>
<tr>
<td></td>
<td>1970</td>
<td>9,300</td>
<td></td>
<td>4.8</td>
<td></td>
</tr>
<tr>
<td>Mississippi</td>
<td>1974</td>
<td>11,900</td>
<td>+45</td>
<td>5.1</td>
<td>+38</td>
</tr>
<tr>
<td></td>
<td>1970</td>
<td>8,200</td>
<td></td>
<td>3.7</td>
<td></td>
</tr>
<tr>
<td>Rhode Island</td>
<td>1974</td>
<td>2,500</td>
<td>+47</td>
<td>2.7</td>
<td>+50</td>
</tr>
<tr>
<td></td>
<td>1970</td>
<td>1,700</td>
<td></td>
<td>1.8</td>
<td></td>
</tr>
<tr>
<td>South Dakota</td>
<td>1974</td>
<td>2,000</td>
<td>+43</td>
<td>3.0</td>
<td>+50</td>
</tr>
<tr>
<td></td>
<td>1970</td>
<td>1,400</td>
<td></td>
<td>2.0</td>
<td></td>
</tr>
</tbody>
</table>

Data extrapolated from STATISTICAL ABSTRACT 1977, supra note 19, tbl. 113, at 77.


29. "It surely is impossible to argue that a divorce law based on consent, or 'marriage breakdown,' or voluntary separation, would do other than increase the number of divorces." Turner, Retreat from "Fault": An English Lawyer's View, 46 Neb. L. Rev. 64, 75 (1967). See also Wheeler, Book Review, 71 Mich. L. Rev. 607, 611 (1973).

30. For a discussion of what these other factors might be, see notes 90-110 & accompanying text infra.

31. Judge Lawrence Krell of Nebraska's Fourth Judicial District, which sits in Omaha, thinks "the rise here is merely part of a national trend." Divorce Rate Spurts; Is No-Fault at Fault?, Omaha World-Herald, Feb. 17, 1974, § B, at 1, col. 8. In the opinion of University of Nebraska at Omaha sociology professor
noted. The data cited above, as well as the interrupted time series analysis presented below, concern divorce. They do not purport to measure family stability. It is the breakdown of a marriage which actually is the "social evil" that is so often and passionately denounced for splitting homes and imperiling children. Divorce is merely the law's recognition that the marriage has broken down, and the law's restoration to the parties of the right to enter into new socially respectable and legally effective marital relationships.

While the law obviously can have an enormous effect on the incidence of divorce—a state could abolish divorce, then the divorce rate would be zero—its effects on marriage stability are harder to gauge and are considered by many to be marginal at most. An

Merlin Hofstetter the increase in the divorce rate does not have "much to do with no-fault. It's influenced by a multitude of different factors." Id.

32. See notes 18-28 & accompanying text supra.

33. See notes 42-76 & accompanying text infra.

34. Whether every marriage is broken in fact when a couple or one of the partners decides to ask for a divorce depends to a large degree on how one defines breakdown. From the subjective viewpoint of one or both of the spouses, breakdown undoubtedly has occurred, except in the freak case in which a divorce is sought for tax or other financial advantages. See, e.g., Man Divorces His Sick Wife So Medicaid Will Pay Bills, Lincoln J., Feb. 21, 1973, at 3, col. 1. Viewed more objectively the marriage really might not be broken and the subsequent divorce might be deeply regretted one day. See Bodenheimer, Book Review, 7 Fam. L.Q. 112, 120 (1973).


36. Id. at 262.

37. "It is . . . apparent that the legal limitations in the possibilities to dissolve a marriage have no more than marginal position effects on family stability, while on the other hand it is clear that they cause significant difficulties with divorce." Sage, Dissolution of the Family Under Swedish Law, 9 Fam. L.Q. 375, 379 n.21 (1975) (quoting 41 Swedish Government Official Reports 105-06 (1972)).

A rather dramatic, although doubtlessly unauthentic, demonstration of the divergence between divorce and marital breakdown and the inability of the law to control the latter appeared in the June 11, 1825, issue of the Niles' Register, quoted in N. Blake, The Road to Reno 80-81 (1962):

The following inscription is written in large characters over the principal gate in the city of Agra in Hindostan: "In the first year of the reign of King Julief, two thousand married couples were separated, by the magistrates, with their own consent. The emperor was so indignant, on learning these particulars, that he abolished the privilege of divorce. In the course of the following year, the number of marriages in Agra was less than before by three thousand; the number of adulteries was greater by seven thousand; three hundred women were burned alive for poisoning their husbands; seventy-five men were burned for the murder of their wives; and the quantity of furniture broken and destroyed, in the interior of private families, amounted to the value of three million of rupees. The emperor re-established the privilege of divorce."

Less homicidal, but equally licentious, were the citizens of South Carolina in those years prior to 1949 when divorces were unobtainable under the state constitution. Members of the South Carolina bar alleged that there were more people living in adultery or practicing bigamy in South Carolina than in
increase in the frequency of divorce which might accompany a change in a state's marriage dissolution law could be a reflection of nothing more than the state legally recognizing and sanctioning marital breakdown that always had existed, but of which the state previously had refused to take cognizance.

Those for whom divorce or annulment was unobtainable for either legal or economic reasons could continue to live together in conditions varying from mere disharmony to violent hostility, perhaps clandestinely looking for love and affection from other sources; they could live apart divorced in all but name, or one could desert the other, disappearing to start a new life elsewhere.40

38. Marriages which end in annulment represent marital breakdowns which might not be reflected in divorce statistics. Despite their historical and theoretical differences, the majority of annulments are probably merely substitutes for divorces. Where the divorce law is particularly unattractive annulments may be proportionally high. In 1958, two states accounted for 73% of all reported annulments. In California, where remarriage was unavailable for one year following a divorce decree, annulments represented almost 12% of all marital dissolutions. In New York, where divorces could only be obtained for adultery and where stringent remarriage prohibitions were imposed on a guilty party after a divorce, annulments represented almost 40% of total dissolutions. C. Foote, R. Levy & F. Sander, supra note 26, at 572-73.

In California annulments were reduced from 10.1% of that state's total marital dissolutions in 1969 to 5% in 1970, after its divorce reform which, in addition to abolishing fault as grounds for divorce, reduced the interlocutory period to six months. U.S. Vital Statistics 1970, supra note 21, tbl. 2-3, at 2-7. After New York added fault and separation grounds to its divorce law, effective September 1, 1968, annulments decreased from 35.4% of its total marital dissolutions in 1967 to 21.8% in 1968, 10.3% in 1969, and 8% in 1970. Id.

39. The sheer cost of a divorce can be an enormous impediment to a legal dissolution for people of limited means. A partial explanation for the current increase in divorce can be found in the more widespread provision of free legal services for the poor, as well as the Supreme Court's decision in Boddie v. Connecticut, 401 U.S. 371 (1971), that court fees and process costs cannot be allowed to prevent those unable to afford them from dissolving their marriages.

England's high divorce rate has been attributed in part to the low cost at which many forms of dissolution can be obtained in that country. Hongkong Standard, supra note 24. For instance the mail-in divorce of Princess Margaret and the Earl of Snowden cost only $29. Marr. & Divorce Today, June 5, 1978, at 4. Iowa's no fault law and its attendant increase in divorce was accompanied by the establishment of legal aid societies in the state's major cities. Sass, The Iowa No-Fault Dissolution of Marriage Law in Action, 18 S.D. L. Rev. 629, 639 (1973).

The real economic burden in obtaining a divorce now might be on those of the lower middle class who cannot meet legal service agencies' income guidelines. However, divorce is an area which seems particularly well suited to price competition in the wake of the Supreme Court's lifting of bans on attorney advertising in Bates v. State Bar of Arizona, 433 U.S. 350 (1977).

40. Desertion, often called "poor man's divorce," is an extra-legal remedy widely invoked by those on the lower end of the economic ladder, although statistics
If financially able, one or both spouses could go to a state with less restrictive divorce laws and obtain a dissolution which, it would be hoped, would gain either real or apparent legal recognition in their home state. While none of these cases would appear in the local divorce statistics, neither do they represent the kind of stable families one might hope to preserve.

III. AN INTERRUPTED TIME SERIES ANALYSIS OF NEBRASKA DIVORCES

The 1972 change in Nebraska's divorce law, from a system em-

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In 1976 the number of "separated" persons in the United States was only about half as large as the number of divorced persons (3.8 million versus 7.2 million) . . . . During recent years, the number of divorced persons has increased more rapidly than the number of separated persons. This suggests that more of those with serious marital conflicts are resolving them through a divorce decree which they can now afford to obtain—or is more easily obtainable—and which frees them for possible remarriage to a (hopefully) more suitable partner.

Glick & Norton, supra note 18, at 15.

41. Max Rheinstein's "Gresham's Law of Divorce" states that whenever it is possible for divorce seekers to obtain divorces with some difficulty in one place and with greater ease or speed in another, cases tend to accumulate in the place of easy, and to dry up in the place of hard divorce. This law of experience can, of course, operate only where the effect of the divorce, i.e., the divorce seeker's restoration to the freedom of the marriage market, takes place in the hard divorce district even though the divorce was granted in the easy district.


Nevada, Mexico, and other "divorce mills" have been only too willing to let this "law" work to their economic advantage. They have been aided and abetted by courts frustrated by restrictive divorce laws and unwilling to render illegal those relationships which have sprung up in reliance on migratory divorces. Accordingly, courts have distorted jurisdictional notions to the point that "settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill." Williams v. North Carolina, 317 U.S. 287, 316 (1942) (Jackson, J., dissenting). See also Williams v. North Carolina, 325 U.S. 226 (1945); Sherrer v. Sherrer, 334 U.S. 343 (1948); Rosenstiel v. Rosenstiel, 16 N.Y.2d 64, 209 N.E.2d 709, 262 N.Y.S.2d 86 (1965), cert. denied, 384 U.S. 971 (1966).

Part of the increase in the California divorce rate that accompanied its new dissolution law can be explained by couples opting to stay home and get California divorces instead of migratory ones. In 1970, the new law's first year, Nevada divorces decreased by more than 16%. Extrapolated from U.S. Vital Statistics 1970, supra note 21, tbl. 2-2, at 2-6.

42. For a more technical analysis examining the effect of Nebraska's no fault legislation through 1974, see Mazur-Hart & Berman, Changing From Fault to
ploying traditional fault concepts to one authorizing dissolutions when marriages are found to be irretrievably broken, provides an opportunity to test the hypothesis that the introduction of a no fault marriage dissolution scheme leads to an increase in divorce. The effects of law reform on human behavior are hard to assess. Where a political unit enacts legislation which is put into effect across the entire unit, no group is available as a control and the only base of comparison is the record of observations taken in the previous months and years. In such situations it has been recommended that an interrupted time series quasi-experimental design be used. Such a design was employed in the present research to test the effects of Nebraska’s no fault dissolution law on the frequency of divorce.

A. Subgroups

In addition to examining the state’s overall divorce rate, separate analyses were conducted on the rates of selected subgroups of Nebraska’s population in order to determine whether the change in the divorce law had a greater impact on some segments of society than on others. The subgroups selected, for the reasons described below, were (a) residents of urban counties and residents of rural counties; (b) husbands and wives under thirty years of age, between thirty and fifty years, and over fifty years of age; and (c) black couples and white couples.

Studies of divorce in Nebraska and elsewhere have concluded that the urban/rural differential is the single most important factor affecting the rate of divorce. The higher divorce rates in urban

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45. D. CAMPBELL & J. STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH 37-43 (1966). The term “time series analysis” refers to any analysis of multiple assessments of some unit (e.g., group, person, state, etc.) on some measure of interest (e.g., crime rates, gross national product, etc.). An “interrupted time series analysis” is a research design in which one tests the hypothesis that some sudden event has affected the measure which is being repeatedly assessed.


An urban county is one which contains either a city greater than 50,000 in population or the immediate suburbs of such a city. STATISTICAL ABSTRACT 1977, supra note 19, at 923. Two of Nebraska’s four urban counties—Douglas (with 5.0 divorces per 1000 population) and Lancaster (5.3)—were among those with the highest divorce rates in Nebraska in 1977, although Hall (5.5)
areas have been attributed, in part, to the lessening in importance of traditional values—a reduction which is directly related to urbanization. Thus it might be anticipated that rural people—more traditional and less vulnerable to the mercurial nature of modern society—would be wedded to the notion of the sanctity of marriage and hence less affected by changes in divorce procedures.

Typically, among marriage partners of approximately the same age, the lowest divorce rates are among couples between the ages of thirty and fifty years. The divorce rates for both older and younger couples normally are higher. One reason offered for this U-shaped distribution is that those in the middle age group, in addition to their greater economic stability, often have a number of minor children in their care. If it is true that the parties’ concern for their minor children is a significant factor in this group’s comparative reluctance to seek divorce, one would suspect that any effect the new law has on the divorce rate would be felt less by this age category. As for those couples over fifty years of age, there might well be many who over the years desired a divorce, but were unable or reluctant to secure one under the old law. To the extent that the no fault law removed these impediments, it can be anticipated that the divorce rate would increase for the over-fifty couples, at least initially.

One reason for adopting no fault divorce was to reduce the number of divorces by desertion, sometimes termed “poor man’s divorce.” Lawmakers expected that the no fault law would make

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47. Cannon & Gingles, Social Factors Related to Divorce Rates for Urban Counties in Nebraska, 21 RURAL SOC. 34 (1956).

A recent study concluded that the presence of a young child has a significant inhibiting influence on divorce, although the effect of additional young children and of older children (ages 6-17) was much weaker. Becker, Landes & Michael, An Economic Analysis of Marital Instability, 85 J. POLITICAL ECON. 1141, 1165-66 (1977). The cause-and-effect relationship was found to work both ways, with couples who feel that they are likely to divorce tending not to have children. Id. at 1170-72. But see H. Ross & I. SAWHILL, TIME OF TRANSITIONS 57 (1975) (not finding that “the presence of children has any significant effect on [marital] stability”).

49. See note 40 supra. Not all extralegal divorces were lacking in ceremony. Among rural blacks, the custom of jumping over a broom to sanctify a mar-
divorce simpler and perhaps less expensive.\textsuperscript{50} If the change to no-fault divorce had this effect, the new law should produce a proportionally greater increase in divorces among those with low incomes. Although the available records in Nebraska do not reveal the financial position of the parties, they do denote race, which national statistics indicate is highly correlated with socio-economic status.\textsuperscript{51} Thus, in order to get an indication of any differential effects the divorce reform law might have on the poor, the divorce rates for black and white couples were analyzed separately. Only couples in which both spouses were of the same race were used.

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\begin{table}[h]
\centering
\caption{Selected Characteristics by Race (Numbers in Thousands)}
\begin{tabular}{lccc}
\hline
Selected Characteristics & Total & White & Black \\
\hline
Employment (Persons 16 years & over—1977) & & & \\
Percent in civilian labor force & 62.3 & 62.6 & 59.7 \\
Percent unemployed & 7.0 & 6.2 & 13.9 \\
Income (1976) & & & \\
Median income of persons with income: & & & \\
Male, 14 years & over & $9426 & $9937 & $5983 \\
Female, 14 years & over & $3576 & $3606 & $3359 \\
Percent below poverty level & 11.8 & 9.1 & 24.7 \\
Family income (percent) & & & \\
Under $5000 & 10.3 & 8.4 & 26.1 \\
$5000 to $9999 & 19.6 & 18.7 & 27.3 \\
$10,000 to $14,999 & 20.2 & 20.4 & 18.8 \\
$15,000 & over & 49.8 & 62.5 & 27.7 \\
Median family income & $14,958 & $15,537 & $9242 \\
\hline
\end{tabular}
\end{table}

B. Method

The observations in these time series were the number of divorces per month over an eight-year period from January, 1969, through December, 1976. The interruption in the time series was July 6, 1972, the day Nebraska's no fault divorce law went into effect. As it was impossible to classify July, 1972, as either before or after the interruption, it was dropped from the series. In addition, an extremely high number of divorces was granted during June, 1972. Because such outliers lead to incorrect identification of statistical models, June, 1972, also was excluded from the series. The analyses in this study were composed of forty-one observations (months) before the interruption and fifty-three after it. The number of observations before and after intervention was, therefore, well beyond the recommended minimum of twenty-five.

The data for these time series were collected from official records, which are maintained by the Department of Health. At the time of a final divorce decree, the lawyers involved in the proceeding were to complete a Report of Divorce Form which was filed with the district court in which the divorce had taken place and was then sent to the Bureau of Vital Statistics.

Some prior studies of divorce have used a ratio of divorces to population size rather than raw frequencies of divorce. Such a ratio index is particularly useful in studies encompassing many years, during which the population may fluctuate greatly. Since this study encompasses only an eight-year span, during which the population size of Nebraska has been relatively stable, raw frequencies of divorce were used.

The study analyzed all the Nebraska divorce decrees granted between 1969 and 1976, inclusive. The total number of divorces for that eight-year period was 36,350. Because a change in record-keeping procedures can pose a threat to the internal validity of a study, it is important to note that a check on the record-keeping techniques at Nebraska's Bureau of Vital Statistics showed that

52. Interview with Gene Glass (Nov., 1976).
55. M. Rheinstein, supra note 35, at 299.
there were no significant changes during the years studied.\textsuperscript{59}

Another potential threat to the validity of this type of research is the possibility that some other influential event occurred at the same time as the change in the law. According to previous research, the two events most likely to produce dramatic shifts in the divorce rate are a sudden economic change and the termination of a major war.\textsuperscript{60} Various economic indicators for the state of Nebraska were inspected and none of them showed any dramatic changes around the time of the inception of no fault divorce.\textsuperscript{61} Although troops were returning from Vietnam, the withdrawal was a gradual process, conducted over several years, rather than an abrupt one. Thus, it appears that there are no critical events which could explain a sudden change in the frequency of divorce in mid-1972 except the change in the law.

C. Time Series Analysis

Special statistical procedures are required in order to analyze time series data because the data points are frequently correlated with each other. This dependency among observations violates some assumptions necessary for making accurate statements about the effects being studied. The goal of these statistical procedures is to identify the nature of the dependency and to correct for it. Despite the complexities, the statistical models for testing the intervention effects in the interrupted time series quasi-experimental design have been developed\textsuperscript{62} and the necessary computer programs for these analyses are available.\textsuperscript{63} The method is useful for investigating the effects of new social programs, modifications in old programs, behavioral interventions, or legal changes, where the dependent variables of interest have been collected in a consistent manner for a period of time before and after the innovation.

The most common types of effects investigated in the interrupted time series quasi-experimental design are changes in the level of the series, \textit{i.e.}, the series shifts up or down by a constant, and/or the slope, \textit{i.e.}, the series changes direction at the point of the interruption.\textsuperscript{64}

\textsuperscript{59} Interview with Mary Lou Eastman, Dir., Div. of Health Data & Stat. Research, Neb. Dept of Health (June 24, 1977).

\textsuperscript{60} P. Jacobson, \textit{supra} note 37, at 88-96; Elliott, \textit{Divorce Legislation and Family Stability}, 272 \textit{Annals} 134, 146 (1950); Isaacs, \textit{supra} note 50, at 41.

\textsuperscript{61} \textit{Economic Atlas of Nebraska, supra} note 55, at 2-49.

\textsuperscript{62} See G. Glass, V. Wilson & J. Gottman, \textit{supra} note 53, for the most readable presentation.


\textsuperscript{64} A change in the level of the number of divorces as a function of the change in the law would mean that the plot of the monthly divorces for the state would look identical both before and after the change except that the latter plot
D. Results

Figure 1 shows a plot of the total number of divorces in Nebraska per month over the eight years of the study. The statistical analysis showed that the overall slope of this series increased significantly, but that there was no significant change in level or in slope after the intervention. This indicates that during the period of time studied, divorces did systematically increase, but that the enactment of no fault divorce had no discernable effect on that increase.

would be some constant number higher or lower than the former plot. Such a change would indicate that the law produced a sudden and continuing change. A change in slope of the series studied here would mean that after the change, the divorce rate steadily accelerated or decelerated, that is, the plot after the change would have a different angle of slope than the plot before the change. It should be noted that it is very possible to have both a change in level and in slope. Also, because the divorce rate has climbed continually over the eight-year period of the study, it is necessary to control for what will be called "the overall slope." Thus, in the discussion of the analyses of the series, there will be references to changes in level, changes in slope, and overall slope.

Analyses showed that the dependencies among the observations were negligible. Thus, the following multiple regression equation was fitted to each series:

\[ Y = a + b_1X_1 + b_2X_2 + b_3X_3 + E \]

where \( Y \) = number of divorces per month; \( a \) = overall level of the series; \( b_1 \) = a coefficient representing change in the level of the series; \( X_1 \) = a dummy variable coded to discriminate between months which were pre- and post-intervention; \( b_2 \) = a coefficient representing the overall slope of the series; \( X_2 \) = a dummy variable coded to discriminate between each month of the series; \( b_3 \) = a coefficient representing change in slope of the series; \( X_3 \) = a dummy variable coded to discriminate post-intervention months from each other and from pre-intervention months; and \( E \) = error. For a discussion of multiple regression, see J. COHEN & P. COHEN, APPLIED MULTIPLE REGRESSION/CORRELATION ANALYSIS FOR THE BEHAVIORAL SCIENCES 73-120 (1975).

65. When presenting the results of these analyses, what will be presented is a probability level, \( p < .XX \), which represents the probability that the effect being described could have occurred by chance alone. For example, if the probability associated with a change in level were \( p < .03 \), this would mean that the probability that this change in the level of the number of divorces occurred by chance alone is less than three in one hundred. That is, it is not very likely that this change is merely a random event and, therefore, it appears to be a real difference. Somewhat arbitrarily, social scientists frequently use \( p = .05 \) as the critical probability level. More specifically, if the \( p \)-value is less than or equal to .05, i.e., the chances are equal to or less than five out of 100 that this difference is a random event, social scientists are willing to say that the difference under study is a significant one. If the \( p \)-value is greater than .05, it is felt that the odds are too high that the difference could be a random one and that, therefore, no real difference exists.

For the total number of divorces in Nebraska, the probability associated with the overall slope was \( p < .001 \); for the change in level, \( p < .35 \); for the change in slope, \( p < .95 \).
There had been reason to expect that the law would affect couples in urban counties more than couples in rural counties.\textsuperscript{66} Contrary to this expectation, the no fault divorce law did not differentially influence divorce rates in either urban or rural counties. An overall increase in divorces did occur in both types of counties across the time period of the study, but that increase was not related to the inception of no fault divorce.\textsuperscript{67}

Separate analyses were performed for three age groups of husbands and three age groups of wives. For both husbands and wives who were under thirty years of age there was a significant increase in the overall slope of the number of divorces, but no evidence of any changes in level or changes in slope at the time of the interruption.\textsuperscript{68} Thus the change in the law appears to have had no effect on the divorce rate of these two groups.

For husbands and wives between thirty and fifty years of age,\textsuperscript{67}

\begin{itemize}
\item For urban counties, $p < .002$ for overall slope; $p < .08$ for change in level; and $p < .99$ for change in slope.
\item For rural counties, $p < .001$ for overall slope; $p < .99$ for change in level; and $p < .99$ for change in slope.
\end{itemize}

\begin{itemize}
\item For husbands under 30, $p < .001$ for overall slope; $p < .40$ for change in level; and $p < .99$ for change in slope.
\item For wives under 30, $p < .001$ for overall slope; $p < .16$ for change in level; and $p < .8$ for change in slope.
\end{itemize}

\textsuperscript{66} See text accompanying notes 46-47 supra.

\textsuperscript{67} For urban counties, $p < .002$ for overall slope; $p < .08$ for change in level; and $p < .99$ for change in slope. For rural counties, $p < .001$ for overall slope; $p < .99$ for change in level; and $p < .99$ for change in slope.

\textsuperscript{68} For husbands under 30, $p < .001$ for overall slope; $p < .40$ for change in level; and $p < .99$ for change in slope. For wives under 30, $p < .001$ for overall slope; $p < .16$ for change in level; and $p < .8$ for change in slope.
the pattern was slightly different. Once again the statistically significant increase in the overall slopes emerged. While no differences for change in level were found, for both sexes this effect was closer to significance than for those under thirty and the direction of difference suggested that there were more divorces after the new law was enacted than before. However, in each case there was an eventual descent in slope as the number of divorces returned to the pre-intervention level. Therefore, any rise in divorces due to the new law appears to have been short-lived.

This pattern of temporary effects of the new law was even more discernible for people who were over fifty years of age, as can be seen in Figures 2 and 3. Both sexes at this age show an overall ascending slope, a statistically significant rise in the level of the series, and a statistically significant descending slope following that rise. This suggests that, as had been suspected, there was a

\[\text{Number of Divorces}\]

\[\text{Monthly Time Periods}\]

\[\text{No. Fault}\]


\[\text{Figure 2: Divorces for Husbands over Fifty Years Old}\]

69. For husbands between 30 and 50 years of age, \(p < .001\) for overall slope; \(p < .08\) for change in level; and \(p < .04\) for change in slope. For wives between the ages of 30 and 50, \(p < .001\) for overall slope; \(p < .15\) for change in level; and \(p < .04\) for change in slope.

It had been hypothesized that this age group would be less affected by the new law. See text accompanying note 48 supra. This did not prove to be true.

70. For this age group the overall slope was much less pronounced than for the other groups. For males, \(p < .08\); for females, \(p < .03\).

71. For males over 50 years of age, \(p < .005\) for change in level; and \(p < .01\) for change in slope. For females, \(p < .01\) for change in level; and \(p < .005\) for change in slope.
backlog of married people, especially older ones, who were enabled by the inception of no fault to seek divorces which for legal, financial, or psychological reasons they were unwilling to procure previously.\textsuperscript{72}

The separate analyses for white and black couples showed that among white couples divorces have increased over time, but no statistically significant changes in the level or slope as a function of the no fault divorce intervention were found.\textsuperscript{73} On the other hand, among black couples the level of divorces did increase significantly as a function of the new law, and this increase seems to be accelerating,\textsuperscript{74} as Figure 4 shows. It had been expected that black couples would be more affected by the change in the law than white couples.\textsuperscript{75} The reason for this was that one intended effect of no fault divorce was to make divorce simpler and less ex-

\textsuperscript{72} See text following note 48 supra. The over 50 category contained comparatively few cases and should be interpreted with caution.

\textsuperscript{73} White couples' data resulted in $p < .001$ for overall slope; $p < .5$ for a change in level; and $p < .9$ for change in slope.

\textsuperscript{74} Black couples' data resulted in $p < .12$, an overall slope which was not statistically significant, $p < .05$, a rise in level which was statistically significant, and $p < .03$, an acceleration of the slope of the number of divorces which was statistically significant.

\textsuperscript{75} See text accompanying notes 49-51 supra.
pensive and, therefore, more attractive and available to people of low economic status. If race is highly correlated with socio-economic status—and there is good reason to believe that it is\textsuperscript{76}—then these data suggest that this objective of the law has been met.

Figure 4: Divorces for Black Couples

IV. PRIOR RESEARCH

The major finding of this study—that the change in Nebraska’s divorce law from a system based on fault to one based on the irretrievable breakdown of the marriage did not significantly influence the frequency of divorce—is consistent with much of the previous research on the relationship between divorce laws and marital dissolution. The earliest known study, undertaken in Italy in 1882, compared the separation and divorce rates of various European countries and concluded that “the frequency of divorces and of separations in relation to the population or to marriage does not appear to be greater in countries where legal restrictions make it easier for spouses to obtain them.”\textsuperscript{77}

One year later, a French study noted dramatic differences in

\begin{itemize}
\item \textsuperscript{76} See note 51 supra.
\item \textsuperscript{77} M. Rheinstein, supra note 35, at 288 (quoting Bodio, Le Separazioni Personali di Coniugi e i Divorzi in Italia e in Alcuni Altri Stati, 1 ANNALI DI STATISTICA, Ser. 3, at 92 (1882)). For a later Italian study arriving at the same conclusion, see M. Rheinstein, supra note 35, at 292 (reporting on A. Bosco,
the incidence of divorce and judicially-decreed separation between different parts of a country with a uniform law and startling similarities among regions with different laws. In places where the law had undergone changes over time the incidence of divorce remained strikingly uniform. The study concluded that the predominant influence on the rate of divorce and judicial separation was not law but "the state of the mores." One specific factor that the French study did find correlated strongly with a low divorce rate was the high cost of procuring a divorce decree. More recently, a 1959 Metropolitan Life Insurance Company report showed that while the substantial jump in the divorce rate in England and Wales from 1911 to 1947 may have been due to the liberalization of the law in 1937, significant increases were registered in the years before the reform, as well as in the years after it.

In the 1950's, the Chicago Comparative Law Research Center undertook one of the leading studies of the relationship between divorce grounds and the divorce rate. The study focused on the 1900 and 1938 law reforms in Germany. Before 1900 differing laws were in operation in various parts of Germany. The Civil Code of 1896, which became effective in 1900 for the whole of the German empire and made "guilty misconduct" the sole ground for divorce, was more liberal than some of the prior laws, but much more restrictive than others. The 1938 Nationalist-Socialist law was considerably more liberal, permitting divorce whenever disruption of the marriage relationship could be shown. After comparing the number of petitions for conciliation in the various regions and the divorce rate per 100,000 population over the years, the researchers concluded that the changes in the law had no significant impact in either promoting or discouraging divorce. However, when other statisticians interpreted the same data by use of a time series quasi-experiment similar to the one employed in the instant study, the incidence of divorce and judicially-decreed separation between different parts of a country with a uniform law and startling similarities among regions with different laws. In places where the law had undergone changes over time the incidence of divorce remained strikingly uniform. The study concluded that the predominant influence on the rate of divorce and judicial separation was not law but "the state of the mores." One specific factor that the French study did find correlated strongly with a low divorce rate was the high cost of procuring a divorce decree. More recently, a 1959 Metropolitan Life Insurance Company report showed that while the substantial jump in the divorce rate in England and Wales from 1911 to 1947 may have been due to the liberalization of the law in 1937, significant increases were registered in the years before the reform, as well as in the years after it.

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78. M. Rheinstein, supra note 35, at 289 (quoting J. Bertillon, Etude Démographique du Divorce et de la Séparation de Corps Dans Les Différents Pays de L'Europe (1883)).
80. Elliott, supra note 60, at 140 (reporting on Metropolitan Life Ins. Co., Statistical Bull., April, 1949, at 1-3). In 1911 the divorce rate in England and Wales was 2.2 divorces for every thousand marriages. In 1936 the rate had reached 12.3, an increase of almost 500% even though the law permitted divorce only for adultery. Moreover, even though the laws did not become more lenient after 1937, the divorce rate rose from 15.2 in that year to 138.5 in 1947. Id.
82. Id.
they found that "the effect of the introduction of the new Civil Code in 1900 is clearly reflected in both the divorce rate and the petition for reconciliation rate." It should be noted, though, that in the German study, as in the instant Nebraska analysis, whatever effects the changes in the law produced appear to have been temporary. While the immediate result of the enactment of the 1896 Code was a decline in the divorce rate in those German states where the law previously had been more liberal, the rate soon began to climb at the same pace at which it had been escalating prior to the new law. Whether the rise would have been even greater without the legislation cannot be answered unequivocally from the available data.

Studies in the United States exploring the correlation between the law of divorce and the divorce rate have produced mixed results. Walter F. Willcox's turn of the century comparison between the statutory divorce grounds and the divorce rates of various states led him to conclude that "the immediate, direct and measurable influence of legislation is subsidiary, unimportant, almost imperceptible." Conversely, another University of Chicago study which tried to measure the relationship between the divorce law as actually practiced in the state and the incidence of marital breakdown—not mere divorce—did find a positive correlation between the permissiveness of divorce law and the incidence of marriage breakdown. The researcher, Alexander Broel-Plateris, reasoned that this was not simply because permissive laws create the breakdown of marriages, nor, conversely, because a high incidence of marriage disruption causes pressure for a permissive divorce law. Rather, he concluded, the relationship is a synergistic one in which "a permissive divorce law and a high incidence of marriage disruption mutually strengthen each other."

A 1975 study by two Florida researchers discerned a positive correlation between the permissiveness of the statutory laws of a state and that state's divorce rate and an even stronger correlation between the permissiveness in the implementation of these laws

84. Id. at 560-61.
86. M. Rheinstein, supra note 35, at 444-69 (reporting on A. Broel-Plateris, Marriage Disruption and Divorce Law (unpublished doctoral dissertation, Division of Social Sciences, University of Chicago)).
and the rate of divorce. The correlation remained even where controlled for the effects of industrialization, urbanization, income, education, ethnicity, Catholicism, and population stability. However, in a more recent study, these researchers found little support for the hypothesis that the adoption of liberal breakdown provisions in divorce laws has caused the rate of divorce to escalate. The divorce rates in no fault states were adjusted to eliminate increases that probably would have occurred even if there had not been any changes in the laws of those states. The level of adjustment was based on the increases in the divorce rate which took place during the same period in states which did not reform their laws. An interrupted time series analysis of the adjusted divorce rates revealed that the adoption of no fault had little effect on the incidence of divorce in the country as a whole. In Nebraska, as well as in nine other states, the post-reform adjusted divorce rate actually was lower than the pre-reform rate. In some states there were statistically significant increases in the divorce rate, but these were best explained by factors other than the reform of those states' divorce laws.

V. WHY MARRIAGES ARE BREAKING UP

If, as the instant study and at least some of the prior research indicate, divorce legislation plays only a peripheral role in marriage breakdown, other factors must be considered in order to explain the accelerating divorce rate of recent years. While much has been written on this subject, embarrassingly little can be said with any certainty. The incisive 1966 report on divorce issued by the Archbishop of Canterbury could only conclude that

until much, much more research is done, the social aspects and entailments of divorce will remain matters about which, though not all opinions are equal, at best only opinion based in inadequate data is possible. Knowledge and some approximation to certainty on the sociological premises of judgment in this sphere await the future.

Nonetheless some explanations can be tendered. To a degree

88. Stetson & Wright, The Effects of Laws on Divorce in American States, 37 J. MARR. & FAM. 537 (1975). A 1977 Canadian study also found that the law had an important effect on the divorce rate. Abernathy & Arcus, The Law and Divorce in Canada, 26 FAM. COORDINATOR 409 (1977). Between 1887 and 1968 various Canadian provinces, where previously only Parliamentary divorces had been available, introduced judicial divorce. That these changes were accompanied by large gains in the divorce rate is hardly surprising.


90. PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY 169 (1966) [hereinafter cited as PUTTING ASUNDER]. There was a call at the 1977 annual meeting of the American Bar Association's Family Law Section for a National Divorce Center to study the causes and consequences of marital breakdown. See 3 FAM. L. REP. (BNA) 2686 (1977).
the legal phenomenon of divorce has replaced the natural phenomenon of death as a method by which marriages are ended. The increase in life expectancy\(^9\) combined with the fact that, until recently, people tended to marry younger\(^2\) means that "the aver-

91. It has been argued that increased longevity is not in itself a significant factor in the escalating divorce rate:

Fifty years ago a man of twenty could expect to live to be sixty-six; a woman of twenty could expect to live a bit longer, to age sixty-seven or sixty-eight. Thirty years later, in 1956, a man of twenty could expect to live to be seventy and a woman of twenty could expect to live to be seventy-six. Men had gained about 6 percent, women about 14 percent, in the length of their adult lives. These are not insubstantial gains. In that same period, however, the divorce rate increased by about 40 percent, or almost seven times as much as the increase in adult life for men, three times as much as the increase in adult life for women. Furthermore, from 1960 to 1971, a period when life expectancy hardly changed at all, the divorce rate increased by more than 70 percent.


92. The median age at first marriage declined steadily until the late 1950's when it slowly began to rise, as shown in Table VII.

TABLE VII
Median Age at First Marriage, by Sex:
1890 to 1977

<table>
<thead>
<tr>
<th>Year</th>
<th>Male</th>
<th>Female</th>
<th>Year</th>
<th>Male</th>
<th>Female</th>
</tr>
</thead>
<tbody>
<tr>
<td>1977</td>
<td>24.0</td>
<td>21.6</td>
<td>1960</td>
<td>22.8</td>
<td>20.3</td>
</tr>
<tr>
<td>1976</td>
<td>23.8</td>
<td>21.3</td>
<td>1959</td>
<td>22.5</td>
<td>20.2</td>
</tr>
<tr>
<td>1975</td>
<td>23.5</td>
<td>21.1</td>
<td>1950</td>
<td>22.8</td>
<td>20.3</td>
</tr>
<tr>
<td>1974</td>
<td>23.1</td>
<td>21.1</td>
<td>1930</td>
<td>24.3</td>
<td>21.5</td>
</tr>
<tr>
<td>1973</td>
<td>23.2</td>
<td>21.0</td>
<td>1920</td>
<td>24.6</td>
<td>21.2</td>
</tr>
<tr>
<td>1972</td>
<td>23.3</td>
<td>20.9</td>
<td>1910</td>
<td>25.1</td>
<td>21.6</td>
</tr>
<tr>
<td>1971</td>
<td>23.1</td>
<td>20.9</td>
<td>1900</td>
<td>25.9</td>
<td>21.9</td>
</tr>
<tr>
<td>1970</td>
<td>23.2</td>
<td>20.8</td>
<td>1890</td>
<td>26.1</td>
<td>22.0</td>
</tr>
</tbody>
</table>


The tendency to marry younger, by itself, helps to account for the increase in divorce. Teenage marriages, for instance, are twice as likely to end in divorce as marriages which occur in the twenties. Glick & Norton, supra note 18, at 15.

Table VII, supra, demonstrates that there has been a recent trend toward postponing marriage. Additional indicators of this can be seen in the fact that the proportion of all women 20 to 24 years old who had never married increased by more than half between 1960 and 1977, from 28% to 45%, and that since 1970 the proportion of men and women 25 to 29 years old who had never married has increased after showing no significant change between 1960 and 1970. Marital Status: 1977, supra, at 2. This trend, particularly strong since 1974, has been cited by population specialists as a major reason the divorce rate now appears to be leveling off. Wall St. J., supra note 25.

It also should be noted, however, that late marriages, i.e., those after age 30, while not as vulnerable statistically as teenage marriages, are less stable than those entered into by couples in their twenties. Becker, Landes & Michael, supra note 48, at 1159-60; Glick & Norton, supra note 18, at 16. Those who marry later may have developed independent living habits that could
age duration of marriage has doubled since the 19th Century and marriages are at risk for twice as long as they were.93 One consequence of this is that many more marriages are being called upon to meet the needs of the parties over a wide array of life experiences. A spouse suitable to an identity-seeking twenty year old may seem burdensome to the career-minded thirty year old and incompatible to the forty year old facing mid-life transition.94

Sociologists and historians report that it is the centrifugal forces of urbanization, industrialization, and modernization that have fashioned the modern family.95 Pre-industrial society was agrarian and patriarchal. Work took place in and life revolved around the family.96 With the industrial revolution the factory or office replaced the home as the primary unit of production, the job replaced the family as the chief determinant of rank and status, and salaries and pensions replaced inheritance as the main source of wealth.97 Since kinship was no longer the major unit of social organization and the intact family no longer an economic necessity, the consequences of severing the connection with one's family were less drastic. This uprooting has resulted in a highly individualistic and mobile society, one in which a married couple is isolated as never before. Lacking the support of the extended family and traditional community-centered mores and social con-

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94. See generally D. LEVINSON, THE SEASONS OF A MAN'S LIFE (1978). Levinson is an exponent of a new psychological theory which argues that adulthood—like childhood and adolescence—is a series of predictable developmental stages, each of which is punctuated by a crisis. Levinson points out that there has probably never been a society, except perhaps Communist China, in which the average age of marriage was greater than 25. Those who marry early have had little experience in forming peer relationships with adults of the opposite sex and a lasting relationship will result only where it furthers the development of both of the partners. At "Age-30 Transition," when they examine their provisional life-structures, one or both may find their original choices unacceptable. Thus, the "seven-year itch." Id. at 49-63.
96. Lasch, The Family and History, supra note 95, at 38.
trols, the couple must cope with an increasingly impersonal and complex world on its own.98

These forces of change have had their most profound effect on women. As the household lost its income-producing role, that function devolved primarily to the husband. Where one wage earner could support the family, woman's exclusive role was that of homemaker and child-rearer.99 However, these forces have also emancipated her from her former legal, social, and political disabilities. Educated better than ever before and given the promise of equality, many modern housewives feel frustrated and dissatisfied with the drudgery and isolation of their assigned role. Sociologist Jessie Bernard has concluded that a woman's marriage is greatly different from a man's: his marriage brings him better mental and physical health and a higher income than single men enjoy while her marriage inflicts more mental and emotional stress than single women suffer.100 Being a housewife, Bernard reports, literally makes women sick.101

Although still hampered by tradition and discrimination, women need not be economically dependent on men. As an independent and educated being, a woman can pursue her own life's work.102 While this may make married life more tolerable, it also makes unmarried life more feasible. A wife who is not economically dependent upon her husband is less likely to endure an unhappy marriage than is a woman who cannot support herself outside of marriage.103 At the same time society is much less likely to stigmatize a woman who makes the choice to go it alone.

If the role of the family as an economic and social unit of society has diminished, the expectation that it will fulfill psychological, emotional, and interpersonal needs has grown. Marriage is seen as a haven from the cold and impersonal outside world. In the words of psychologist Richard E. Farson, "[m]arriage is now burdened

98. See V. Packard, A Nation of Strangers (1972). The decline in the stabilizing influence of even the more conservative religions can be seen by the fact that the divorce rate for Catholics just about parallels the national rate, 3 Fam. L. Rep. (BNA) 2032 (1976), and by the recent explosion in divorces among the clergy. See, Divorce Among Clergy Is a Worrisome Phenomenon, Milwaukee J., Jan. 7, 1978, at 4, col. 1.
101. Id. at 48.
102. In 1977, 48.4% of the American female population 16 years old and over was in the labor force. In 1960 the figure was only 37.7%. Population Profile: 1977, supra note 51, tbl. 22, at 40.
103. Elliott, supra note 60, at 146. In addition, the declining birth rate assures that many young married women have few, if any, children to complicate their return to unmarried status, should they decide to do so. Becker, Landes & Michael, supra note 48, at 118; Glick & Norton, supra note 18, at 5. For the effect of children on divorce, see note 48 supra.
with the expectation that husbands and wives should enjoy intellectual companionship, warm intimate moments, shared values, deep romantic love, [and] great sexual pleasures."\textsuperscript{104} Above all, despite the fact that it is an institution demanding community and cooperation, marriage has become a vehicle for the maximizing of individual self-fulfillment and personal happiness.\textsuperscript{105} In an era in which the mass media perpetuates an over-romanticized view of family life and popular psychologists advise that we should look out for "number one,"\textsuperscript{106} it is not surprising that many marriages are not strong enough to bear the weight of excessive expectations.\textsuperscript{107}

The recent sharp upturn in the divorce rate began in the late 1960's, a period of profound social unrest in which contemporary values were called into question, women's rights to equality and independence were vigorously asserted, and new forms of interpersonal relationships were developed.\textsuperscript{108} This period also marked the beginning of the current ferment in divorce reform legislation. The Nebraska interrupted time series analysis, as well as much of the other empirical and historical research, indicates that the wide acceptance of no fault divorce is much more the product of the same forces that have produced high divorce rates than the cause of those high rates.

Yet, the effect of the liberalization of divorce laws on the rate of divorce and marital breakdown cannot be dismissed altogether. The law itself is part of the cultural climate under which divorce has flourished. While the direct, measurable influence of legislation on marital breakdown indeed may be negligible, especially when the thrust of the legislation runs counter to societal values, the law's impact may be greater when it is in tune with other social


\textsuperscript{105} There are no people in the world who make greater demands upon marriage than Americans do, since they lay greater exactions upon it and also expect greater psychic satisfaction from it. They do not make the necessarily right demands, but whether right or wrong, they don't settle easily for a small fraction.

M. Lerner, America as a Civilization 595 (1957).


\textsuperscript{107} There is "hardly any activity, any enterprise which is started with such tremendous hopes and expectations, and yet, which fails so regularly, as love." E. Fromm, The Art of Loving 4 (1956).

\textsuperscript{108} See generally J. Bernard, supra note 100; S. Firestone, The Dialectic of Sex (1971); Ramey, Emerging Patterns of Innovative Behavior in Marriage, 21 Fam. Coordinator 435 (1972).
forces. The law is a symbol, and some see the new divorce laws as symbolizing to “young people particularly to look on marriage as a sociological experiment.”

The Broel-Plateris study lends support to the notion that there is a synergistic relationship between divorce law and the other cultural elements that have contributed to greater family instability. The fact that Broel-Plateris tried to measure the effects of the law as it was actually administered, rather than of the law on the books, gives insight into why the Nebraska study detailed in this article shows the Nebraska divorce reform legislation to have had so little impact on the divorce rate—the practice under the new law does not differ markedly from that under the old.

VI. THE LAW OF DIVORCE—THEN AND NOW

A. “What therefore God has put together, let not man put asunder.”

Since the Middle Ages the domestic relations laws of the Western world have been dominated by the Christian belief in the permanency of the marriage union. Marriage was a religious institution—a God-given, indissoluble sacrament. Thus, from the turn of the twelfth century until 1857 absolute divorce was virtually unknown in English law. While those wealthy enough could ob-

110. Karl Llewellyn has remarked that while direct and indirect legal sanctions are often ineffective in regulating social mores it is [not so, we must suspect, with regard to the direct effects of another aspect of law, which we may term law-in-ideology, measured not by its sanctions but by itself. For, once law has intervened in marriage . . . once it has intervened also as the exclusive authorization of divorce, the law gathers to itself much of the ideological power which builds around any distinctive symbolization. It is then Law which makes marriage-as-permanent easy to see, to inculcate, to think about. It is Law which sets a goal, contains a threat, and urges to a process—all in terms any youth can understand. To deny power to it in producing some of what it symbolizes would be to deny power to the flag or the Constitution in producing national feeling and unity.
111. Comment of judge in Judges’ Questionnaire, supra note 15.
112. See text accompanying notes 86-87 supra.
114. Prior to the Middle Ages marriage was viewed as an essentially private institution insulated from the regulatory powers of the state. Under Roman law, for instance, marriages were internal matters to be handled by the head of the household. Except for questions of property rights the state exercised no control over marital dissolution. W. Johnson, supra note 25, at 5; Walker, supra note 49, at 271.
tain a legislative termination of their marriages—termed a Parliamentary divorce—those of lesser means had to settle for a divorce from bed and board granted by the ecclesiastical courts. This released an innocent spouse from the duty of cohabiting with the other spouse upon proof of the latter's adultery, cruelty, or unnatural practices, but did not permit the innocent spouse to remarry.

By 1857, when the Matrimonial Causes Act removed jurisdiction over questions of marriage from the ecclesiastical courts and authorized the civil court to decree absolute divorces, the concept of allowing divorce only upon the showing of wrongdoing by the defendant spouse had become firmly engrained. The old grounds for divorce from bed and board were carried over not only into the English civil law regarding absolute divorce, but into American divorce legislation as well.

That divorce was allowed at all was a retreat from the concept of indissolubility. Besides offending the religious sensibilities of those who believed that the purpose of marriage was not the pursuit of sexual pleasure nor human love and companionship, but

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116. Most could afford neither alternative. In the prologue to their casebook Foote, Levy, and Sander relate the story, first reported by Dean Pound, of the workingman being sentenced after a conviction for bigamy:

On being asked what he had to say why sentence should not be pronounced, the accused told a moving story of how his wife had run away with another man and left him with a number of small children to look after while barely earning a living by hard labor. After waiting several years he remarried in order to provide a proper home for the children. Mr. Justice Maule shook his head. "My good man," said he, "the law did not in any wise leave you without a sufficient remedy. You should first have brought an action in Her Majesty's Court of Common Pleas against this man with whom, as you say, your wife went away. In that action, after two or three years and the expenditure of two or three hundred pounds you would have obtained a judgment against him which very likely would have been uncollectible. You should then have brought a suit against your wife in the ecclesiastical court for a divorce from bed and board, which you might have obtained in two or three years after expenditure of two or three hundred pounds. You would then have been able to apply to Parliament for an absolute divorce, which you might have obtained in four or five years more after spending four or five hundred pounds. And," he continued, for he saw the accused impatiently seeking to interpose and to say something, "if you tell me that you never had and never in your life expect to have so many pennies at one time, my answer must be that it hath ever been the glory of England not to have one law for the rich and another for the poor."

C. FOOTE, R. LEVY & F. SANDER, supra note 26, at x (quoting I. POUND, THE SPIRIT OF THE COMMON LAW 211-12 (1921)).


118. Id. at 273-74. Until 1937 the only ground for divorce in England was adultery. A wife's adultery was reason enough for her husband to divorce her, but a wife could obtain a divorce only if her husband's adultery was aggravated by bigamy, cruelty, or incest. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 282 (1968).
the perpetuation of the race for the glorification of God,\textsuperscript{119} divorce also was an anathema to those who saw it as eroding "the very heart and essence of marriage—its permanence for life."\textsuperscript{120} Never mind that a marriage promised only lifelong unhappiness—"it is incomparably better that individuals should suffer than that an Institution, which is the basis of all human good, should be shaken, or endangered."\textsuperscript{121} If, despite such heartfelt objections, marriages were to be dissolved, legislatures were determined to make sure that they would be terminated only for matrimonial offenses so severe and irreparable as to be considered a breach of the marriage contract.\textsuperscript{122} The divorce would be a repudiation of the offender and his or her punishment would deter others from committing similar indiscretions.

B. "A divorce . . . must be grounded on a legal fault within the grounds enumerated in the statutes . . . . It is not for this court to do what it deems best for the parties."\textsuperscript{123}

This philosophy of divorce as a punishment of the party guilty of grave marital misconduct and as a privilege for the innocent had been embodied in Nebraska's divorce laws from the time the first statute on the subject was enacted in January, 1856.\textsuperscript{124} A divorce could be obtained for abandonment, adultery, cruelty, desertion, drunkenness, insanity, three or more years' imprisonment, a sentence of life imprisonment, and physical incompetence at the time of the marriage.\textsuperscript{125} These were similar to the statutory grounds of other states.\textsuperscript{126} Yet, even the perpetration of one or more of the enumerated offenses by one of the spouses would not guarantee to the other the right of divorce. Divorce was a privilege to be enjoyed only by one who had not committed marital offenses himself or herself, and only by one who was so gravely injured by the offense of the other that forgiveness was unthinkable. Thus the law made recrimination and condonation defenses to divorce.

Recrimination would bar a petitioning spouse from obtaining a

\begin{thebibliography}{99}
\bibitem{Rheinstein35} M. Rheinstein, \textit{supra} note 35, at 286.
\bibitem{Blake} N. Blake, \textit{supra} note 37, at 58 (quoting T. Dwight, \textit{Theology, Explained and Defined in a Series of Sermons} 427 (5th ed. 1828) (Dwight was President of Yale College)).
\bibitem{Robinson} Robinson v. Robinson, 164 Neb. 413, 417, 82 N.W.2d 550, 553 (1957).
\bibitem{Act1945} Act of April 12, 1945, ch. 101, § 1, 1945 Neb. Laws 329 (repealed 1972); Act of Jan. 26, 1856, ch. 52, § 7, 1856 Neb. Laws 277 (repealed 1972). The statutes are set out at note 9 \textit{supra}.
\bibitem{Rheinstein352} M. Rheinstein, \textit{supra} note 35, at 50-52 (citing 2 C. Vernier, \textit{American Family Laws} 3-4, 70-71 (1932)).
\end{thebibliography}
divorce where the petitioner himself or herself had been guilty of an offense constituting grounds for a divorce;\textsuperscript{127} divorce was a remedy available only to the truly "innocent" spouse. Condonation was the forgiving by one spouse of the marital offenses committed by the other. Having been forgiven, the offenses no longer constituted grounds for divorce. This enabled the parties to start anew, without the previous misconduct hanging over the head of the guilty spouse.\textsuperscript{128}

Even if this mechanism were appropriate for the era of its creation, there was widespread agreement that it was ill adapted to more modern needs and mores. An English study of the problem reported "[t]hat the law as it stands is unsatisfactory all the judges and lawyers who gave us evidence agreed... As a piece of social mechanism the present system has not only cut loose from its moral and traditional foundations; it is, quite simply, inept."\textsuperscript{129}

The primary defect in the fault system was that it had more to do with religious and political philosophy than with the realities of marriage and divorce. It allowed failed marriages to be officially dissolved only where the blame for the failure could be placed squarely on one of the parties. However, while some marital breakdowns may be due solely to the culpable acts perpetrated by an unprovoked wrongdoer against a wholly innocent spouse, such cases are rare.\textsuperscript{130} Even where there appears to be one clearly

\textsuperscript{127} See Act of Jan. 26, 1856, ch. 52, § 9, 1856 Neb. Laws 277 (repealed 1972) (set out at note 10 supra). Although the statute stated that the defense applied where the complaining party was guilty of the same offense as the respondent, the Nebraska Supreme Court interpreted it to preclude divorce whenever the conduct of both parties furnished grounds for divorce, even where one was grossly more culpable than the other. Studley v. Studley, 129 Neb. 784, 263 N.W. 139 (1935). See generally Gradwohl, The Doctrine of Recrimination in Nebraska, 37 Neb. L. Rev. 409 (1958).

\textsuperscript{128} H. CLARK, supra note 118, at 366-67. Condonation was not a bar where subsequent to the act of forgiveness the wrongdoer engaged in the same or similar wrongful acts. The forgiveness was conditioned upon the wrong not being repeated. Repetition of the offense was said to revive the wrong condoned. Johnson v. Johnson, 183 Neb. 670, 163 N.W.2d 596 (1968); Wade v. Wade, 183 Neb. 268, 159 N.W.2d 570 (1968); Rickus v. Rickus, 183 Neb. 140, 158 N.W.2d 540 (1968); Fletcher v. Fletcher, 182 Neb. 549, 156 N.W.2d 1 (1968); Gartzide v. Gartzide, 181 Neb. 46, 146 N.W.2d 777 (1966); Beck v. Beck, 175 Neb. 108, 120 N.W.2d 585 (1963); Waldbaum v. Waldbaum, 171 Neb. 625, 107 N.W.2d 497 (1961); Workman v. Workman, 164 Neb. 642, 83 N.W.2d 368 (1957); Cowan v. Cowan, 159 Neb. 74, 69 N.W.2d 300 (1955); Wakefield v. Wakefield, 157 Neb. 614, 61 N.W.2d 208 (1953); Hodges v. Hodges, 154 Neb. 178, 47 N.W.2d 361 (1951); Wright v. Wright, 153 Neb. 18, 43 N.W.2d 424 (1950); Eicher v. Eicher, 146 Neb. 178, 28 N.W.2d 808 (1947); Watenkamp v. Watenkamp, 140 Neb. 392, 289 N.W. 491 (1941); Anderson v. Anderson, 89 Neb. 570, 131 N.W. 907 (1911); Heist v. Heist, 46 Neb. 794, 67 N.W. 790 (1896).

\textsuperscript{129} PUTTING ASUNDER, supra note 90, at 32 (emphasis in original).

blameworthy party, it is impossible to know whether the "innocent" spouse's conduct, perhaps intangible or even unintended, may not have driven the "guilty" spouse to his or her culpable act.\(^{131}\) Furthermore, rarely can the roots of marital breakdown be found in the statutory lists of acts or omissions which are grounds for divorce. The alleged grounds are at most only symptoms of a breakdown which occurred for far more complex reasons, and may be nothing more than pretexts for escaping from the problems of a bad marriage.\(^{132}\) Simply, the traditional law of divorce did not recognize the social and psychological reality that divorce was not a reward for marital virtue on one side and a penalty for marital delinquency on the other; not a victory for one spouse and a reverse for the other; but a defeat for both, a failure of the marital "two-in-oneship" in which both its members, however unequal their responsibility, are inevitably involved together.\(^{133}\)

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\(^{132}\) Clark, supra note 17, at 405. "The grounds for divorce . . . may be symptoms rather than really the cause. Extreme cruelty and [other grounds] may arrive really after the marriage has broken down." Hearings, supra note 130, at 27 (testimony of attorney, now judge, Ronald E. Reagan).

\(^{133}\) Putting Asunder, supra note 90, at 18.
The inability of the law to deal with the realities of married life and marital failure produced paradoxical consequences. While the law was intended to ensure that divorce would be sanctioned only when the marital relationship was severely ruptured, the actual result was that if the technical grounds could be shown, even a viable marriage would be dissolved. The fact one of the parties had committed adultery, for example, did not assure that the marriage had irreparably broken down; yet it was dissolvable without question. On the other hand, a marriage that was irrevocably at an end could not be officially terminated where the requisite fault could not be shown or where a valid defense, such as recrimination, existed. In such situations the Nebraska Supreme Court had no difficulty recognizing its duty as mandated by the legislature, it had to deny the dissolution because "[a] divorce . . . must be grounded on legal fault within the grounds enumerated in the statutes . . . . It is not the province of the courts to grant such decrees for sociological reasons. . . . It is not for this court to do what it deems best for the parties." Where both parties were at fault "the remedy must be sought by them, not in the courts, but in the reformation of their conduct." While the law would not sanction a dissolution in these cases, neither could it force the couple to remain together and re-establish a meaningful relationship. Apparently, if they would not "reform," they were to endure their mutual unhappiness as a punishment for their marital sins.

134. As with most other problems, Americans tend to view infidelity as a question of mental health, usually as part of the crisis of the middle-aged male in search for sexual reassurance. A psychiatrist is likely to say that it is only the compulsive types of infidelity that present a serious problem, since their compulsiveness makes them self-destructive—and therefore destructive of others as well, and of the whole family pattern. In other words, instead of thinking of infidelity as a rigid moral category Americans tend to think of it in terms of what it does to the personality and to the web of relationships. Yet, this does not mean . . . that Americans take it lightly.

M. Lerner, supra note 105, at 595-96.

135. "[I]t is personally tragic and socially destructive that the court should be absolutely required, upon proof of a single act of adultery or extreme cruelty—perhaps regretted as soon as committed—to end a marriage which may yet contain a spark of life." REPORT OF THE GOVERNOR'S COMMISSION ON THE FAMILY 27 (Cal. 1966) [hereinafter cited as CAL REPORT].

136. "Divorce and its incidents are a matter of public concern over which the Legislature has authority. What policies to adopt concerning its regulation are for it to decide and are not for the courts." Harrington v. Grieser, 154 Neb. 685, 688, 48 N.W.2d 753, 755 (1951), quoted in Detter v. Erpelding, 176 Neb. 600, 614, 126 N.W.2d 827, 834 (1964); Ruehle v. Ruehle, 161 Neb. 691, 698, 74 N.W.2d 689, 693 (1956).


138. Meffert v. Meffert, 118 Ark. 582, 588, 177 S.W. 1, 3 (1915).
Even those who were permitted by the divorce laws to end their marriage did not emerge from the process unscathed. In order to prove the grounds necessary to procure a divorce the “innocent” party had to disclose to his or her lawyer and expose in a public trial some of the most intimate and embarrassing details of married life.\textsuperscript{139} The “guilty” defendant was in the even worse position of being publicly branded an adulterer, deserter, or maliciously cruel home-wrecker. Not only did he or she stand guilty of a transgression against his or her spouse, but also of an act against society itself, and against one of its principal institutions, marriage.\textsuperscript{140} As few were anxious to have the blame for the failure of their marriage placed exclusively on their shoulders, or to accept the loss of property or child custodial rights which often accompanied such blame, their natural instinct was to contest the issue.\textsuperscript{141} If they did contest they would become immersed in the accusatorial adversary process\textsuperscript{142} which “exacerbate[d] the aggressive forces . . . already undermining the family;”\textsuperscript{143} induced feelings of bitterness, acrimony, and resentment; and destroyed the possibility of reconciliation or of having the kind of amiable post-divorce relationship which can be assuasive to the children.\textsuperscript{144} This adversary, non-therapeutic approach to divorce was compounded by the doctrine of condonation which made the price of an attempted reconcilia-

\textsuperscript{139} Evidently those sensitive people who were reluctant to air their dirty linen in public were to resign themselves patiently to continuing an unhappy relationship. Elliott, \textit{supra} note 60, at 146.

\textsuperscript{140} W. JOHNSON, \textit{supra} note 25, at 103.

\textsuperscript{141} For many the need for vindication is strong. They will try to manipulate the marriage counselor, the lawyer, and anyone else who will listen into believing that the break-up of the marriage was the fault of their spouse. \textit{Hearings, supra} note 130, at 35-36 (testimony of Charles Scutter, Dir. of Law Reform & Litigation, Omaha Legal Services).

\textsuperscript{142} The accusations and fault-finding began early in the legal process with the pleadings:

\textquoteright I think from the standpoint of the practicing attorney, what this bill will do more for reconciliation than anything else is it simply will not develop an instant acrimony or animosity between the parties. The present law now requires a practicing attorney who wants to file a petition . . . to go in and say the other party has been guilty of conduct which amounts to extreme cruelty or has been guilty of adultery, and it places the defendant in a divorce action under the present system, as an accused, an immediate accused. He's been accused of wrongdoing. And the human reaction is to lash out in defense.\textquoteright Id. at 28 (testimony of Bellevue attorney, now judge, Ronald E. Reagan).

\textsuperscript{143} Goldstein & Gitter, \textit{supra} note 131, at 81.

\textsuperscript{144} \textquoteright Litigations between husbands and wives exceed in bitterness and hatred those of any other relationships.\textquoteright L. NIZER, \textit{MY LIFE IN COURT} 153 (1961). To the extent that an acrimonious divorce proceeding acts as a catharsis for the allegedly wronged spouse, it serves some useful purpose. On balance, however, the negative aspects far outweigh the positive. See M. WHEELER, \textit{supra} note 50, at 180-81; Zuckman & Fox, \textit{supra} note 132, at 585.
tion inordinately high. If marital relations were resumed in the attempt to effectuate a reconciliation and the attempted reconciliation were to fail, the grounds for the divorce would be considered condoned and the condonation would constitute a bar to the divorce action.145

C. "Legislative divorce policy of an era before Nebraska became a state . . . may not reflect her modern mood."146

As the moral climate turned more liberal and individualistic, many people felt disserved by "a temporal law which followed the dictates of clerical authority."147 Instead of viewing matrimony as an indissoluble sacrament, they saw it as a human institution, a bond created through an exercise of free will by a man and a woman who are responsible, but fallible, individuals. Where serious mistakes are made the parties should be able to rectify them and live out their lives as joyfully as possible with a minimum of governmental intrusion.148

Moreover, while aware that divorce can be harmful to the parties, to their children, and to society,149 many refused to accept the


In divorce law the quality of mercy is verboten. At no stage of the proceedings does the law authorize anything akin to it, and if the plaintiff extends mercy to the defendant, the law punishes him for it. By the doctrine of condonation, the law presumes to subvert the divine attribute of forgiveness. And thereby the law opens the door to trickery, perjury, duress; closes the door upon honest attempts at reconciliation!


148. W. FRIEDMANN, supra note 115, at 239. "[T]he general understanding of individual liberty today is revolted by the idea that a person can be maintained in ties as intimate as those of marriage, especially when he no longer accepts them and they seem intolerable to him." Glendon, Is There a Future for Separate Property?, 8 Fam. L.Q. 315, 327 n.44 (1974) (quoting Bénabot, La Liberte Individuelle et le Marriage, 1973 REVUE TRIMESTRIELLE DE DROIT 440, 498).

149. It is asserted by many that divorces are far too numerous in our society, that they undermine the foundations of family life, that they generate instability throughout society and that they leave an ever-increasing portion of American children without the society and affection of a united family, thereby producing juvenile delinquency, truancy, and a variety of psychological ills.

Clark, supra note 17, at 403. Psychologist William Glasser has commented that "[b]ecause divorce is common, many children in our society have no intact family to help them toward a successful role. These children, with less
notion that it is an unmitigated evil. Even though studies indicate that the initial effects of divorce are often traumatic on members of the family, they also demonstrate that recovery usually is swift. Furthermore, the most severe consequences come not from the act of divorce itself, but from the conflicts that precede it. A divorce which frees the couple and their children from a destructive environment, possibly opening the way to new and healthier relationships, is probably far less detrimental than continuing the family involvement, often have a difficult task gaining a successful identity. Many fail, and hostile about their failure, place a heavy burden on society." W. GLASSER, THE IDENTITY SOCIETY 133 (1972). One indication of this is that children of divorced parents are thought to be more prone to divorce. Landis, The Pattern of Divorce in Three Generations, 34 SOC. FORCES 213 (1956).


150. In 46 middle class families studied by a team of University of Virginia researchers, "there was none in which at least one family member did not report distress or exhibit disrupted behavior, particularly during the first year after divorce." Heatherington, Cox & Cox, The Aftermath of Divorce, in MOTHER/CHILD, FATHER/CHILD RELATIONSHIPS 149, 174 (J. Stevens & M. Mathews eds. 1978). Parents exhibited stress in the practical problems of living, in self-concept and emotional adjustment, and in inter-personal relations. There also were marked disruptions in parent-child relations. Children were more dependent, disobedient, aggressive, whining, demanding, and lacking in affection. Id. "However, by the second year after divorce a process of restabilization and adjustment was apparent .... Most of the members of divorced families ultimately were able to cope with many of their problems, but the course of adjustment was often unexpectedly painful." Id.

Wallerstein's and Kelley's study of children of divorced parents in California, note 149 supra, concluded that while most children, irrespective of age, are upset at first by their parents' separation, more than half return to normal development by the end of the first year. Reported in R. WEISS, supra note 91, at 213-17. Goode's study of 425 divorced mothers found that more than 90% thought their children were better off or as well off as a result of the divorce. W. GOODE, supra note 132, at 307-29.

151. "[M]ost divorced persons...pay marriage the homage of trying again...." M. LERNER, supra note 105, at 597. Data from 1975 indicates that four of every five divorced persons remarry by middle age. Glick & Norton, supra note 18, at 8. Partly, if not mostly, because divorced women usually retain custody of
the children, Becker, Landes & Michael, supra note 48, the remarriage rate is higher for men, with five out of six remarrying, than for women, with three out of four remarrying by middle age. 3 Fam. L. Rep. (BNA) 2032 (1976). However, like the marriage rate, the rate of remarriage has dropped off in recent years, id., and the divorce rate for second marriages traditionally has been considerably higher than that for first marriages. Becker, Landes & Michael, supra note 48, at 1177-78; Monahan, The Duration of Marriage to Divorce: Second Marriages and Migratory Types, 21 Marr. & Fam. Living 134 (1959); Monahan, The Changing Nature and Instability of Remarriages, 5 Eugenics Q. 73 (1958). See generally J. Bernard, Remarriage (1971).

Post-divorce relationships are not only marital ones. The number of couples living together without being married nearly doubled from 1970 to 1977. Glick & Norton, supra note 18, at 32. In 1977, 5.4% of divorced men and 8.3% of divorced men under 35 were living with an unrelated woman. Id. at 34.

152. [W]hat causes the major disturbance to the children is the break-up of the home and the quarrels that preceded it, and . . . once a break-up has occurred a subsequent legal recognition that the marriage is dead can do little more harm and may indeed do good. The final break may lead to a lessening of the bitterness between parents and may facilitate the establishment of a new stable environment which is the children's greatest need.

Law Commission, supra note 93, at 24-25.

A study of 780 high school students in Washington state concluded that "as a group, adolescents in broken homes show less psychosomatic illness, less delinquent behavior, and better adjustment to parents than do children in unhappy unbroken homes. They do not differ significantly with respect to adjustment in school, church, or delinquent companions." Nye, Child Adjustment in Broken and in Unhappy Unbroken Homes, 19 Marr. & Fam. Living 356, 358 (1957) (emphasis in original). Moreover, the study found that parents in broken homes adjusted much better individually and to their spouses than did those in unhappy intact homes. Id. at 361.

Landis compared the attitudes toward marriages and the family of 3000 college students from broken, happy unbroken, and unhappy unbroken homes. Results indicated that there were no significant differences in self-evaluations of children from unhappy non-divorced marriages and children from homes broken by divorce. It was the emotional climate of the home, not the actual structure of the family, that was found to be most important. Landis, A Comparison of Children From Divorced and Nondivorced Unhappy Marriages, 11 Fam. Life Coordinator 61 (1962).

Burchinal studied families with children in the seventh and eleventh grades in Cedar Rapids, Iowa, to determine whether there were significant differences among selected personality characteristics and selected measures of social relationships among children from unbroken families, one-parent families, and reconstituted families where the custodial parent had remarried: He concluded that "[i]nimical effects associated with divorce or separation and, for some youth, with the remarriage of their parents with whom they were living, were almost uniformly absent in the populations studied." Burchinal, Characteristics of Adolescents From Unbroken, Broken, and Reconstituted Families, 26 J. Marr. & Fam. 44, 50 (1964).

Similarly, a recent investigation of 289 third, sixth, and eighth grade children found that there were no significant differences in children's self-concepts whether they came from intact, single-parent, reconstituted, or other types of families. Self-concept, which is a measure of social personal adjustment, was significantly low, however, for children who reported high levels of
Even though most people regarded fault divorce legislation as unrealistic, hypocritical, and out-of-date, little relief was provided by the predominantly conservative state legislatures. Instead the parties, their attorneys, and the courts themselves guided divorce actions safely through the treacherous waters of traditional divorce grounds and defenses in order to arrive at the desired destination—a relatively quick and painless divorce. In the process they created a divorce law vastly different from the one ensconced in the statutes and appellate court decisions. As Justice Traynor described the resulting situation, "perhaps in no other area has the discrepancy between law in dogmatic theory and law in action, evading dogma by fiction and subterfuge, become so marked as in divorce law. . . . Rules insensitive to reality have been cynically circumvented by litigants and attorneys, with the tacit sanction of the courts.”

The primary evasionary device was the uncontested divorce which, according to most authorities, accounted for more than ninety percent of the decrees granted. In the vast majority of


153. See Elliott, supra note 60, at 134.
155. Another widely used device was migratory divorce, i.e., obtaining a divorce in another jurisdiction where the law was less strict or more easily evaded. See note 41 supra. See also N. Blake, supra note 37; Freed & Foster, Divorce American Style, 383 ANNALS 71 (1969). A cheaper way simply was to abandon one's spouse. See note 40 supra.
156. W. JOHNSON, supra note 25, at 27; H. O'GORMAN, LAWYERS AND MATRIMONIAL CASES 22 (1963); M. Ploscowe, H. Foster & D. Freed, FAMILY LAW 313, 344 (2d ed. 1972); M. Rheinstein, supra note 35, at 247; Foster, supra note 40, at 55-56; Walker, supra note 49, at 283.

In 1971, 89.5% of the divorce petitions granted in Nebraska were uncontested. Extrapolated from BUREAU OF VITAL STATISTICS, NEB. DEPT OF HEALTH, STATISTICAL REPORT 1971, at 91 [hereinafter cited as NEB. STATISTICAL REPORT 1971]. Commissions studying divorce laws prior to the recent reforms reported uncontested rates of 94% in California and 93% in England. CAL. REPORT, supra note 135, at 16-17; LAW COMMISSION, supra note 93, at 14.

Although the hearings were uncontested, the plaintiff still had to put in his or her proof. As one judge observed:

Further to impede divorce, the law forbids a decree by default. That would too patently be divorce by mutual consent. So although in some 90% of the cases the defendant stays carefully away, the plaintiff must, nevertheless, put on an exhibition of shadow-boxing and give the shadow a knockout to the satisfaction of the law. Whoever originated the forms and procedures for divorce litigation little realized that he was setting the stage for a sham battle against the little man who isn't there.

Alexander, supra note 145, at 107-08.
cases the decision not to contest was a deliberate one designed to present to the court just enough corroborated facts to establish one of the statutory grounds—usually cruelty—while concealing

157. In Nebraska corroboration by other evidence of the parties' testimony as to the grounds for the divorce was required by statute: "No decree of divorce and of nullity of a marriage shall be made solely on the declaration, confessions or admissions of the parties, but the court shall, in all cases, require other satisfactory evidence of the facts alleged in the petition for that purpose." Act of Jan. 26, 1856, ch. 52, § 38, 1856 Neb. Laws 277 (most recently codified at Neb. Rev. Stat. § 42-335 (Reissue 1968)) (repealed 1972).

While the purpose behind the corroboration requirement was to prevent collusive or fraudulent divorces, the Nebraska Supreme Court speculated that the requirement "has generated more collusion and fraud than it may have prevented." Goree v. Goree, 187 Neb. 774, 777, 194 N.W.2d 212, 214 (1972). In the absence of a statute the common law and majority rule is that corroboration is not generally required, although in certain circumstances it may be called for. Annot., 15 A.L.R.2d 170 (1951).

158. In 1971, 69% of the divorces granted in Nebraska were for cruelty. Extrapolated from Neb. Statistical Report 1971, supra note 156, at 90. Nationally, 58.7% of all divorces in 1950 were granted on the ground of cruelty. P. Jacobson, supra note 37, tbl. 58, at 121. The figure today in those states still subscribing to the fault theory is thought to be much higher. See M. Wheeler, supra note 50, at 4 (at least 75%). Before California adopted its irreconcilable differences ground, about 95% of all complaints for divorce in that state were based on extreme cruelty. Goddard, A Report on California's New Divorce Law: Progress and Problems, 6 Fam. L.Q. 405, 406 (1972) (citing Bureau of Vital Statistics, Cal. Dept of Pub. Health, Divorce in California 175 (1967)).

The popularity of the cruelty ground stems from its lack of specificity and from the elasticity with which courts have been willing to interpret it in order to allow couples to free themselves of unwanted marriages. The rule in Nebraska was that

any unjustifiable conduct on the part of either the husband or the wife, which so grievously wounds the mental feelings of the other, or so utterly destroys the peace of mind of the other as to seriously impair the bodily health or endanger the life of the other . . . or such as utterly destroys the legitimate ends and objects of matrimony, constitutes "extreme cruelty" under the statutes, although no physical or personal violence may be inflicted, or even threatened.


While the court found that this test was not met in Benton v. Benton, 180 Neb. 759, 145 N.W.2d 576 (1966) (husband drank and quarreled, particularly about finances and wife's son); Murphy v. Murphy, 175 Neb. 239, 121 N.W.2d 404 (1963) (wife nagged and argued about finances); and Smith v. Smith, 160 Neb. 120, 69 N.W.2d 321 (1955) (frequent quarreling)—it found sufficient evidence of cruelty in Allgood v. Allgood, 189 Neb. 429, 203 N.W.2d 102 (1972) (wife constantly nagged and argued with husband); Stevens v. Stevens, 184 Neb. 370, 167 N.W.2d 761 (1969) (husband was self-centered and pre-occupied
from the court any evidence of the plaintiff's recriminatory misconduct which might provide a basis for the court denying the divorce. The testimony presented was at times perjured, but more often was merely a highly circumscribed version of the truth, expressly or implicitly agreed to by the parties, which enabled them to get a divorce while exposing only the smallest possible portion of their private lives to public scrutiny. The result was a ten minute charade, stage-managed by the plaintiff's attorney, which beguiled

with satisfying his own desires and exhibited a lack of concern for his child); and Beals v. Beals, 152 Neb. 364, 41 N.W.2d 152 (1950) (wife kept herself and the home offensively untidy and accused husband of consorting with other women). For a good discussion of the cruelty ground replete with cases in which cruelty was found, sometimes under questionable circumstances, see M. Ploscowe, H. Foster & D. Freed, supra note 156, at 393-433.

The fact that an appellate court occasionally would deny a cruelty divorce in a contested case is not necessarily indicative of the practice of trial courts in uncontested cases. As a rule the plaintiff simply testified that the defendant's "cold and indifferent" behavior had caused the plaintiff to become "seriously ill, nervous and upset." Cal. Report, supra note 135, at 119. The ease by which a divorce on the grounds of cruelty could be obtained in Nebraska was illustrated by Judge Theodore Richling of the Fourth Judicial District in his testimony before the Legislature's Judiciary Committee: "I have heard it frequently said and I do not disagree with it, 'What do you need to get a divorce in Nebraska?' 'Three hundred dollars, that's all you need.' And under our present divorce law, under the extreme cruelty, why that's about right." Hearings, supra note 130, at 38.

Even where the divorce could be obtained on other grounds, cruelty was often alleged because testifying as to "mental" cruelty was seen as less incriminating and distasteful. Elliott, supra note 60, at 145; Zuckman & Fox, supra note 132, at 564.

It is common knowledge that in a vast number of divorce cases fabricated evidence is presented to the courts and true evidence is withheld from them in violation of the principle that in matters of divorce all relevant facts are to be truthfully presented. Perjured oaths are sworn not only by witnesses testifying to fabricated acts of adultery, cruelty or desertion, but also by plaintiffs who depose under oath that they have always conducted themselves as good and faithful husbands or wives, as the case may be, or that they have come into the forum state with the intention of there establishing a residence.

For a description of faked adultery divorces in New York, see Wels, New York: The Poor Man's Reno, 35 Cornell L.Q. 303, 315-18 (1950). One judge has estimated that in Nebraska fault divorces, "about half the testimony, if not perjured, at least was exaggerated." Hearings, supra note 130, at 14 (testimony of Judge Lawrence C. Krell).

Technically such an agreement would be considered collusion. Divorces were to be denied if they were sought by collusive means. Act of Jan. 26, 1856, ch. 52, § 9, 1856 Neb. Laws 277 (most recently codified at Neb. Rev. Stat. § 42-304 (Reissue 1968)) (repealed 1972). As it was highly unlikely that the parties would raise the defense, it rarely was utilized. See H. Clark, supra note 116, at 361-65.

According to California attorneys the average uncontested divorce under the old law took no more than 10 minutes of the court's time. Kay, A Family Court: The California Proposal, 56 Calif. L. Rev. 1205, 1219 (1968). The same
no one, certainly not the judge who was its principal audience.\textsuperscript{162} Obviously, the brevity of time and information that characterized these hearings precluded any cogent attempt to ascertain whether a statutory ground for divorce really was present or whether a defense existed, let alone whether the marriage had so broken down that any attempt to save it would be futile. If society had an interest in preserving marriages, that interest was poorly represented by a procedure which, in actuality, permitted divorce by consent.

The fact that most divorces were uncontested did not mean that they proceeded without disputes or difficulties. There often were serious disagreements among the parties—especially as to property settlements, support, and custody—but most were settled through negotiation in the lawyers’ offices rather than through litigation in the courtroom. At times one of the spouses—whether motivated by greed, spite, or a genuine desire to preserve the marriage\textsuperscript{163}—would attempt to prevent the divorce. Where the spouse was innocent of any statutory wrongdoing or was able to present a valid defense, the power to block the divorce existed. Yet, if the other party was persistent enough, the consent of the reluctant spouse usually could be purchased or coerced.\textsuperscript{164} Often the ability

\textsuperscript{162} was true in England. \textit{Law Commission}, supra note 93, at 31. In 1973 it was reported that the average hearing time for uncontested divorces in King County, Washington, was six minutes. Rails, \textit{The King County Family Court}, 28 \textit{Wash. L. Rev.} 22, 26 (1953).


\textsuperscript{164} \textit{Foster, Spadework for a Model Divorce Code}, 1 \textit{J. Fam. L.} 11, 17-18 (1961).
to prevent a divorce, which the traditional grounds and defenses provided, was utilized solely as a means of extracting financial or custodial concessions from the other party. There was no guarantee that this powerful bargaining weapon would be wielded only by the party less at fault or more in need; in fact, there is every reason to believe that it provided the most leverage in the hands of the less despairing and the more calculating of the parties.\textsuperscript{165}

The system of divorce that evolved in this country, then, was actually two systems. The "living law," which reflected the norms held by a large segment of American society and which permitted divorce by consent of the parties, was hidden behind the facade of the official law of divorce for misconduct, which reflected the religious and moral convictions of a conservative elite.\textsuperscript{166} While some may have accepted and even admired this compromise,\textsuperscript{167} many decried the situation for diminishing respect for and confidence in the legal system.\textsuperscript{168}

Many appellate courts, troubled by the hypocrisy which characterized divorce practice in the trial courts\textsuperscript{169} and by the duty, im-

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  \item J. Marr. & Fam. 571 (1978); Gunter, Notes on Divorce Filing as Role Behavior, 39 J. Marr. & Fam. 95 (1977).
  \item See W. Friedmann, supra note 115, at 249; H. O'Gorman, supra note 156, at 20-22; M. Rheinstein, supra note 35, at 254; Traynor, supra note 154, at 236.
  \item See M. Rheinstein, supra note 35, at 254.
  \item For example, Judge Henry A. Riederer of Kansas City has commented: "This whole area of marriage dissolution is a growing cancer in which we blandly and blindly participate, without recognizing the obvious great harm to our profession's real and public image." Riederer, Marriage Dissolution Trends: An Analysis of a Missouri Bar Survey, 25 J. Mo. B. 549, 550 (1969). For perspectives on divorce practices under the former Nebraska law, see Tenney, Divorce Without Fault: The Next Step—A Model for Change, 46 Neb. L. Rev. 24 (1967); Comment, Terminating a Marriage in Nebraska, 43 Neb. L. Rev. 156 (1963).
  \item Judicial annoyance with the improbity of the divorce system is not only a recent phenomenon. In 1832 the Ohio Supreme Court complained:

  Perhaps there is no statute in Ohio more abused than the statute concerning "divorce and alimony." Perhaps there is no statute under which greater imposition is practiced upon the court, and more injustice done to individuals. . . . The hearings are generally ex parte. Witnesses are examined, friendly to the applicant, and it is almost, if not utterly impossible for the court, in most instances, to arrive at the real truths of the case. I would not be understood that there are no
\end{itemize}
posed on them by statute, to deny a divorce even in situations in which one clearly was warranted, added their voices to those calling for reform. On the eve of the 1972 floor debate on divorce reform in the Nebraska Unicameral, the Nebraska Supreme Court vacated a trial court’s divorce decree, even though it was “reluctant to . . . blot out a logical view of practical reality,” because “the statute leaves us no alternative.” The supreme court pointed out that the corroboration statute, “word for word, has remained unchanged since 1866” and suggested that “[t]he fact that the present statute has been in effect for over 100 years might well suggest a reexamination by the Legislature. Legislative divorce policy of an era before Nebraska became a state may or may not reflect her modern mood.”

D. “Dissolution of marriage shall mean the termination of a marriage by decree of a court of competent jurisdiction upon a finding that the marriage is irretrievably broken.”

Upon reexamining Nebraska’s divorce statutes, the state legislature concluded that a marriage can be dissolved when, and only when, a court determines that it is “irretrievably broken” and that “every reasonable effort at reconciliation has been made.”

meritorious cases. That there are some such there can be no doubt. But of the great multitude of cases which are before this court, I am confident that by far the greater number are not of this class. Harter v. Harter, 5 Ohio 318, 319 (1832).

170. Not infrequently an appellate court would be forced to overturn a decision of a trial court judge who, in order to reach what was thought to be an equitable result, chose to ignore the statutory restrictions and grant a divorce. In Bahr v. Bahr, 272 Wis. 323, 75 N.W.2d 301 (1956), the Wisconsin Supreme Court found that recrimination barred the divorce. The court explained that

[under the circumstances we deduce that the [trial] court believed the marriage was wrecked, considered that it ought to be terminated and thought that a termination upon the wife’s complaint . . . , even though Mrs. Bahr had seriously erred in her marital obligations, was the best way out of a bad matter. If that was the court’s conclusion we can find no philosophical fault with its disposition of the matter. We can only say that the law in Wisconsin, as we read it, does not permit. Id. at 326, 75 N.W.2d at 302.

In Simkins v. Simkins, 198 So. 2d 648 (Fla. Dist. Ct. App. 1967), the Florida District Court of Appeals reversed the trial court which had stated, “I don’t think he has shown any grounds that I am willing to accept at all, but I am going to divorce them. They both want it, don’t they?” Id. at 649.


172. Id. at 778, 194 N.W.2d at 214.

173. Id. at 777, 194 N.W.2d at 214.

174. Id. at 778, 194 N.W.2d at 214.

175. NED. REV. STAT. § 42-347 (Reissue 1974).

176. Id. § 42-361.

177. Id. § 42-360.
The inquiry now would be focused on the state of the marriage relationship itself rather than on the acts and characteristics of the parties.

In making breakdown the sole criterion for the dissolution of a marriage and in abolishing the common law defenses and the corroboration requirement, the Unicameral not only cast aside its century old fault based divorce scheme, but also passed over less far-reaching divorce reform devices which had been implemented in other states. These reforms—primarily the revision or elimination of the traditional defenses and the addition of such non-physical factors as the state of the marriage relationship itself—have been adopted by most states which have promulgated no fault divorce statutes. In Georgia, where the common law defenses have not been abolished, the state supreme court has held that where the parties reconcile and live together after filing a petition for divorce which alleges that the marriage is irretrievably broken, the defense of condonation applies and terminates the action, even though the reconciliation failed and the couple again separated. As no subsequent action of the defendant spouse can revive the no fault claim, a new action must be filed. Woods v. Woods, 241 Ga. 393, 245 S.E.2d 651 (1978); Lindsay v. Lindsay, 241 Ga. 166, 244 S.E.2d 9 (1978).

Compare these decisions to those in states in which the common law defenses have been abolished. E.g., Smith v. Smith, 322 So. 2d 580 (Fla. Dist. Ct. App. 1975); Nooe v. Nooe, 277 So. 2d 835 (Fla. Dist. Ct. App. 1973); Peitola v. Peitola, 79 Mich. App. 709, 263 N.W.2d 25 (1977); Cowser v. Cowser, 78 Mich. App. 129, 259 N.W.2d 393 (1977) (all holding that instances of sexual intercourse between the parties which occurred after the commencement of the dissolution proceedings were not sufficient bases to deny the divorce).

Some states, while retaining fault grounds, have expressly abolished some or all of the major defenses to a divorce action. See, e.g., N.J. REV. STAT. § 2A:34-7 (Cum. Supp. 1978) (abolishing recrimination and condonation, and allowing divorces to be granted to both parties if each makes out a ground for divorce); N.Y. DOM. REL. LAW § 171 (McKinney 1977) (limiting recrimination to the ground of adultery). Others, by statute or case law, have made the application of recrimination discretionary. See, e.g., MISS. CODE ANN. § 53-5-3 (1972); De Burgh v. De Burgh, 39 Cal. 2d 858, 250 P.2d 598 (1952) (where both parties are at fault the trial court can grant a divorce to either, neither, or both, bearing in mind (1) the prospect of reconciliation, (2) the effect of the marital conflict on the spouses, (3) the effect of the conflict on third parties, and (4) comparative guilt). (California subsequently adopted no fault legislation which abolished the traditional defenses. CAL. CIV. CODE §§ 4000-5318 (West 1970)).

In other instances the doctrine of recrimination has been replaced by that of comparative rectitude whereby only the more guilty of the two spouses would be denied a divorce. See, e.g., Act of April 11, 1972, ch. 220, § 7, 1971 Wis. Laws 643 (repealed 1978) (court may grant a judgment of divorce "to the party whose equities on the whole are found to be superior"); KAN. STAT. § 60-1606 (1976) ("court may grant or refuse a divorce when the parties are found to be in equal fault"). See also Stewart v. Stewart, 158 Fla. 326, 29 So. 2d 247 (1946).

Where the defense of condonation has not been abolished, some states have tried to mitigate its negative effect on reconciliation attempts, see text accompanying note 145 supra, by suspending the divorce proceedings for a period of time while the parties are allowed to resume living together without

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178. Act of April 20, 1972, L.B. 820, § 35, 1972 Neb. Laws 246 (repealing prior divorce law). Not all states which have promulgated no fault divorce statutes have abolished the common law defenses. In Georgia, which has not repealed these defenses, the state supreme court has held that where the parties reconcile and live together after filing a petition for divorce which alleges that the marriage is irretrievably broken, the defense of condonation applies and terminates the action, even though the reconciliation failed and the couple again separated. As no subsequent action of the defendant spouse can revive the no fault claim, a new action must be filed. Woods v. Woods, 241 Ga. 393, 245 S.E.2d 651 (1978); Lindsay v. Lindsay, 241 Ga. 166, 244 S.E.2d 9 (1978).

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Where the defense of condonation has not been abolished, some states have tried to mitigate its negative effect on reconciliation attempts, see text accompanying note 145 supra, by suspending the divorce proceedings for a period of time while the parties are allowed to resume living together without
fault grounds as separation\textsuperscript{180} and incompatibility\textsuperscript{181} to the cus-

running the risk that their grounds for divorce will be considered condoned. \textit{See, e.g.}, \textsc{Tenn. Code Ann.} § 36-8-36 (1977). Modifying or eliminating these defenses, of course, does not negate the necessity of proving grounds for divorce.

\textsuperscript{180} In 1850 Kentucky became the first state to make separation or living apart a ground for divorce. \textsc{M. Ploscowe, H. Foster & D. Freed, supra} note 156, at 349. By 1972 some form of this ground was recognized in 28 states. \textit{Id.} at 353.

While some statutes permit divorce solely upon proof that the spouses have been separated for the requisite time period, others require that the separation be voluntary on the part of both parties. A third type of statute makes divorce available only to the spouse who did not cause the separation, while a fourth authorizes a divorce only when the parties have lived separate and apart pursuant to a decree of legal separation or separate maintenance. \textit{Id.} at 353-69; \textsc{Wadlington, Divorce Without Fault Without Perjury}, 52 \textsc{Va. L. Rev.} 32, 52-66 (1966). Although all are based on the premise that a separation of a proscribed length is both a clear indication that the marriage has broken down and a check on hasty dissolutions, only the first two varieties offer an escape from the morass of fault finding, and only the first allows a no fault nonconsensual divorce. Even legislation of the first type is not immune from court-imposed fault concepts. \textit{See, e.g.}, \textsc{Byers v. Byers, 223 N.C. 85, 25 S.E.2d 466 (1943)} (construing an apparently non-fault separation statute to preclude divorce where the separation amounts to abandonment).

A major problem with the separation ground has been the length of time the parties have been required to live apart before being eligible for a divorce. As recently as 1968, most statutes called for periods of from three to five years, and Rhode Island's statute required ten. \textsc{H. Clark, supra} note 118, at 332. While many of the separation periods have been shortened, they still range from six months, \textit{see, e.g.}, \textsc{Vt. Stat. Ann. tit. 15, § 551 (T) (1974)}, to five years, \textit{see, e.g.}, \textsc{Idaho Code} § 32-610 (1963), with most being one or two years. "\textsc{Gresham's Law}" of divorce, \textit{note 41 supra}, indicates that those couples who wish to terminate their marriages quickly will find lengthy separation grounds to be unsatisfactory alternatives to the more rapid fault based grounds with which they co-exist. For instance, in April, 1972, Wisconsin reduced the period of separation necessary to get a divorce under its voluntary separation statute from five years to one. \textit{Act of April 11, 1972, ch. 220, § 3, 1971 Wis. Laws 641} (repealed 1978). Where the voluntary separation ground accounted for only 3.5\% of Wisconsin divorces in 1970, 2.5\% in 1971, and 4.3\% in 1972, it shot up to 7.1\% in 1973, 8.5\% in 1974, and 9.4\% in 1975. Extrapolated from data obtained from \textsc{Div. of Health, Wis. Dep't of Health & Social Services} (Jan. 5, 1978). Still, more than 88\% of all Wisconsin divorces obtained in 1975 were for "\textit{cruel and inhuman treatment}." \textit{Id. See also Rheinstein, supra} note 41, at 642; \textsc{Comment, Divorce Reform—One State's Solution}, 1967 \textsc{Duke L.J.} 956, 965 n.58.

Among other questions of interpretation that separation statutes raise, such as the nature of the separation and when the period of separation is deemed to commence, is the effect of a reconciliation attempt during the separation. While the law may draw fine distinctions, \textit{see Wadlington, supra} at 75-76, a couple contemplating a try at getting back together could well be put off by the fear that doing so would turn "\textit{the separation clock . . . back to zero}." \textsc{M. Wheeler, supra} note 50, at 46.

\textsuperscript{181} Incompatibility of temperament as a ground for divorce made its way into American law from Denmark via 1933 legislation in the Virgin Islands, formerly a Danish possession. \textsc{M. Ploscowe, H. Foster & D. Freed, supra} note 156, at 369. Currently six American jurisdictions list incompatibility as a ba-
tomary grounds for divorce—more often than not failed to eradicate the major shortcomings of the fault approach.\(^{182}\) By adopting the irretrievable breakdown standard the Nebraska Unicameral provided the "unequivocal legislative mandate"\(^{183}\) that critics of previous reform efforts had felt was necessary to assure that divorces could be obtained free from considerations of fault.\(^{184}\)


The generally accepted definition of incompatibility clearly indicates that the fault of either party ought to be irrelevant when a divorce is sought on this ground:

[Int]incompatibility of the temperament... does not refer to... petty quarrels and minor bickerings [but]... to conflicts in personalities and dispositions so deep as to be irreconcilable and to render it impossible for the parties to continue a normal marital relationship with each other. ... It is the legal recognition of the proposition... that if the parties are so mismated that their marriage has in fact ended as a result of their hopeless disagreement and discord the courts should be empowered to terminate it as a matter of law.


"Yet, when grafted into an existing divorce statute containing traditional fault-based grounds and defenses, it was difficult for the courts to avoid the contagious effects of a concept so deeply rooted in their jurisprudential thought." Walker, supra note 132, at 200. In particular, courts have had difficulty in resisting the temptation to insist that the blame for the couple's incompatibility be laid squarely on the defendant spouse and that the plaintiff spouse be free of any serious misconduct. See Schlesinger v. Schlesinger, 399 F.2d 7 (3d Cir. 1968) (Virgin Islands incompatibility ground cannot be used where to do so would reward an unfaithful husband for his marital infidelity); Shearer v. Shearer, 356 F.2d 391 (3d Cir. 1965) (it is clearly erroneous to award a divorce under the Virgin Islands incompatibility statute to a husband who refused to resume his marital relationship with his wife after they had lived apart for six years and she had sued him for separate maintenance and had had him jailed for arrearages in support); Clark v. Clark, 54 N.M. 364, 225 P.2d 147 (1950) (trial court has the discretion to deny a divorce, if granting it, in view of the plaintiff's adultery, would "shock the conscience"); But see Garner v. Garner, 85 N.M. 324, 512 P.2d 84 (1973) (overruling Clark) (recrimination is not a defense where a divorce is sought on the grounds of incompatibility). See also Chappell v. Chappell, 296 P.2d 766 (Okla. 1956) (the incompatibility ground is inapplicable where only the spouse seeking the divorce complains of incompatibility). But see Kennedy v. Kennedy, 461 P.2d 614 (Okla. 1969); Waller v. Waller, 439 P.2d 952 (Okla. 1968); Stuart v. Stuart, 433 P.2d 951 (Okla. 1967); Bessinger v. Bessinger, 372 P.2d 870 (Okla. 1962); Wegener v. Wegener, 365 P.2d 728 (Okla. 1961); Rakestraw v. Rakestraw, 345 P.2d 888 (Okla. 1959) (all holding that incompatibility does not have to be mutual).

182. See notes 179-81 supra. Many states which had implemented reforms of this type have since abandoned them in favor of breakdown statutes.

183. Wadlington, supra note 180, at 52.

184. Id. The Unicameral did not give an unequivocal mandate to eliminate fault
The new law embraced the notion that "[o]nce a couple has irreconcilably ceased to be committed to one another, once a couple has irretrievably lost the ability to complement each other as husband and wife, they are in fact divorced." In such cases the court is "empowered to declare defunct de jure what . . . is already defunct de facto." By providing a realistic and efficient method of dissolving broken-in-fact marriages the no fault law freed the divorce process of much of the collusion, hypocrisy, and embarrassment that had characterized it in the past. Aside from this, however, as had been predicted, it "for the most part change[d] only the law in the books and [left] the law in practice relatively unmolested." The minimal effect the no fault law has had on the divorce rate, as demonstrated by the interrupted time series analysis, is evidence that this prediction was accurate.

1. Does the Irretrievable Breakdown Standard Reduce the Animosity of Divorce?

One of the great attractions of a no fault divorce procedure was the promise that it would minimize the acrimony, distress, and humiliation that the adversarial fault system engendered and maximize the possibility of future harmonious relationships among the parties and their children. The prevalent feeling among Nebraska district court judges is that it has lived up to this promise. Two-thirds of those surveyed felt that the change in the law has led to a lessening in the parties' feelings of animosity toward each other. Furthermore, when asked to identify the law's major strengths, the attributes most often cited by the judges were the

from such divorce-related issues as alimony and division of property, however. See note 406 & accompanying text infra.


186. PUTTING ASUNDER, supra note 90, at 38.


188. Indicative of the intent of the drafters of the no fault law to reduce the hostile atmosphere of divorce actions are the "psychosemantic" changes the law makes. King, Marriage, Divorce and Custody Reform in South Dakota, 18 S.D. L. Rev. 654, 669 (1973). Thus "dissolution" is used instead of the more ominous "divorce," Neb. Rev. Stat. § 42-347(1) (Reissue 1974); "proceeding" instead of "action," id. § 42-352; "petition" instead of "complaint," id.; "petitioner" and "respondent" instead of "plaintiff" and "defendant," id. § 42-353; and "responsive pleading" instead of "answer," id. § 42-354. One stylistic change that Nebraska did not adopt, although it was a part of many other reforms, is the entitling of the proceeding "In re marriage of ______________," rather than the more adversarial "______ vs. _________," See, e.g., UNIFORM MARRIAGE AND DIVORCE ACT § 301(b).

189. Judges' Questionnaire, supra note 15, question 19. Similar responses were obtained in surveys of California and Iowa judges and attorneys. Goddard, supra note 158, at 419; Sass, supra note 39, at 636-37.
elimination of fraud and perjury and the reduction of bitter conflict.  

While admitting that animosity clearly has been reduced during the trial itself, one judge felt certain that "there would be no difference in many cases as far as the feelings and opinions of the parties toward each other." Certainly, while the accusatory nature of the old procedure greatly exacerbated the acrimony of divorce, blame for the hostility exhibited by a divorcing couple cannot be laid solely on the law. Much of it is inherent in the process of alienation that leads to divorce. A mere change in the law, no matter how sweet, cannot be expected to neutralize all that bitterness.

Since fighting over who caused the break-up is futile, "those

190. Judges’ Questionnaire, supra note 15, question 22. Parties to the new-style dissolution proceedings also have been impressed, praising their divorces as "delightful . . . absolutely amiable" experiences, in which they do not have to "spill their guts." No-Fault Law Ending Dishonesty in Divorce, Omaha World-Herald, Aug. 29, 1978, at 1, col. 4; Lincolnites Defend No Fault Divorce, Lincoln Star, Nov. 6, 1974, at 21, col. 1. However, some find the proceedings "too impersonal and coldblooded." Zuckman & Fox, supra note 132, at 517. See also Elston, Fuller & Murch, Judicial Hearings of Undefended Divorce Petitions, 38 MOD. L. REV. 609 (1975).


192. See notes 139-45 & accompanying text supra.

193. [H]ostility is not engendered by the fact that one of the spouses accuses the other of excessive drinking, association with someone of the opposite sex, physical violence, or mental cruelty. Hostility derives from the fact that one of these conditions does exist in the home; hostility arises because one of the parties does not want a divorce.


194. In marriage and divorce the sequence is as follows: wish-fulfilling fantasies lead to idealization; one identifies himself strongly with the object of idealization, reality makes the idealization untenable and thus shatters the identification; one then turns against the marriage partner and the marriage relationship, desiring to hurt the one and destroy the other. "Woe unto you if you are not perfect."

Often the disillusioned one discovers a capacity for vindictiveness that surprises him. It is usually the one upon whom the divorce has been forced who strikes back hardest. This person has suffered a terrific ego wound and a great threat to his security and love by the defection of the mate, and the mate has forced the alienation process too rapidly for him to assimilate it. At length he strikes back with bitter joy and tries to do something to the mate that will once more establish him as a person to be reckoned with.


This tempo of bitterness may be furthered by friends and sympathizers of the divorcé, who are often more bitter than the parties and who bolster their friend and disparage his or her mate. Id. at 523-27.
who want a fight, now use collateral issues as the battle ground."

Fights over custody and support are far more prevalent and are often just as acrimonious and humiliating as those over grounds, if not more so. These conflicts can be especially fierce when they are engineered by over-zealous attorneys who, in their desire to win for their clients, may be unmindful of the bitter price that often must be paid for victory. The economic realities that dictate that both spouses may be forced to reduce their standard of living after a divorce also promote interspousal discord.

Nine of the judges who responded to the survey felt that the change in the law had led to more disputes on collateral issues. They reasoned that under the old law a spouse whose "fault" would appear to frustrate his or her desire to end the marriage would have to reach some compromise in order to get a divorce, while under the new law that person is free to contest child custody or property matters. Approximately one-fourth of the dissolution cases reported on in the Judges' Questionnaire were contested. As this is a higher percentage than before no-fault, and as most of the contests were on collateral issues, litigation

195. Comment of judge in Judges' Questionnaire, supra note 15. See also Podell, supra note 193, at 601, 7 Fam. L.Q. at 170.

196. While there is sometimes only a fine line between providing the means to obtain a divorce and providing a method of vindication, there is a difference. Allowing the second to cloud the first provides a shallow victory for both client and lawyer. Most often the results are further litigation requiring further contact with an ex-spouse, which reopens the old wounds. The very idea of divorce as an act freeing one person from having to deal with his/her former mate becomes self-defeating once the process becomes acrimonious. In these situations, especially if no-fault exists, it must be questioned whether the lawyers are simply operating in an established adversary framework or if it is their activities and advice, or lack of it, that create the adversary process—a process which leaves deep emotional scars and impedes, if not prevents, psychological recovery of the men, women, and children involved.


198. Judges' Questionnaire, supra note 15, question 20. Of the nine judges who believed no-fault divorce caused more disputes, two sat in Omaha and four in Lincoln. Id.

199. Id. See also Van Pelt, No Fault Divorce: A Re-examination of Nebraska Law, 54 Neb. L. Rev. 27, 45 (1975).


201. In 1971 only 10.5% of the divorce petitions granted in Nebraska were contested. Extrapolated from NEB. STATISTICAL REPORT 1971, supra note 156, at 91.

202. Only in slightly more than three percent of the contested cases did one of the
over these issues does seem to have increased. Even so, the intensity of the disputes may have lessened. In fact, more than half the judges surveyed felt that the more amiable atmosphere of no fault divorce proceedings facilitated the settlement of collateral issues.203

2. How Closely Are Marriages Scrutinized in Order to Determine Whether They Are Irretrievably Broken?

The weight of opinion is that the Nebraska dissolution of marriage law has succeeded in creating a practical and realistic process whereby marriages which are bereft of life can receive a decent burial. As admirable an accomplishment as that may be, it can be argued that this is only a part of what the law should achieve. In addition, "efforts should be made to make sure that the marriage actually is 'dead' and not viable and . . . that some 'live' marriages are not being pronounced 'dead.' "204 A law which makes divorce too easy to obtain and which does not try to save those marriages which are salvageable can be accused of ignoring society's legitimate interest in marriage stability.205 Divorce laws, the argument

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203. Id. question 20. One judge commented, "In most cases the relief given to both sides of not having to go through the sometimes painful details of infidelities, social behavior, etc., leaves the parties better able to work out more fairly the important matters of custody—visitation—support—property division—alimony, etc." Id.

204. ABA FAMILY LAW SECTION, PROPOSED REVISED UNIFORM MARRIAGE AND DIVORCE ACT § 302, Comment (adopted by the Family Law Section Council, Nov. 9, 1972), reprint in 18 S.D. L. Rev. 693 (1973); 7 FAM. L.Q. 135 (1973); DESK GUIDE, supra note 185, at 61 [hereinafter cited as PROPOSED REVISED ACT]. The English Law Commission concluded that a divorce law should seek to achieve both these objectives:

(i) To buttress, rather than to undermine, the stability of marriage, and

(ii) When, regrettably a marriage has irretrievably broken down, to enable the empty shell to be destroyed with the maximum fairness, and minimum bitterness, distress and humiliation.

205. [T]he concept of marriage as a social institution that is the foundation of family and of society remains unchanged . . . . Since marriage is of vital interest to society and the state, it has frequently been said that in every divorce suit the state is a third party whose interests take precedence over the private interests of the spouses. Posner v. Posner, 233 So. 2d 381, 382-83 (Fla. 1970).

The following have been identified as important societal functions that marriage and the family are expected to fulfill:

(1) Provision of an efficient and orderly setting for sexual activity . . . ; (2) procreation in associationally stable and economically secure circumstances, (3) . . . socialization of children . . . ; (4) "post-honeymoon" companionship and mutual psychological
continues, should not be so lax as to entice people to undertake marriage lightly and without adequate thought, or tempt them into hasty and frivolous divorces, or otherwise encourage them to exalt what they perceive to be their greater individual happiness over the interests of their marital partners and children. Of course, this contention assumes that divorce laws can have a substantial effect on marriage stability. This is an assumption which has neither been conclusively proved nor universally accepted.

support in time of individual stress...; (5) economic security and long run assurance that permits role division in terms of career and child raising without threat of ultimate destitution for the "at-home partner" when the job is done, and (6) rudimentary "social security", i.e., mutual... economic insurance against economic adversity, as well as the production and raising of children as guarantors of security in old age... .


206. "Fault helped create the notion of 'til death do us part—no fault of 'let's try it.'" Comment of judge in Judges' Questionnaire, supra note 15.

207. Every survey of married couples seems to indicate that in the overwhelming majority of normally successful marriages one or both of the partners felt for a period of time that the marriage was a mistake and could not work. How many married persons act on this conviction and obtain a divorce simply because a quick divorce is practically advertised by the law as a permanent remedy for marital unhappiness?

Drinan, supra note 120, at 70.

208. [L]aw in America teaches that the desire of any married person for a divorce and remarriage has priority over any and all rights which his marital partner or his children may have acquired to his continued companionship. American law has consequently embraced the theory that a marriage agreement may be broken if one of its members thinks that a greater happiness may be found in another situation.

Id. at 66.

209. A great deal has been said and written about the pernicious effect that easy divorce must have on stability in marriage. In fact there is no evidence whatever to show that couples enter marriage more lightly if divorce is legally easy to obtain. Most of the factors that tend to stability in marriage are already present and operative in the child, long before he is of an age to be consciously affected by a divorce law.

Putting Asunder, supra note 90, at 147-48. See also notes 36-41, 77-89, 109-11 & accompanying text supra.

Certainly the state has an interest in safeguarding the integrity of the family. Too often, however, purely punitive divorce measures have been advanced under the guise of protecting society's interest in marital stability. Accordingly, the National Conference of Commissioners on Uniform State Laws rejected the language proposed by the Family Law Section of the American Bar Association, proclaiming that marriage is a civil contract "in which the State has an interest." Proposed Revised Act, supra note 204, § 201. In the Commissioners' view "that concept has been the source of much of the artificiality which has characterized the dissolution of marriages which are, in fact, irretrievably broken." Conference of Commissioners' Report, re-
The traditional fault-oriented divorce laws provided neither an honest method of ending a failed marriage nor an effective means of strengthening a salvageable one. The law as written permitted a marriage to be dissolved when proper grounds were shown, even if the parties were reconcilable. The law as practiced freely allowed consensual divorces with little or no inquiry into the real state of the marriage relationship. The no fault law, with its requirement that the marriage be shown to be irretrievably broken, could well have established a far more difficult and demanding criterion for marital dissolutions, one which would demand a complete bioscopy of the marriage.

This was the goal of many of the advocates of divorce reform. Studies conducted in England and California embraced the marital breakdown concept, but maintained that the fact of breakdown could be determined only after the marriage "has been subjected to a penetrating scrutiny and the judicial process has

printed in DECK GUIDE, supra note 185, at 54, 56. For the dispute between the Family Law Section and the Commissioners generally, see Zuckman, The ABA Family Law Section v. The NCCUSL: Alienation, Separation and Forced Reconciliation over the Uniform Marriage and Divorce Act, 24 CATH. U.L. REV. 61 (1974).

210. See notes 134-35 & accompanying text supra.

211. See notes 155-65 & accompanying text supra.


213. PUTTING ASUNDER, supra note 90. The group appointed by the Archbishop of Canterbury called for a proceeding which would be "in some respects analogous to a coroner's inquest, in that its object would be judicial inquiry into the 'death' of the marriage relationship." Id. at 67. In this "procedure by inquest," id. at 19, the court would be authorized to inquire into "the acts, events, and circumstances alleged to have destroyed the marriage." Id. at 67. The truth of the statements made by the parties would be closely examined, especially in uncontested cases, which, because of the public interest in the stability of marriage, could "call for greater care and judicial skill than one that was contested." Id. at 77. The court would be aided in its investigation by "advocates" or "forensic social workers," id. at 70, who, among their other duties, would help the court determine whether there have been "genuine though unsuccessful efforts by the parties to be reconciled to one another, [or whether] in the circumstances of the particular case, such attempts could only be in vain." Id. at 63.

214. CAL. REPORT, supra note 135. The Report of the California Governor's Commission on the Family advocated that a court be empowered to grant a decree of divorce upon a finding that "the legitimate objects of matrimony have been destroyed and there is no reasonable likelihood that the marriage can be saved." Id. at 91. To aid the court in making these determinations the Report recommended that a Family Court be created in every county in California. In every case there would be an "initial interview" with a member of the staff of professional counselors and investigators who would "determine the susceptibility of the marriage to conciliation services." Id. at 18. On the basis of an extensive report submitted by the counselor and any other evidence presented by the parties, the court would determine whether the marriage should be dissolved.
provided the parties with all the resources of social science in aid of conciliation."215 Regarded as intriguing but impractical, neither of these proposals has been enacted into law.216

Although the English Law Commission had estimated that the breakdown with inquest approach would call for trials of at least a half hour for uncontested cases,217 the average length of an uncontested dissolution hearing in Nebraska is sixteen minutes.218 In the high population centers of Omaha and Lincoln the average is only seven and one-half minutes.219 While contested cases average three and three-fourths hours,220 the vast majority of these involve contests over custody, property, or support—not over breakdown.221 Clearly the Nebraska courts do not conduct "a complete biopsy of the marriage relationship from beginning to end."222

It is proper that they do not, for the wisdom of the inquest approach is questionable. The enormous financial burdens imposed by a system that would subject every marriage brought before it to a strict scrutiny would not be justified by the limited benefits that it would yield—the prevention of divorces in the comparatively few cases in which the parties might be acting precipitately.223 Unless

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215. Id. at 23.
216. "[W]e are forced to the conclusion that Breakdown with Inquest, as proposed by the Archbishop's Group cannot, despite its undoubted attractions and our sympathy with the principles underlying the Group's approach, be made to work because of purely practical difficulties." LAW COMMISSION, supra note 93, at 35.

California eventually enacted its precedent-setting no fault divorce law. Family Law Act, ch. 1603, § 6, 1969 Cal. Stats. 3314 (codified at CAL. CIV. CODE §§ 4000-5138 (West 1970)). However, the measure had been gutted of its separate family court and mandatory counseling features. See generally Krom, California's Divorce Law Reform: An Historical Analysis, 1 PAC. L.J. 156 (1970).

217. LAW COMMISSION, supra note 93, at 30.
218. Judges' Questionnaire, supra note 15, question 4(a). One judge's uncontested hearings averaged less than five minutes, another's between 30 and 60 minutes. Id. A survey of Iowa judges and attorneys reported that uncontested divorce trials in that state averaged between 15 and 20 minutes. Sass, supra note 39, at 650, 652.

219. Judges' Questionnaire, supra note 15, question 4(a). Douglas County (Omaha) uncontested divorces averaged nine minutes, Lancaster County (Lincoln) seven minutes. The average for the rest of the state was 18 minutes. Id.

220. Id. question 4(b).
221. See note 202 supra.
223. Clark, supra note 17, at 406. In the view of the English Law Commission, the breakdown with inquest approach would greatly increase the length of trials and concomitantly the requisite expenditures and court staff. Finding the necessary "forensic social workers" was considered particularly difficult in view of the shortage of trained people. LAW COMMISSION, supra note 93, at 33. In California it was estimated that the compulsory counseling provision
it were envisioned that the counselors/investigators would be "official snoopers . . . interviewing perhaps the corner grocer or the mother-in-law," the facts that comprise the basis for the "penetrating scrutiny" would have to be gathered primarily from the parties themselves. It is difficult to imagine that such a procedure would be effective in unearthing the real reason for the rupture of the marriage. Undoubtedly there would be many who would be reluctant to disclose the intimate facts and details of their married lives and a strenuous effort to overcome this reluctance would seem to be an unwarranted intrusion on their personal privacy.

If the parties had settled on a divorce as the best solution to their marital woes, their testimony, even if honest, would inevitably be slanted toward the achievement of that goal. Furthermore, if the result of the inquest procedure were the wholesale denial of divorces which were desired by the parties, all the evasionary devices that undermined the policy behind divorce based on fault doubtlessly would reemerge.

While the Nebraska legislation does not provide for an inquest-like inquiry into the state of the marriage, it does require that the trial court "consider all relevant factors" and "after hearing, . . . make a finding whether the marriage is irretrievably broken." The law clearly intends the determination of breakdown to be a

called for by the Governor's Commission would cost California counties between five million and ten million dollars per annum. Krom, supra note 216, at 171.


226. Ventilating the whole matrimonial history in public was perceived by the English Law Commission as even more distasteful and humiliating than the proceedings under the old fault law. Law Commission, supra note 93, at 31-32.


228. Bodenheimer, supra note 224, at 200.


Marriage irretrievably broken; findings. (1) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken, or one of the parties has so stated and the other has denied it, the court, after hearing, shall make a finding whether the marriage is irretrievably broken.

(2) If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospect of reconciliation, and shall make a finding whether the marriage is irretrievably broken.

The statute was adapted from the Uniform Marriage and Divorce Act § 305. The unicameral did not include all the language of section 305, however. This has resulted in a statute which has been justifiably criticized as redundant. Van Pelt, supra note 199, at 33-34.
judicial function. The trial court is not expected to "perform a ministerial duty of . . . merely approving a properly filed petition," but it is to make an independent "judicial decision based upon evidence presented at the final hearing." Since divorces by consent effectively undermined the courts' duty under the previous law to award divorces only upon the fault of one party, it is appropriate to inquire whether, under the no fault law, the role of the trial judge in determining whether marital breakdown has occurred is truly meaningful or merely a facade.

The phrase "irretrievably broken," like its no fault counterparts "irreconcilable differences" and "destruction of the legitimate objects of matrimony," has been severely criticized for its ambiguity and uncertainty. Marital breakdown is a conclusional criteria of doubtful justiciability, providing little, if any, guidance to judges, practitioners, or the public. It is questionable whether complex

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230. This section makes the determination of whether the marriage is irretrievably broken, in all cases, a matter for determination by the court, "after hearing" which means "upon evidence." The Conference concluded, even as to [uncontested] cases, that the determination of breakdown should be a judicial function rather than a conclusive presumption arising from the parties' testimony or from the petition.


233. "Now the phrase, the term, 'the marriage has broken down irretrievably' is as broad and as long as the human imagination itself . . . I really and truly do not know what it means." Transcript, supra note 14, at 4108 (comment of Senator Fred W. Carstens). See also M. Reinstein, supra note 35, at 367-87; 1971 Midyear Report, supra note 147, at 174; Bodenheimer, supra note 224, at 202-03; Foster & Freed, Divorce Reform: Brakes on Breakdown? 13 J. Fam. L. 443, 448-52 (1973).

234. "[I]f we have 160 circuit judges in the state, we have just as many potential interpretations. There are absolutely no guidelines as to what constitutes an irreparable breakdown." Cowsert v. Cowsert, 78 Mich. App. 129, 133, 259 N.W.2d 393, 395 (1977) (Kelly, P.J., concurring).

But see Tenney, supra note 168, at 45 ("it is doubtful whether the ambiguity of the [author's proposed no fault] statute would pose serious problems for a judge who, by the time he takes the bench, certainly will be sufficiently mature and have enough professional and personal experience to apply the flexible standard with sufficient precision"); Zuckman & Fox, supra note 132, at 595 n.311 ("certainly, competent judges will . . . know an irretrievably broken marriage when they see it").

To be sure "irretrievable breakdown" is not the only vague formulation
family interactions can be constrained within strict guidelines, however. The very fact that the law lacks precision has brought it praise from courts which believe its flexibility allows each unique marital relationship to receive individual attention. When no fault divorce legislation has been attacked as unconstitutionally vague, appellate courts have been unanimous in upholding the statutes, pointing out that the irretrievably broken standard is "no more susceptible to the charge of vagueness than were the words, 'extreme cruelty.'" 

with which judges and lawyers have to deal. It has been pointed out that "unconscionability" is another such term, id., and that juvenile court and domestic relations judges have dealt competently with such concepts as "best interests of the child" in custody matters, "lack of proper parental care" in neglect and termination of parental rights petitions, and the principles of "individualized justice" in delinquency proceedings. Tenney, supra note 168, at 45-47. The reference to the latter concepts is unfortunate in view of subsequent criticism of the manner in which courts deal with them. See, e.g., Mnookin, Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy, 39 LAW & CONTEMP. PROBS. Summer, 1975, at 226; In re Gault, 387 U.S. 1 (1967) (highly critical of the "clinical" juvenile justice system); Alsager v. District Court, 406 F. Supp. 10 (S.D. Iowa 1975), aff'd per curiam, 545 F.2d 1137 (8th Cir. 1976) (Iowa's termination of parental rights statute is unconstitutionally vague). Contra, State v. A.H., 198 Neb. 444, 253 N.W.2d 283 (1977) (Nebraska's neglect and termination statutes are not void for vagueness).

The Legislature has not seen fit to promulgate guidelines as to what constitutes an "irretrievably broken" marriage. It is suggested that this lack of definitive direction was deliberate and is desirable in an area as volatile as a proceeding for termination of the marital status. Consideration should be given to each case individually and predetermined policy should not be circumscribed by the appellate courts of this State. Thus, we are hesitant to set forth specific circumstances which trial courts could utilize as permissible indices of an irretrievable breakdown of the marital status. Were we to attempt to do so, we feel that the basic purpose of the new dissolution of marriage law would be frustrated. Such proceedings would either again become primarily adversary in nature or persons would again fit themselves into tailor-made categories or circumstances to fit judicially defined breakdown situations. It is our opinion that these two problems are the very ones which the Legislature intended to eliminate.


A law which provides flexibility and individual attention correspondingly is susceptible to a wide variety of judicial interpretations. Vested with broad discretion, judges might deny or grant dissolutions in accordance with their personal predilections, rather than the policies of the statute. Judges who are hostile toward "easy divorce" could well apply concepts carried over from the fault system in order to block divorces which they find offensive, while those sincerely interested in promoting family stability might deny a dissolution in the hope that "therapeutic" approaches might save the marriage. Others, unfettered by specific criteria with which to measure marital breakdown, might grant divorces freely upon request.

Available data indicate that granting unbridled discretion to divorce judges to determine whether a particular marriage has been irretrievably broken does not lead to the indiscriminate denial of divorces. While published opinions reveal that trial judges have denied dissolutions because, in their view, the marriage has not been proven to be irretrievably broken, these denials invariably have been reversed on appeal.

Of the approximately 10,000 petitions for dissolution heard by the thirty Nebraska district court judges who responded to the Judges' Questionnaire, forty-eight were denied for failure of proof of breakdown or adequate attempts at reconciliation. Although a denial rate of under .5 percent is hardly overwhelming, the fact

238. This is what often occurred when divorces were available on living separate and apart or incompatibility of temperament grounds. See notes 180-81 supra.

239. R. LEVY, supra note 193, at 93-94.


241. Judges' Questionnaire, supra note 15, question 3. The number 48 is not exact. Some of the judges' responses were approximations. The question on the survey was: "In how many cases did you deny prayer of dissolution?" The fact that nearly all the 48 cases in which a judge indicated he had denied the dissolution eventuated in divorce or reconciliation indicates that the judges correctly understood "deny" to include all situations in which the divorce was not decreed immediately. In most instances the case probably was continued pending further reconciliation efforts. One judge responded that he did not deny any dissolutions when they were still requested after conciliation, thereby suggesting that he continued some cases, even though he "denied" none. As the survey asked the judges to report on the ultimate resolution of the case—Did the petitioner reconcile? Was a dissolution eventually granted?—the assumption is that most of the judges counted all instances of failure to grant dissolution for substantive reasons at the initial hearing, including continuances, as "denials."
that some petitions were denied is significant in itself.\textsuperscript{242} A further breakdown of these statistics is particularly revealing. Where twenty-one of the thirty judges granted every prayer of dissolution that came before them, three judges alone were responsible for thirty-three of the forty-eight denials.\textsuperscript{243} The remaining six judges handed down the other fifteen denials. Clearly there are wide variations in the way the breakdown standard is being applied. The concern that some couples whose marriages have broken down are being denied divorces is lessened considerably by the knowledge that forty-two of the forty-eight couples whose dissolution petitions were not granted ultimately were divorced. Five of the other couples were reconciled, leaving only one undivorced couple unaccounted for.\textsuperscript{244} While in certain courts, under certain circumstances, there might be considerable delay before a marriage is legally terminated,\textsuperscript{245} apparently where a divorce is truly desired, it eventually will be obtained.

The findings of the Judges' Questionnaire are in sharp contrast with the image, portrayed in much of the divorce reform legislation

\textsuperscript{242} The number might have been greater were it not for the fact that "the attorneys . . . do an awful lot of pre-sorting." Comment of judge in \textit{id}. However, this is not true in every case. Hubert O'Gorman's study isolated two basic role definitions of matrimonial lawyers—the "Counselor" and the "Advocate."

The Counselor's definition is one in which the lawyer strives to control the relationship with his client by defining, to his own satisfaction, the substance of the client's problem, by arriving at his own judgment as to what constitutes the client's best interests, and by guiding the client to a solution that is equitable for both spouses. In contrast, the Advocate's role is one in which counsel accepts the client's definition of the problem as well as the client's proposed solution. Furthermore, lawyers who adhere to the Advocate's role tend to see successful professional role performance as a victory over the opposing spouse. While most of the informants defined their role in matrimonial actions as that of Counselor, a substantial minority, almost one out of three, defined their role as Advocate.


\textsuperscript{243} Two Lincoln-based judges denied 10 dissolutions each. An out-state judge, a firm-believer in the therapeutic/counseling approach, denied 13. Of the more than 2500 dissolution petitions heard by four Omaha judges, only one was denied, whereas four Lincoln judges disallowed 25 out of more than 3700 petitions. Judges' Questionnaire, supra note 15, question 3.

\textsuperscript{244} Id. question 3(d).

\textsuperscript{245} In some instances even a delay in granting a justified divorce can be damaging. Extending the period of uncertainty can add to the emotional trauma of the parties and frustrate their desire to arrange a new ordering of their personal affairs. See G\.róecki, \textit{Divorce in Poland—A Socio-Legal Study}, 10 ACTA SOCIOLOGICA 68, 73, 80 n.3 (1967).
and appellate decisions,\textsuperscript{246} of the trial court as an active "overseeing participant"\textsuperscript{247} in the breakdown determination. The dispatch with which hearings are conducted\textsuperscript{248} and the overwhelming proportion of cases that end in divorce\textsuperscript{249} indicate that most uncontested\textsuperscript{250} divorces are handled perfunctorily.

3. Does No Fault Divorce Permit Divorce by Consent?

All but one of the judges surveyed agreed that if there has been adequate counseling, where both of the parties maintain that the marriage is irretrievably broken and that they are unwilling to resume the marital relationship, or where one of the parties so states and the other does not deny it, the marriage is irretrievably broken and should be dissolved.\textsuperscript{251} Although many judges demand more extensive evidence,\textsuperscript{252} apparently the parties' own conclusion that their marriage is irreparably ruptured is regarded as the best, if not the definitive, evidence of marital failure.\textsuperscript{253} This is not surprising in view of the fact that breakdown is a highly subjective determination\textsuperscript{254} often incapable of corroboration\textsuperscript{255} by objective

\textsuperscript{246} See notes 231-32 supra.
\textsuperscript{247} In re Marriage of McKim, 6 Cal. 3d 673, 679, 493 P.2d 868, 871, 100 Cal. Rptr. 140, 143 (1972).
\textsuperscript{248} See notes 217-21 & accompanying text supra.
\textsuperscript{249} See notes 241-45 & accompanying text supra.
\textsuperscript{250} Although the survey attempted to ascertain how many of the divorces which were denied or delayed were ones in which one of the parties denied that the marriage was irretrievably broken, the responses were not detailed enough to permit statistical analysis. However, it appears that most, but not all, of the reported denials were in cases in which breakdown was contested. Judges' Questionnaire, supra note 15, question 3.
\textsuperscript{251} Id. question 5(a).
\textsuperscript{252} The one judge who answered question 5(a) in the negative stated that he "require[s] a statement of fact as to the nature of the problem. The . . . statements in the question are legal conclusions." Id. Another district court judge has written that the statement of one or both parties under oath that the marriage is irretrievably broken "is probably conclusive" and that further evidence on the specific problems burdening the marriage "is probably not necessary," although it is "helpful to the court particularly in determining whether efforts to effect a reconciliation have been made." Van Pelt, supra note 199, at 31-32. A third judge, who answered "yes" to the survey question, admitted that his desire for more information is "to some degree a matter of curiosity." Judges' Questionnaire, supra note 15. See also notes 254 & 256 infra.
\textsuperscript{253} See also LAW COMMISSION, supra note 93, at 36.
\textsuperscript{254} One question frequently addressed by the commentators and cases is "whether [the breakdown] standard is subjective or objective: Must the conditions exist in the form of observable acts and occurrences such as marital quarrels or separation of the parties, or is irreconcilable differences a state of mind?" Comment, The End of Innocence: Elimination of Fault in California Divorce Law, 17 U.C.L.A. L. Rev. 1306, 1319 (1970). While the appellate courts instruct the trial judge that no fault divorce does not mean divorce by consent, they also indicate that "the central inquiry should be a subjective,
proof. Since in most cases the parties' testimony will be the only evidence before the court, it is difficult to imagine on what basis the court could find the marriage not to be irretrievably broken, unless the parties' testimony was tentative or incredible. Indeed, it would seem that any evidentiary hurdles erected by the courts could be easily surmounted by spouses, who, having agreed to procure a divorce, could manufacture and "prove" the required rather than an objective one." Riley v. Riley, 271 So. 2d 181, 183 (Fla. Dist. Ct. App. 1972). But cf. Ryan v. Ryan, 277 So. 2d 266, 271 (Fla. 1973) (emphasizing the need for an inquiry into all the surrounding facts and circumstances).

Perhaps the best articulation of the proper mix of objective and subjective elements can be found in In re Marriage of Dunn, 13 Or. App. 497, 511 P.2d 427 (1975), interpreting that state's irreconcilable differences statute. Or. Rev. Stat. § 107.025(1) (1977):

[O]nce the existence of a difference or differences claimed by the petitioner to be irreconcilable has been established, . . . the test our statute contemplates is (1) whether or not such difference is one that reasonably appears to the court to be in the mind of the petitioner an irreconcilable one, and (2) based upon that difference, either alone or in conjunction with other differences established by the evidence, whether or not the court concludes that the breakdown of the particular marriage is irremediable.


Of the states adopting the breakdown approach to marriage dissolution, only Iowa continued to require corroboration. Its corroboration requirement recently was repealed, however. Act of May 20, 1976, ch. 1228, § 10, 1976 Iowa Acts 496 (repealing Iowa Code § 598.10 (1975)). See also Craft v. Craft, 226 N.W.2d 6 (Iowa 1975); In re Marriage of Collins, 200 N.W.2d 886 (Iowa 1972); In re Marriage of Boyd, 200 N.W.2d 845 (Iowa 1972).

256. One form of objective proof of marital failure is the improper acts which formed the basis for granting a divorce under the previous fault law. Only 11 of the 30 judges who responded to the survey thought evidence of misconduct should be admissible to show that the marriage had broken down and only nine said they did admit such evidence. Judges' Questionnaire, supra note 15, questions 7(a), 8(a). The concern is that relying on such evidence would convert no fault divorce into the equivalent of the old law. See also Comment, Kentucky No Fault Divorce; Theory and the Practical Experience, 13 J. Fam. L. 567, 571-72 & n.23 (1973) (majority of Kentucky judges surveyed agreed that evidence of fault should not be introduced to show breakdown). But see Sass, supra note 39, at 643-44 (16 out of 20 Iowa judges surveyed admit fault evidence in an effort to determine whether marital breakdown is irretrievable).


257. See Uniform Marriage and Divorce Act § 305, Comment.
manifestation of marital breakdown.\footnote{258} It is still divorce by consent, this time under a veneer of breakdown rather than fault.

Although consensual divorce may be the prevalent form of terminating marriage relationships in fact, few legislatures have been willing to pierce the breakdown veneer and openly permit divorce by agreement.\footnote{259} Nonetheless, some jurisdictions, by legislation or judicial decree, have acknowledged frankly the consensual nature of marriage dissolutions. While not sanctioning divorce by consent \textit{per se}, a Colorado statute creates a presumption of breakdown when both spouses aver that their marriage has broken down or when one party so avers and the other does not deny it. Unless this presumption is controverted by evidence, which is highly unlikely, the court must dissolve the marriage.\footnote{260} Divorce courts in several states are authorized to grant consent divorces where both parties stipulate that their marriage has irretrievably disintegrated, or where one party's affirmation of breakdown is not contested, and where no issues of property, support, and custody remain unresolved.\footnote{261} Nowhere in the United States, however, is

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\item \footnote{258} Comment, supra note 254, at 1323 n.122. See also \textit{In re Marriage of Collins}, 200 N.W.2d 886, 890 (Iowa 1972) ("In truth, if it were demonstrated the parties were in collusion to bring about a termination of the marriage relationship, it would further evidence the fact of the marriage breakdown.").
\item \footnote{259} For instance, although the Family Law Committee of the Colorado Bar Association "generally agreed that consent divorce on a no-fault basis would more accurately reflect the realities of the day," it concluded that "the legislature was not prepared to accept such an extreme change." \textit{1971 Midyear Report, supra} note 147, at 172.
\item \footnote{261} Act of Aug. 21, 1978, ch. 508, § 2, 1977-1978 Cal. Legis. Serv. 1624 (to be codified at \textit{CAL. CRV. CODE} § 4550) (effective Jan. 1, 1979) (childless spouses, who have been married less than two years and have no real property, less than $5,000 in personal property, and less than $2,000 in debts, and who have divided their assets and have waived all rights to spousal support, may file a joint petition for summary dissolution of their marriage on the grounds of irreconcilable differences; when six months have expired either party may apply for a final judgment dissolving the marriage); \textit{CONN. GEN. STAT. ANN.} § 46-48(a) (West 1978) (where both parties have stipulated that their marriage has broken down irretrievably and at least one party has so testified in open court and where the couple has submitted an agreement concerning custody, support, and division of property, the court shall dissolve the marriage); \textit{MISS. CODE ANN.} § 93-5-2 (Supp. 1977) (upon the joint bill of the husband and wife or an uncontested bill of complaint, the court may dissolve a marriage for irreconcilable differences without proof or testimony, where the court has found that the parties have made adequate and sufficient provision by written agreement for the custody and maintenance of their children and for the settlement of property rights); \textit{OHIO REV. CODE ANN.} §§ 3105.63 to .64 (Page Supp. 1977) (where both spouses petition for the dissolution of their marriage
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divorce by consent recognized more openly, although not by that name, than in Washington and Wisconsin. Under those states' no fault statutes a trial court is required to grant a decree of dissolution where both parties affirm that their marriage is irretrievably broken, or, in Washington, where one party so affirms and the other does not deny it.\(^{262}\) Thanks to a liberal judicial interpretation of its irretrievable breakdown statute, Georgia's no fault law is almost as permissive. The Georgia Supreme Court has ruled that judgments on the pleadings or summary judgments of divorce are to be awarded without hearing where both parties allege that their marriage is irretrievably broken or one party so alleges and the other either does not contest or seeks a divorce on other grounds.\(^{263}\) The most comprehensive piece of judicial legislation,

and execute an adequate separation agreement providing for division of property, alimony, child custody, and child support and where they both acknowledge under oath in court that they seek the dissolution and are satisfied with the agreement, the court shall grant a decree of dissolution; Or. Rev. Stat. § 107.035(4) (1977) (where the parties are co-petitioners or the respondent is in default and where support or custody of minor children is not involved, the court may enter a decree of dissolution based upon an affidavit of the petitioner, setting forth a prima facie case); Tenn. Code Ann. § 36-801(II) (Supp. 1978) (where the respondent has been personally served and where the parties have made adequate and sufficient provision by written agreement for custody, support, and property settlement, an uncontested bill of complaint for divorce may be taken as confessed without testimony as to the facts constituting irreconcilable differences or any attempts to reconcile such differences). See also 2 Fam. L. Rep. (BNA) 2600 (1976) (a procedural rule of the New York Appellate Division, First Department, allows parties living in New York or Bronx counties to dispense with court appearances in uncontested divorce actions; evidence is presented by affidavit); Matrimonial Causes Rule, 1977 Stat. Inst. No. 344 (in England, where the petitioner's affidavit of marital breakdown is undefended, the court may decree a judgment of divorce without the appearance of either party; where children under 16 are involved, the husband or wife must appear to satisfy the court that custody and support arrangements have been properly made). See also National Council on Family Relations, Task Force Report: Divorce and Divorce Reform 11-12 (1973) (where there are no children of the marriage and where division of property and spousal support have been agreed upon, the parties should be free to dissolve their marriage by registration).

\(^{262}\) WASH. REV. CODE ANN. § 26.090.030(1) (Supp. 1977); WIS. STAT. ANN. § 247.12(2)(a) (West Supp. 1978). Compare id. ("the court, after hearing, shall make a finding that the marriage is irretrievably broken") (emphasis added) with NEB. REV. STAT. § 42-361(1) (Reissue 1974) ("the court, after hearing, shall make a finding whether the marriage is irretrievably broken") (emphasis added).


however, was that drafted by the Puerto Rico Supreme Court, which held that the failure of Puerto Rican law to provide for divorce by mutual consent constituted a violation of the right of privacy guaranteed by the Commonwealth's constitution.264

Whether openly acknowledged, buried under the ponderous morality of fault, or covered by the mantle of objectivity provided by the breakdown ground, the essentially consensual nature of most divorce proceedings remains unaffected. As the Nebraska interrupted time series analysis demonstrates, the divorce rate is also uninfluenced by cosmetic changes in the law which do not alter the fundamental nature of divorce practice.

4. Does No Fault Divorce Permit Divorce upon Unilateral Demand?

It has been asserted, however, that no fault statutes go beyond previous enactments in that they "convert the system from one where divorce most often is a matter of mutual consent into one where it is available upon unilateral demand."265 Much of the data

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[t]he constitution of the Commonwealth protects the rights of Puertoriquenos to safeguard their dignity and their intimate life in divorce proceedings by means of the expression of a mutual decision to be divorced on the common acknowledgement of irreparable breakdown of the bond of matrimonial cohabitation.

. . . . The parties do not have to express reasons for their decision if in their judgment they have arrived together at the sad realization, and need not reveal painful details of their intimate lives. We cannot force the parties to live apart for two uninterrupted years as the only means of exercising their right of privacy and the inviability of human dignity.

Id. at —, 4 Fam. L. Rep. at 2746. See also Comment, Are Fault Requirements in Divorce Actions Unconstitutional?, 16 J. Fam. L. 266 (1978).

While the court intimated that the commonwealth could take steps to assure itself that the joint decision to seek a dissolution is not the product of haste or collusion, it did not spell out any mechanism or standards for doing so.

265. Foster & Freed, supra note 233, at 446. See also Proposed Revised Act, supra note 264, § 302, Comment (breakdown approach without standards or guidelines "inevitably will lead to divorce upon demand of one party"); H.
obtained through the Nebraska Judges' Questionnaire supports this contention. While most of the dissolution cases which were delayed temporarily were ones in which one of the parties maintained that the marriage had not irretrievably broken down, all or nearly all of the cases in which a reconciliation was not effectuated after further counseling eventuated in divorce. In fact, this survey of nearly 10,000 dissolution cases failed to reveal a single instance in which it could be said with certainty that a divorce which was desired by even one of the spouses was ultimately refused.

Twenty-seven of the thirty judges who responded to the questionnaire felt that where there has been adequate counseling and where one of the parties maintains that the marriage is irretrievably broken and that he or she is unwilling to resume the marital relationship, the marriage is irretrievably broken and should be dissolved, even if the other spouse insists that the marriage has not failed irremediably. To refuse to grant a divorce under such circumstances would be to treat the marriage as if it were intact and not as if it had broken down beyond repair. This is contrary to the spirit of no-fault divorce. The party who filed the petition for dissolution is entitled to have his or her claim heard and to have the facts considered. The fact that the other spouse opposes the divorce does not mean that the marriage should be preserved at all costs. The court should not be bound by the other spouse's objections.


266. See note 250 supra.

267. See text accompanying note 244 supra.

268. In an Iowa survey "neither the judges nor the attorneys reported a single contested case in which the petition for dissolution was denied." Sass, supra note 39, at 641. But cf. M. Wheeler, supra note 50, at 39 (in Texas, where divorce can be obtained on the grounds that the marriage has become unsupportable, a few contested divorces have been denied "where the marriages are of long standing and the separation has been short").

269. Judges' Questionnaire, supra note 15, question 5(b). See also Van Pelt, supra note 199, at 34 ("as a practical matter, if one party insists that the marriage is irretrievably broken, even if the other attempts to contradict this assertion, most courts would find the marriage to be irretrievably broken, particularly after a contested trial").

Similar attitudes have been noted in other no-fault jurisdictions, M. Wheeler, supra note 50, at 22 (California); Abrahams, supra note 265, at 429 (Florida). See also Riley v. Riley, 271 So. 2d 181, 184 (Fla. Dist. Ct. App. 1972) ("If one marital partner has made the considered decision that the relationship should be terminated, perhaps it might properly be said that the marital relationship has broken down."); McCoy v. McCoy, 236 Ga. 633, 634, 225 S.E.2d 682, 683 (1976); Harwell v. Harwell, 233 Ga. 89, 91, 209 S.E.2d 625, 627 (1974); Kretzschmar v. Kretzschmar, 48 Mich. App. 279, 285, 210 N.W.2d 352, 355 (1973); Desrochers v. Desrochers, 115 N.H. 591, 594, 347 A.2d 150, 152 (1975). But see In re Marriage of Franks, 542 P.2d 845, 852 (Colo. 1975), stay denied, 423 U.S. 1043 (1976) ("Where the parties do not agree as to the breakdown of the marriage, it is imperative for the court to weigh all the evidence and make its own independent determination of that fact."); Ryan v. Ryan, 277 So. 2d 266, 271 (Fla. 1973) (denying that "the judge becomes nothing more than a
circumstances would "just create more problems" since "it takes two to consummate and also to maintain a marriage" and "there is no point in trying to force a person to remain married when he or she has no desire to do so.\textsuperscript{270} Indeed, it is difficult to imagine what evidence a respondent spouse could introduce to counter the impressive demonstration of marital breakdown which is exhibited when one of the parties to a marriage steadfastly insists that the relationship has come to an end. The strained and hostile atmosphere and the ugly courtroom confrontation that would attend a contest over whether marital breakdown has occurred would only further evidence the fact that it had.\textsuperscript{271}

Even if the survey results reflect an increasing tendency to place "the burden of resolving or terminating marital conflicts squarely upon the parties"\textsuperscript{272} themselves and a "diminishing willingness of the State to be involved in the matter of marital termination,"\textsuperscript{273} divorce on demand remains even more unpalatable politically than divorce by mutual consent. Only in the state of Washington does the divorce court not have discretion to refuse to terminate a marriage when one spouse tenaciously insists that it has come to an end. The dissolution hearing takes place at least ninety days after the commencement of the action. If one of the parties denies that the marriage is irretrievably broken, the court may either make a finding that the marriage is irretrievably broken and dissolve the marriage, refer the parties to a counseling service, or continue the case for not more than sixty days. When the case is returned to court following a continuance or referral, if either party continues to allege that the marriage is irretrievably broken, the judge must enter a decree of dissolution.\textsuperscript{274} The role of the

\textsuperscript{270} Comments of judges in Judges’ Questionnaire, supra note 15.

\textsuperscript{271} In reviewing divorce trials in Cracow, Poland, where a marriage could be dissolved upon a showing that it had broken down completely and permanently, sociologist Jan Górecki observed that the hostility engendered during the trial of contested cases often served as an effective demonstration of the degree of breakdown. Górecki, supra note 245, at 72.


\textsuperscript{273} Glendon, supra note 265, at 794.

\textsuperscript{274} WASH. REV. CODE ANN. § 26.090.030(3) (Supp. 1977). See generally Holman, supra note 272. Other formulations similar to the Washington statute have been proposed. The California Governor’s Commission, although advocating that all petitions for dissolution be subjected to a “penetrating scrutiny,” see notes 214-15 supra, recommended that where the family court refused to grant a dissolution at the divorce hearing, the proceeding should be continued for 90 days, after which the court would be required to dissolve the mar-
court is more “declaratory record-keeping” than “adjudicatory.”

If under no fault laws marriages are explicitly or implicitly terminable at will, it would be reasonable to expect that the implementation of such laws would be accompanied by a significant upsurge in the divorce rate. As the instant Nebraska study demonstrates, this is not necessarily true, primarily due to two factors. First, only in a very few cases is there a genuine contest over the grounds for divorce. According to the survey of Nebraska district court judges, only in slightly over three percent of the contested cases, which translates into only .75 percent of all the cases brought to trial, did one of the parties deny in court that the marriage was irretrievably broken. While this low figure undoubtedly is reflective of the fact that there are “many situations in which one party gives up the contest somewhere along the line because he or she realizes it is hopeless,” the high number of un-

riage if one or both of the parties still desired to terminate the relationship.

An early draft of the Uniform Marriage and Divorce Act also required the court to find the marriage irretrievably broken if one of the parties so alleged under oath and if there were no minor unemancipated children of the marriage. If there were children, the court could (1) find the marriage to be irretrievably broken, (2) dismiss the petition, or (3) adjourn the hearing for six months. If the matter was adjourned and if one of the parties stated at the adjourned hearing that the marriage was irretrievably broken, the court was to dissolve the marriage. If the petition was dismissed, a new dissolution proceeding could be commenced six months later. Levy, supra note 262, at 534-35, 7 Fam. L.Q. at 409-10.

In Manning v. Manning, 237 Ga. 746, 229 S.E.2d 611 (1976), the Georgia Supreme Court held that a husband was entitled to a summary judgment of divorce based on his affidavit in which he swore that the separation between him and his wife was complete and permanent, that he was unwilling to live with her, and that there was no possibility whatsoever of a reconciliation. The wife had filed a counter-affidavit in which she swore that the marriage was not irretrievably broken and that a reconciliation was possible. In Dickson v. Dickson, 238 Ga. 672, 235 S.E.2d 479 (1977), the court recanted this position, holding that “[i]f respondent files an affidavit expressing respondent's opinion that the marriage is not irretrievably broken, and that there are genuine prospects for reconciliation, then summary judgment should be denied.” Id. at 675, 235 S.E.2d at 482.

Cf. Galbut v. Garfinkel, 340 So. 2d 470 (Fla. 1976) (it was error for the trial judge to grant a divorce without considering the deposition of the hospitalized respondent-wife who denied that the marriage was irretrievably broken and who felt that the marriage could be saved); Brown v. Brown, 561 S.W.2d 374 (Mo. Ct. App. 1977) (if a spouse, who is in default for failing to file an answer to the original petition that sought a dissolution of the marriage, files an objection before the interlocutory decree becomes final, and the objection alleges that the marriage is not irretrievably broken, the trial court must hold a hearing on the breakdown issue).

275. See Goldstein & Gitter, supra note 131, at 98.
277. Comment of judge in id. Even under the fault system, a spouse who really wants to preserve the marriage may choose not to contest because of lack of
contested divorces under both the fault and no fault systems\textsuperscript{278} indicates that there are relatively few cases in which consent is not given, however begrudgingly. Second, even prior to no fault divorce, de facto unilateral divorce was widespread because “a persistent individual who wants a divorce [could] get one by purchasing or coercing the consent of the other spouse.”\textsuperscript{279} The party more eager for a divorce might have to buy his or her way out by making concessions on custody, property, or support but, in the end, if persevering, he or she would usually succeed.\textsuperscript{280}

Of course, there were some cases under the old law in which divorce-seeking husbands or wives were neither able to secure their spouses’ consent to terminate their marriages nor obtain coercive divorces because they either lacked grounds or were stymied by an available defense. The change to a no fault system allowed them finally to escape from their unwanted relationships. While there were not enough of these situations to make a statistically significant impact on the divorce rate as a whole,\textsuperscript{281} they probably do account for the findings of the time series analysis that the change in the law produced a rise in the divorce rate for couples over thirty years of age,\textsuperscript{282} and particularly for couples over fifty.\textsuperscript{283} Once the backlog of these cases was exhausted, however, the divorce rate dropped back towards the pre-intervention level.\textsuperscript{284}

5. \textit{Are More Objective Standards for Irretrievable Breakdown Needed?}

However insignificant or transitory their effect on the rate of divorce has been, the ease with which unilateral divorces can be obtained under the irretrievable breakdown ground is troubling to many. While it is true that under a no fault system one spouse can no longer keep the other tied to a dead marriage, it is also true that

\begin{itemize}
\item \textsuperscript{278} See note 156 & accompanying text \textit{supra}. \textit{But see} note 277 \textit{supra}.
\item \textsuperscript{279} Glendon, \textit{supra} note 97, at 346-47; Glendon, \textit{supra} note 265, at 704. \textit{See also} note 164 & accompanying text \textit{supra}.
\item \textsuperscript{280} H. KRAUSE, NUTSHELL, \textit{supra} note 205, at 289-91; Bodenheimer, \textit{supra} note 224, at 180, 182; Wheeler, \textit{supra} note 29, at 612. Some jurisdictions, which allow divorce after prescribed periods of separation or living apart, also, in effect, permit divorce by unilateral demand. \textit{See note} 180 \textit{supra}.
\item \textsuperscript{281} See note 65 & accompanying text \textit{supra}.
\item \textsuperscript{282} See note 69 & accompanying text \textit{supra}.
\item \textsuperscript{283} \textit{See} notes 70-71 & accompanying text \textit{supra}. The no fault divorces of those couples who failed to seek a marriage dissolution under the old law because they resented the name-calling and fault-finding it entailed, also are responsible for the increase in the divorce rate for these age groups.
\item \textsuperscript{284} \textit{See} note 72 & accompanying text \textit{supra}.
\end{itemize}
the breakdown ground allows the party who has engineered the destruction of the marriage to impose a divorce on a spouse who does not want one.\textsuperscript{285} In addition to the blow to the ego that one who is sued for divorce suffers, the price that might have to be paid in an unwanted divorce proceeding, in terms of the loss of custody of one's children, the loss of one's home, and the loss of one's other property and income, can be devastating.\textsuperscript{286} Particularly tragic can be the fate of the wife in a long-term traditional marriage. At mid-life she can find that she has been summarily dismissed from the job as housewife and homemaker at which she has worked for a decade or more and for which she may have sacrificed a career of her own.\textsuperscript{287} She has little to show for the years she invested in her

\textsuperscript{285} Under the majority view a wrongdoing husband can come home every Saturday night for five years, drunk and penniless because of skirt-chasing, gambling, or some other misdeeds; then, he may beat, bruise and abuse his wife because he is unhappy with himself, and then he will be permitted to go down and get a divorce on printed forms purchased at a department store and tell the trial judge that the marriage is "irretrievably broken". Or, the offending wife, after jumping from bed to bed with her new found paramours, chronically drunk, and when at home nagging, brawling and quarreling, all against the wishes of a faithful husband who remains at home nurturing the children, is permitted to divorce her husband who does not desire a divorce, but rather, has one forced upon him, not because of anything he has done, but because the offending wife tells the trial court that her marriage is "irretrievably broken". Ryan v. Ryan, 277 So. 2d 266, 278 (Fla. 1973) (Robert, J., dissenting).

See also In re Marriage of Walton, 28 Cal. App. 3d 108, 119, 104 Cal. Rptr. 472, 481 (1972) (while it may be true that "the elimination of the fault concept is unjust and unfair because it permits a spouse guilty of morally reprehensible conduct to take advantage of that conduct in terminating marriage against the wishes of an entirely unoffending spouse" and while this "may be offensive to those steeped in a tradition of personal responsibility based on fault, . . . [i]t is not the province of courts to inquire into the wisdom of legislative enactments"); Roberts v. Roberts, 200 Neb. 256, 263 N.W.2d 449 (1978), appeal dismissed, 99 S. Ct. 60 (1978) (whether the petitioner's relationship with the woman in whose home he took up residence is meretricious is not relevant, as it is apparent that the marriage is irretrievably broken).

It is doubtful, however, whether there are many instances in which one party is entirely blameless for the conditions that caused the marriage to fail. See notes 130-31 & accompanying text supra.

\textsuperscript{286} In In re Marriage of Franks, 542 P.2d 845, 852 (Colo. 1975), stay denied, 423 U.S. 1043 (1976), the respondent husband unsuccessfully argued that the fact that wives have been awarded custody of children in the vast majority of cases demonstrates that Colorado's irretrievable breakdown statute unconstitutionally discriminates against men.

\textsuperscript{287} Karl Llewellyn viewed one of the functions of marriage to be to assure that support for women in their older years be "in decent measure independent of continuing sex charm." He felt marriage acts as "[o]ld age insurance, of a sort. [A] wife . . . is not simply to be fired . . . even under [the] most ruthless individualistic capitalism." Llewellyn, supra note 110, at 1290 (footnote omitted). See also note 205 supra.

Unlike the situation in some other cultures, the widowed or divorced are not readily reabsorbed into their original families in Western societies. Put-
marriage, except the financial provisions of a divorce decree.\footnote{288}

Inequitable results of this type, as well as the perceived need to better protect the interests of the children of the marriage, have led critics of the irretrievable breakdown standard to call for the addition to no fault statutes of "some brake, some objective proof of marriage breakdown."\footnote{289} Accordingly, statutory schemes have been drafted which specify that a marriage will be deemed irretrievably broken only after a stipulated period of separation or upon proof of serious marital discord or misconduct.\footnote{290}

There is little agreement on how long a period of separation would be sufficient to provide a "brake" to divorce. The lattershortest period provided for is one year in a number of states.\footnote{288} It has been argued that a wife acquires a legally cognizable property interest in the social and economic benefits of her marriage when she has made substantial contributions to a marriage of long duration. A change in the law should not be applied to her marriage retroactively so as to subject her to being "fired" at her husband's whim. The situation has been analogized to that in Perry v. Sinderman, 408 U.S. 593 (1972), in which the court held that a university instructor, who had held his job for a number of years, could claim a "liberty" or "property" interest protected by the fourteenth amendment in his continued employment, if he could demonstrate from the circumstances of his service and from other relevant facts, that a de facto tenure system existed. Brief for Appellant at 8-12, Buchholz v. Buchholz, 197 Neb. 180, 248 N.W.2d 21 (1976). \textit{See also} R. EISLER, supra note 197, at 14. The Nebraska Supreme Court rejected this argument, holding that while a wife has a legitimate interest in her status as a married woman, this interest does not constitute property under the fourteenth amendment or under Neb. Const. art. 1, § 3, and that a wife has no vested interest in the state's maintaining in force the grounds for divorce that existed at the time of the marriage. Buchholz v. Buchholz, 197 Neb. 180, 181-83, 248 N.W.2d 21, 22-23 (1976). \textit{See also In re Marriage of Walton, 28 Cal. App. 3d 108, 113, 104 Cal. Rptr. 472, 476-77 (1972); Hopkins v. Hopkins, 540 S.W.2d 783, 786 (Texas Ct. App. 1976).}

\footnote{289} Foster & Freed, supra note 233, at 452.

\footnote{290} Exemplary of a formula that combines both separation and misconduct definitions is the revision of the Uniform Marriage and Divorce Act proposed by the Family Law Section of the American Bar Association. The applicable section provides:

\begin{enumerate}
  \item The [ ] court shall enter a decree of dissolution of marriage if:
    \begin{enumerate}
      \item the court finds that the marriage is irretrievably broken, which finding shall be established by proof (a) that the parties have lived separate and apart for a period of more than one year next preceding the commencement of this proceeding, or, (b) that such serious marital misconduct has occurred which has so adversely affected the physical or mental health of the petitioning party as to make it impossible for the parties to continue the marital relation, and that reconciliation is improbable. . . .
    \end{enumerate}
\end{enumerate}

\begin{footnotesize}
\textit{PROPOSED REVISED ACT, supra note 204, § 302.}
\end{footnotesize}

Although they did not adopt the proposed changes, the Conference of Commissioners on Uniform State Laws did bow somewhat to the demand for more definitive standards. Section 302 of the Uniform Act now provides:
must be before it constitutes objective proof that the marriage is
no longer viable. While it has been reported that most marriage
counselors would agree that if an estranged couple does not recon-
cile within three to six months, chances are they never will,\textsuperscript{291} another commentator has termed a one-year period "the rock bottom
minimum."\textsuperscript{292} Statutes which require periods of separation before
dissolutions under the irretrievable breakdown standard can be
decreed call for durations varying from sixty days\textsuperscript{293} to five
years.\textsuperscript{294} The dilemma is that short periods of separation accom-
plish little except to assure that the decision to seek a divorce is
not made with undue haste, a feat which a waiting period\textsuperscript{295} can
achieve just as well, while lengthy periods can be unduly burden-
some where prompt relief is desirable. Lengthy separation periods
are frequently circumvented by fabricating evidence, using alter-
native grounds,\textsuperscript{296} or "migrating" to more sympathetic states.

\begin{Verbatim}
(a) The [ ] court shall enter a decree of dissolution of
marriage if:
\hspace{1cm}
. . . .
\hspace{1cm}
(2) the court finds that the marriage is irretrievably broken, if
the finding is supported by evidence that (i) the parties have lived
separate and apart for a period of more than 180 days next preceding
the commencement of the proceeding, or (ii) there is serious marital
discord adversely affecting the attitude of one or both of the parties
toward the marriage . . . .
\end{Verbatim}

UNIFORM MARRIAGE AND DIVORCE ACT § 302. This version of the Uniform Act
has been enacted only in Montana. See MONT. REV. CODES ANN. § 48-
316(1)(b) (Cum. Supp. 1977). In the view of one commentator "the change
was merely cosmetic: The 180 day period is so short as to render the 'living
apart' requirement next to meaningless, and the 'marital discord' ground is
phrased so broadly that anything will go." H. KRAUSE, NUTSHELL, \textit{supra}
note 205, at 300.

291. Foster & Freed, \textit{supra} note 233, at 452.
293. KY. REV. STAT. ANN. § 403.170(1) (Baldwin 1973) (there must be a finding that
the marriage is irretrievably broken; a 60 day separation does not in itself
prove breakdown).
the divorce the period is two years. \textit{Id.} § 2(I)(d).
295. \textit{See} notes 317-32 & accompanying text \textit{infra}. Requiring a period of separation,
however, might have the advantage of acquainting the parties with what it
will be like to be divorced.

296. For example, in 1976 it was reported that less than 10\% of the divorce decrees
in Massachusetts had been obtained on the ground of an irretrievable break-
down of the marriage. H. KRAUSE, NUTSHELL, \textit{supra} note 205, at 298. This is
understandable as the required waiting period before a divorce could be de-
creed on that ground was at least 10 months if pursuant to an agreement filed
with the court, and two years in nonconsensual cases. Act of Nov. 19, 1975, ch.
698, § 2, 1975 Mass. Acts 866 (amended 1977). The periods were subsequently
shortened to at least 6 months for consensual divorces and one year for non-
consensual divorces. MASS. GEN. LAWS ANN. ch. 208, §§ 1A, 1B (West Supp.
1978). In all cases the decree does not become final for another six months.
\textit{Id.} § 21.
Moreover, merely dressing up a separation ground in the guise of breakdown does nothing to alleviate the many problems of interpretation that traditionally have plagued separation statutes, including the effect that the resumption of cohabitation in an attempt to reconcile will have on the running of the separation period.

Some jurisdictions which have insisted on more objective standards for determining whether marital breakdown has occurred disallow all divorces where the parties have not lived apart for the requisite length of time or where there has not been serious marital discord or misconduct. Others require specific proof of

297. See note 180 supra. See also Wife S. v. Husband S., 375 A.2d 451 (Del. 1977) (a divorce on the ground that the marriage was irretrievably broken, as evidenced by the fact that the parties were voluntarily living separate and apart, was improperly granted where the separation was not mutually voluntary); In re Marriage of Uhls, 549 S.W.2d 107 (Mo. Ct. App. 1977) (although the parties continued to live in the same house, their lives were separate enough to qualify them for a divorce under a breakdown statute requiring that the couple live separate and apart for 24 months); Santos v. Santos, [1972] Fam. 247 (C.A.) (under an English statute requiring the parties to live apart for a continuous period of at least two years, a mere physical separation will not suffice; the petitioner must also show that during the separation he or she considered the marriage to be over and never intended to return).

298. See note 180 supra. Some states, which make separation an element in determining whether marital breakdown has occurred, allow the separation period to be suspended for a time while the parties attempt a reconciliation. See, e.g., Wis. STAT. ANN. § 247.082 (West Supp. 1978); Divorce Reform Act, 1969, c. 55, §§ 3(3) to 3(5) (England). Even where such statutes exist it cannot be said that forcing couples to separate before they can get a divorce promotes reconciliation. For some couples it may be difficult to separate, even though all the other incidents of marriage have been forsaken. Among the reasons advanced as to why the parties might feel compelled to remain under the same roof are "economic necessity, stubbornness, jockeying for position as to possession of house and contents." In re Marriage of Uhls, 549 S.W.2d 107, 112 (Mo. Ct. App. 1977).

299. In Minnesota a "court may make a finding that there has been an irretrievable breakdown of the marriage relationship if the finding is supported by evidence of any of the following": (1) a "course of conduct detrimental to the marriage relationship of the party seeking the dissolution;" (2) imprisonment; (3) habitual alcoholism or chemical dependency; (4) commitment for mental illness; (5) one year separation under a decree of separate maintenance; (6) "[s]erious marital discord adversely affecting the attitude of one or both parties toward the marriage." Minn. STAT. ANN. § 518.06 (West Supp. 1978).

In England irretrievable breakdown is the sole ground for divorce, but breakdown can be established only by satisfying the court of one or more of the following: (1) "the respondent has committed adultery and the petitioner finds it intolerable to live with the respondent"; (2) "the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent"; (3) two years continuous desertion by the respondent; (4) living apart for a continuous period of at least two years where both parties consent to the divorce; (5) living apart for a continuous period of five years. Divorce Reform Act, 1969, c. 55, §§ 1, 2(1). The adoption of similar cri-
this sort only where there is a contest over whether the marriage has broken down irretrievably. Although it has been held that, even under a statute that requires a demonstration of serious marital discord, "'fault' is not determinative of whether the marriage should be dissolved," the "objective criteria" which have been fashioned "come perilously close to traditional fault grounds." It may be laudable to attempt to assure "that a spouse, who by his or her action makes the life of the other spouse intolerable, [does] not profit by his or her own wrongdoing and thereby obtain a dissolution of the marriage over the objection of the other perhaps inno-

The English Act is a "breakdown" statute in the sense that more than a wrongful act is required; the act must lead to the destruction of the marriage relationship. In requiring a wrongful act or lengthy separation, however, the Divorce Reform Act makes it difficult to dissolve many broken marriages. In theory, even proof of one of the five facts is not conclusive. The court can still deny the divorce if it decides that the marriage has not broken down irretrievably. Divorce Reform Act, 1969, c. 55, § 2(3). "In practice, however, [the proof of] such facts almost always will conclude the matter." Rosenbaum, supra note 24, at 367. In practice, too, uncontested divorces are easily procured. See Matrimonial Causes Rule, 1977 Stat. Inst. No. 344, discussed at note 261 supra. See also Proposed Revised Act, supra note 204, § 302; Uniform Marriage and Divorce Act § 302 (both set out at note 290 supra).

The facts which must be shown under Missouri's "no fault" law in order for the court to find that the marriage has broken down irretrievably are the same as those required by English law, as set out at note 299 supra, with the following exceptions: (1) one or more of the guidelines need be satisfied only if one of the parties denies that the marriage is irretrievably broken and (2) the required periods of desertion (six months) and living separate and apart (12 months if by mutual consent, 24 if not) are shorter. Mo. Ann. Stat. § 452.320 (Vernon Supp. 1978).

Gummels v. Gummels, 561 S.W.2d 442, 443 (Mo. Ct. App. 1978). The court noted that the guideline of the Missouri statute, requiring that the respondent behave in such a way that the petitioner cannot reasonably be expected to continue to live with the respondent, refers to the respondent's behavior—not misbehavior. "It will suffice if the behavior of one spouse, combined with the attitude and behavior of the other, indicates a reasonable likelihood the marriage cannot be preserved." Id. at 443. The court granted the dissolution based on the wife's testimony that only she disciplined the children while her husband consoled them and would not "back her up," that the parties were unable to communicate or "iron out" their differences, and that she could not live with him and no longer loved him. Id. at 443.

It has been suggested that the similar English law has caused a shift in emphasis from culpability or moral turpitude to responsibility for the breakdown of the marriage. The concern now is not with guilt but with causation. Finlay, Reluctant, But Inevitable: The Retreat of Matrimonial Fault, 38 Mod. L. Rev. 153, 156 (1975).

H. Krause, Nutshell, supra note 205, at 297. See also Rosenbaum, supra note 24, at 374 ("the sort of behavior envisaged by [the second English] guideline . . . is in many ways similar to that covered by the old matrimonial offenses of cruelty and constructive desertion").
However, it is disturbingly reminiscent of the discredited past to hear the Missouri Court of Appeals refuse to dissolve a marriage which "may well be beyond saving." Even though it was "but delaying the inevitable," the court felt it had no choice because "we as an appellate court, construe and apply the law, we do not make it."

Proposals that would similarly restrict the ease with which a divorce can be procured when one spouse does not want the marriage terminated and does not believe it to be irretrievably broken, have been introduced frequently in the Nebraska Legislature. It would be tempting to support the philosophy behind these sug-

303. In re Marriage of Mitchell, 545 S.W.2d 313, 318 (Mo. Ct. App. 1976). Missouri not only protects innocent spouses from unwanted divorces, but guilty ones as well. Under Mo. Ann. Stat. § 452.305(2) (Vernon 1977), if either party requests a decree of legal separation rather than a decree of dissolution, the court must refuse the dissolution and grant the legal separation. See also Smith v. Smith, 561 S.W.2d 714 (Mo. Ct. App. 1978); McRoberts v. McRoberts, 555 S.W.2d 682 (Mo. Ct. App. 1977).


305. Id. at 320. Mitchell concerned an eleven-year marriage that had produced two children. The petitioner had separated from his wife on two occasions. After the first separation, the wife admitted her need to seek psychiatric counseling and the husband admitted that he had had intercourse with another woman. In the course of the marriage both had received marital counseling. The petitioner stated that for the past three or four years he had no longer loved his wife; the respondent had realized that something was wrong with the marriage for five years. The couple had had "quarrels" or "discussions." The wife was unhappy that her husband was away so often and so late at night, the husband that the wife never read or attempted personal growth. The couple's difficulty appears to have been largely one of growing incompatibility, probably not fully attributable to the fault of either party. The Missouri Court of Appeals concluded, however, that "[t]he behavior in this record which would make life intolerable is essentially petitioner's, not respondent's." Id. at 320. For similar decisions under the English statute, see Finlay, supra note 301, at 156-66; Rosenbaum, supra note 24, at 371-76.

306. L.B. 294, 85th Neb. Leg., 1st Sess. (1977) (marriages of more than 15 years' duration shall not be dissolved unless both parties testify that the marriage is irretrievably broken or the parties have been legally separated for five years); L.B. 913, 84th Neb. Leg., 2d Sess. §§ 2, 10, 13 (1978) (in marriages of more than 10 years or marriages in which there are unemancipated children, if the respondent has denied that the marriage is irretrievably broken or has asked for a legal separation, the court shall enter a decree of legal separation if it finds that the petitioner has created the major part of the conflict within the marriage; also the parties may enter into an interspousal marriage contract that, among other things, establishes the conditions under which the marriage may be dissolved); L.B. 394, 83d Neb. Leg., 1st Sess. § 8 (1973) (if one of the parties denies that the marriage is irretrievably broken, the marriage can be dissolved only upon a finding that the respondent spouse has engaged in specified wrongful conduct which includes, inter alia, adultery, abandonment, personal violence upon petitioner, nagging for conduct above reproach, failure to provide the homemaking spouse with a standard of living commensurate with the financial means available, or refusing to perform for an extended period his or her share of the household duties as previously agreed to in a written agreement so that petitioner's mental or physical health is impaired).
gested reforms, if not the proposals themselves, if it could be assured that they would operate to the benefit of only those spouses who reasonably and sincerely thought that their marriages were salvageable. Unfortunately, this would not be the case. The motivations that lead one to try to hold onto a marriage that his or her spouse no longer wants are varied and complex; while a sincere desire to preserve the relationship obviously is one—spite, greed, pity, and self-delusion are also strong possibilities.

Behind the tenacious resistance of many of those who fight the divorce is a deep-seated but unconscious desire to break off the relationship, combined with an unwillingness to accept the responsibility for ending it.

A framework for the dissolution of marriage that makes a contested unilateral divorce exceedingly more burdensome to procure than a mutually agreed to uncontested proceeding, can subject the resisting spouse to relentless pressure to discontinue his or her opposition, no matter what its motivation. More significantly, the ability of one spouse to delay and complicate the divorce by precipitating a fight over whether breakdown of the marriage has occurred can be a powerful and dangerous weapon in unscrupulous hands, even if the capacity to actually prevent the divorce is lacking. To those for whom the divorce process is a traumatic experience, and there are many, even an exorbitant price may not be too much to pay for an expeditious proceeding. The result can be a settlement of financial and custodial issues advantageous to the

307. See note 163 supra.

308. The person who plays the active role must take upon himself the full responsibility for breaking the relationship, and this is a real burden, but he is helped in his struggle by the continued opposition of the other. The person who plays the passive role usually suffers more intensely because he has very likely reached a lesser point of alienation and because the severance of the relation, coming as it does at the will of the other party, constitutes a great ego thwart and threat to his security as well as a denial of love; nevertheless, he is enabled to continue his life because of the virtuous feeling which he has; he has really a deep, unconscious desire to break the relationship, and he is put in the fortunate position of one who is able to realize his desires without taking the responsibility for them. At the same time, the person in the active role requires the active opposition of the other; this opposition gives him a feeling of security and enhances his ego.

W. WALLER & R. HILL, supra note 194, at 521. Should for some reason the person in the active role drop his or her agitation for divorce, the opposing spouse often will recommence the arrested alienation process and may even become the divorce seeker. Id. at 522.

309. See note 165 & accompanying text supra.

310. See generally W. GOODE, supra note 132, at 182-88; R. WEISS, supra note 91, at 47-68; Chiriboga & Cutler, Stress Responses Among Divorcing Men and Women, 1 J. Divorce 95 (1977).
more cunning and less desperate of the parties and the transforming of a law designed to protect innocent spouses into one which aids the avaricious.

In short, efforts to temper the defects of the pure breakdown principle by engrafting onto it so-called objective testing standards produces a system with different, but equally troubling, deficiencies. As Professor Homer H. Clark, Jr. has said:

Either we accept the view of psychologists that fault is irrelevant to divorce or we do not. If we abandon the notion of fault, then we will have to tolerate the granting of divorces to some plaintiffs who appear to the untrained, moralistic eye as unworthy; and some spouses who would like to remain married, for whatever reason, will have to accept a divorce. There does not seem to be any device which would enable us to have it both ways. If fault is permitted to enter the case at all, then it seems likely that the defects of the existing system will follow.

Faced then with this "choice of evils," we would tend to agree with the Archbishop's Group that "of the alternatives available to contemporary society a law based on breakdown would be the lesser evil by a very considerable way." This law places the ultimate burden of restoring or interring an ailing marriage on the parties. The state, however, should take steps to assure that their decision rests upon adequate knowledge and reflection.

311. While the settlement agreement is subject to the review of the court, its terms, except for those providing for the custody and support of minor children, are binding upon the court unless it finds the agreement to be unconscionable. Neb. Rev. Stat. § 42-366(2) (Reissue 1974). See also Paxton v. Paxton, 201 Neb. 545, 270 N.W.2d 900 (1978); Weber v. Weber, 200 Neb. 659, 265 N.W.2d 436 (1978); Prochazka v. Prochazka, 198 Neb. 525, 253 N.W.2d 407 (1977). When asked in the judges' survey to indicate in approximately what proportion of cases they ordered significant changes in agreed-to property settlements, 26 of 30 judges responded that they made significant changes in 5% or less. Two judges said they altered 25%, but these figures, as well as at least some of the others, referred mainly to changes in the amount of child support. Even including these higher figures, the average of the percentages was less than five. Judges' Questionnaire, supra note 15, question 16. It is doubtful that these figures would change significantly under a lesser standard of review. Without adversary testimony most judges would not alter property settlements unless they appeared to be patently unfair.

312. Clark, supra note 17, at 408-09.

313. Putting Asunder, supra note 90, at 56.

314. Id. at 56. But see Llewellyn, Behind the Law of Divorce: II, 33 Colum. L. Rev. 249, 261:

There is no "just" solution when one partner calls for freedom and the other for her earned and vested rights. With all its hardships, I see no hope of saner compromise than in the theory of the typical American rules of law: if there be in the defendant no marriage-fault of reasonably serious character, and if he or she remains determined to hang on, an "innocent" spouse's interests plus those of a going though creaking concern outweigh the adversary interest.

315. "[U]nwarranted speed and intemperate decisions have been designated as pitfalls to avoid in 'no-fault' divorce proceedings." In re Marriage of Baier, 561 P.2d 20, 23 (Colo. Ct. App. 1977).
E. "No decree shall be entered . . . unless the court finds that every reasonable effort to effect reconciliation has been made."316

I. Waiting Periods

The brakes Nebraska has chosen to apply in order to discourage hasty and ill-considered dissolutions are the imposition of a sixty-day waiting period following service of process before a suit for divorce can be heard,317 and a requirement that every reasonable effort to effect reconciliation be made before a divorce can be granted.318

Many states have enacted mandatory waiting or "cooling-off" periods in efforts to assure that marriages will not be dissolved precipitately. Waiting periods provide time to reflect on both the chances of rebuilding the marriage and the consequences of terminating it. Counseling can be sought and a reconciliation perhaps effected before the legal battle heats up in earnest. If a divorce is still desired after the expiration of the statutory period, a dissolution can be granted with greater confidence that the marriage indeed has broken down.319

It can be argued that a cooling-off period of a longer duration than the sixty days provided by Nebraska law would better serve these objectives.320 The Nebraska judiciary, however, seems more than satisfied with the current provision, with all thirty judges who responded to the survey indicating they thought sixty days to be the appropriate length.321 In fact, the state bench has demonstrated little tolerance for appreciably longer waiting periods. As first enacted, Nebraska's no fault law mandated an interval of six months between service of process and hearing, but provided that it could be waived if the court determined that conciliation efforts had failed.322 All but one of the district court judges routinely waived the waiting period after two months had passed.323 Consequently the statute was amended and the waiting period reduced

316. NEB. REV. STAT. § 42-360 (Reissue 1974).
318. NEB. REV. STAT. § 42-360 (Reissue 1974).
319. See generally H. CLARK, supra note 118, at 387-88; Elliott, supra note 60, at 136; Goldstein & Gitter, supra note 131, at 90-91.
320. Among those states which have waiting periods, the lengths vary from 20 days, e.g., FLA. STAT. ANN. § 61.19 (West Supp. 1978); IDAHO CODE § 32-716 (Supp. 1978), to one year, MASS. GEN. LAWS ANN. ch. 208, § 1B (West Supp. 1978) (see note 296 supra), with most being from 30 to 90 days.
321. Judges' Questionnaire, supra note 15, question 15. This was the only question in the survey on which there was unanimous agreement.
It is impossible to establish a cooling-off period which would be appropriate for all circumstances. Where the filing of a petition for dissolution was the result of an impetuous decision, more time might be needed, both to allow for reconsideration and to permit the respondent spouse, who may not have been prepared for the decision, to recover from the trauma and decide how to respond. Of course, the statutory waiting period is only a minimum and the pre-hearing interval can be extended by the parties and their attorneys, or by the court. Where the decision to divorce has undergone a long gestation period, as is usually the case, further delay may not be necessary and could be harmful. Once the hard decision to get out of the marriage finally has been made, there is an understandable need for finality and stability, which can be achieved only after the completion of the divorce process.


325. William Goode has reported that where the time between the final decision to divorce and the filing of the suit is short, trauma is likely to be high. Many of these cases are ones in which one party simply "announced" that he or she wanted a divorce. W. Goode, supra note 132, at 193.

326. It should be noted that Goode found that the precipitate divorce, in which one party suddenly demands a dissolution and insists on getting it quickly, usually moves rapidly through all the stages. Id. at 179-80.

327. "Divorces [characteristically] are preceded by a long period of conflict and the final action is the result of a decision and action process that lasts on the average about two years." Id. at 137.

328. See note 245 supra. Unfortunately the process is not fully completed until the decree becomes final, six months after it was rendered. Neb. Rev. Stat. § 42-363 (Cum. Supp. 1978); Neb. Rev. Stat. § 42-372 (Reissue 1974). There is little justification for this interlocutory period. It is doubtful that many couples who fail to reconcile before the hearing do so afterwards, and those that do can always remarry. While the interlocutory period does prevent a divorcee from remarrying with unseemly haste and does provide a time during which the court can correct mistakes, these benefits hardly outweigh the needless prolonging of uncertainty nor the many problems that a six month post-decree wait can engender. One problem is that if one spouse dies during the interlocutory period, the other will inherit or take a statutory forced share of the estate, no doubt contrary to the wishes of the deceased. See, e.g., In re Bassett's Estate, 189 Neb. 206, 201 N.W.2d 848 (1972). Another is that some people, not understanding that their marriage is still in effect, enter into void second marriages before the interlocutory period expires. See, e.g., Copple v. Bowlin, 172 Neb. 467, 110 N.W.2d 117 (1961) (because the parties married one day too early the "wife" of six years was not entitled to workmen's compensation benefits for herself and her daughter from a previous marriage when the "husband/stepfather" died). See also C. Foote, R. Levy & F. Sander, supra note 26, at 1092 n.76; Henderson, supra note 13, at 10-11.

If the Unicameral does not see fit to repeal the interlocutory period, it should provide that marriages celebrated during the six-month period are
It is not unusual for divorce actions to be dropped during the waiting period.\(^3\) Whether this can be ascribed in large measure to the ameliorative effect of the enforced delay is uncertain. Even if the waiting period is responsible for a number of reconciliations, it is difficult to know how many will be lasting.\(^3\) The general feeling is that such periods are helpful,\(^3\) but that they are much more effective when counseling resources are available to aid the couple in seriously exploring the prospects for reconciliation.\(^3\)

2. Reconciliation Attempts

The requirement of Nebraska's no fault dissolution of marriage law that all efforts to effect reconciliation be made serves two related functions: (1) inducing the couple to seek professional counseling which can aid them in reaching a reconciliation or in determining that divorce is the proper measure; and (2) providing the court with a standard which can aid it in determining whether a marriage has irretrievably broken down.\(^3\)

Prior legislation\(^3\) had authorized conciliation courts to be es-

\(^{329}\) validated if the parties are living together as husband and wife when the divorce becomes final, at least where the marriages were entered into in good faith by one of the parties. Cf. Neb. Rev. Stat. § 42-375 (Reissue 1974) (prohibiting annulments of voidable, but not void, marriages when the parties cohabit after the impediment is removed).

\(^{329}\) Of the 421 divorce petitions filed in Lancaster County during the first six months of 1970, 23.3% were dismissed. Letter from Kandra Hahn, Clerk of the District Court, Lancaster County, to Alan Frank (Oct. 30, 1978). See also Lancaster County Conciliation Court, 1972 Annual Report 1 [hereinafter these reports will be cited as Conciliation Ct. Rep.], estimating that one out of three petitions for divorce are not carried through to the decree stage. This is about the national average. P. Jacobson, supra note 37, at 119 (25%); Alexander, The Family Court—An Obstacle Race?, 19 U. Pitt. L. Rev. 602, 608 (1958) (50%). Not all of these are reconciliations. Some petitions are withdrawn or dismissed for want of prosecution even though the couple has separated. P. Jacobson, supra note 37, at 119.

\(^{330}\) See Johnstone, Divorce Dismissals: A Field Study, 1 Kan. L. Rev. 245 (1953) (reporting that only 30 out of a randomly selected 47 couples whose divorce action had been dismissed were still living together one to seven years after the dismissal; in 44 of the cases the reason for the dismissal was reconciliation).

\(^{331}\) "[T]he principal success of the [Iowa] act, it appears to me, is the provision of the ninety-day waiting period, giving the parties time to seriously consider the matter." Sass, supra note 39, at 640 (quoting Iowa attorney).

\(^{332}\) See Cal. Repert, supra note 135, at 23-24; Conway, To Insure Domestic Tranquility: Reconciliation Services as an Alternative to the Divorce Attorney, 9 J. Fam. L. 403, 419 (1970) (without reconciliation services "[i]nstead of 'cooling-off', many couples 'stew' ").

\(^{333}\) "A finding of irretrievable breakdown is a determination that there is no reasonable prospect of reconciliation." Uniform Marriage and Divorce Act § 305(c).

tablished in counties in which the district courts determined that, due to the social conditions and number of domestic relations cases, they were necessary for “the full and proper consideration of such cases” and to “provide means for the reconciliation of spouses and the amicable settlement of domestic and family controversies.” To date conciliation courts have been established in Douglas and Lancaster Counties. Prior to the filing of a divorce action, or while such action is pending, either or both spouses can invoke the jurisdiction of the court. If no divorce action is pending, the filing of a petition for reconciliation precludes the institution of a dissolution proceeding until thirty days after the petition is heard. In addition, the trial court is empowered to transfer a divorce action to the conciliation court. In counties in which no conciliation court has been established, the judge may refer the parties to qualified marriage counselors, family service agencies, or other qualified persons or agencies if there appears to be some reasonable possibility of effecting reconciliation.

The results of the survey of Nebraska district court judges provide a fascinating glimpse at the variety of ways in which these conciliation mechanisms are employed. For the state as a whole, in only somewhat more than half the cases did the parties see marriage counselors or the equivalent before the dissolution hearing. In Lancaster County, however, counselors were consulted prior to trial in ninety-five percent of the cases. The average for the rest of the state was slightly over thirty percent, with some judges reporting that in as few as five percent of the cases did the parties have the benefit of counseling.

Clearly in Lancaster County the mandate that every reasonable

335. NEB. REV. STAT. § 42-803 (Reissue 1974).
336. Id. § 42-801.
337. Id. § 42-812.
339. Id. § 42-821(1). The hearings actually are conferences with the conciliation counselor and are confidential. NEB. REV. STAT. § 42-810 (Reissue 1974).
340. NEB. REV. STAT. § 42-822 (Reissue 1974). Whether a case comes to the conciliation court by petition or by a transfer from the district court, priority is given to those cases in which there are minor children whose welfare may be adversely affected by the dissolution of the marriage and in which there are reasonable prospects of reconciliation. Id. §§ 42-811, 42-822. Where no children are involved or where help in securing a settlement is the main motivation, applications for conciliation proceedings are accepted only if the work of the court in cases involving children will not be seriously impeded. Id. § 42-823.
341. Id. § 42-360. Cases generally are referred only when at least one of the parties believes that the marriage can be saved. Comment of judge in Judges’ Questionnaire, supra note 15. In 1977, 17 cases were referred by the domestic relations court to the Lancaster County Conciliation Court. 1977 CONCILIATION CT. REP., supra note 329, at 13.
342. Judges’ Questionnaire, supra note 15, question 12. The figures for individual
effort to effect reconciliation be made has become the equivalent of compulsory counseling.\textsuperscript{343} with attorneys advising their clients not to appear before the court unless they have consulted a counselor at least once.\textsuperscript{344} The value of many of these consultations is open to question.\textsuperscript{345} Outside Lancaster County, while a visit to a coun-

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\textsuperscript{343} In some states counseling is compulsory. For example, until 1977 a Maine statute provided: "When the alleged cause is irreconcilable marital differences, a divorce shall not be granted unless both parties have received counseling by a professional counselor . . . ." Act of Oct. 3, 1973, ch. 532, 1973 Me. Acts 932 (amended 1977). In Connecticut, if either spouse or the counsel for any minor children of the marriage requests conciliation, each party must attend at least two consultation sessions with a conciliator. \textsuperscript{344} See also In re Marriage of Penney, 203 N.W.2d 380 (Iowa 1973) (court held that because under IOWA CODE ANN. § 598.16 (West Supp. 1978) counseling is mandatory unless waived by both parties, the conciliation procedures must be complied with when the wife refused to waive them, even though the couple had been separated for more than five years, pre-filing counseling had not been successful, and the differences between the parties were deep-seated). \textsuperscript{345} But see Mo. ANN. STAT. § 452.320(2) (Vernon Supp. 1978) ("No court shall require counseling as a condition precedent to a decree, nor shall any employee of any court, or of the state or any political subdivisions of the state, be utilized as a marriage counselor.").

The arguments against mandatory counseling can be summarized as follows: (1) government-coerced counseling infringes on individual choice and personal liberty as well as the privacy of the intimate marriage relationship; (2) those who voluntarily participate in a reconciliation program are more amenable to therapy and more willing to explore honestly the sources of their marital problems and possible solutions; coercion only creates resistance; (3) scarce counseling resources should be channeled toward those cases in which need is great or chances for success high; they should not be wasted on people who are just going through the motions; (4) as much of the mandatory counseling will not be successful, the efficacy of marriage counseling in general will be called into question. Baum, \textit{A Trial Judge's Random Reflections on Divorce: The Social Problem and What Lawyers Can Do About It}, 6 J. FAM. L. 61, 81-83 (1966); Baum, \textit{Law and Social Work: Marriage Counseling, A Case in Point}, 3 J. FAM. L. 279, 284-85 (1963); Conway, supra note 332, at 423; Seidelson, supra note 227, at 89-93. \textit{See also PUTTING ASUNDER}, supra note 90, at 151 ("Most of our witnesses were agreed that various schemes which have been tried in foreign countries, requiring compulsory attendance of parties to a divorce suit before some form of conciliation agency or tribunal, had proved in the end to be a routine and useless formality."). But see Foster, \textit{Conciliation and Counseling in the Court in Family Law Cases}, 41 N.Y.U. L. REV. 353, 379-81 (1966).

\textsuperscript{344} Most of the judges polled agreed that if the petitioner had seen a marriage counselor once and still believed that the marriage was irretrievably broken they normally would not require the petitioner to undergo further attempts at reconciliation. Judges’ Questionnaire, supra note 15, question 14.

\textsuperscript{345} The \textit{pro forma} nature of much of this counseling is revealed by the following: Through 1977 about 80% of all referrals to the Lancaster County Conciliation Court have come from attorneys. Extrapolated from 1977 \textit{CONCILIATION CT. REP.}, supra note 329, at 13; 1978 id. at 16; 1975 id. at 16; 1974 id. at 15; 1973 id. at...
ounselor might be required in particular instances, less strenuous efforts to effect a reconciliation appear to be sufficient in the majority of cases. This is consistent with the Nebraska Supreme Court's opinion in Condreay v. Condreay, a case in which the respondent was an inmate in the Nebraska Penal Complex. In Condreay the court held that, even when the respondent spouse denies that the marriage is irretrievably broken and no counseling has taken place, a court may refuse a request to refer the case to a counselor for conciliation and may make a finding that every reasonable effort to effect reconciliation has been made, if reconciliation does not appear to be feasible.

Whether the counseling that does take place is effective in rehabilitating infirm marriages is difficult to determine. Some advocates of legislatively-created, court-directed conciliation procedures claim that such services are "extra-ordinarily effective in a great number of cases," but many lawyers and judges in-
volved in divorce practice believe that in most instances reconciliation efforts are futile. Some conciliation courts have disseminated data that demonstrate that their programs have succeeded in inducing a significant number of discordant couples to settle their differences and resume their marriages. These reports must be read with care, for they frequently are statistically unsophisticated and may fail to take into account the number of divorce actions which are dismissed without court or conciliator

352. In a survey of Iowa judges, 10 judges thought conciliation was successful only "sometimes," 3 indicated it was "seldom" successful, and 6 believed it "never" succeeded. None thought it succeeded "always" or "often." Sass, supra note 39, at 642, 650. A 1974 poll of 31 Lincoln attorneys found 6 who believed reconciliation attempts were "usually futile," 11 who said they were "often futile," 14 who agreed that they were "occasionally successful," and none who felt that they were "often successful." Embacher & Johnson, supra note 242, at 8, 36.

Iowa attorneys have expressed concern about the low rate of success of Iowa's reconciliation provisions and have indicated that the procedures frequently have been invoked solely for the purpose of delay. Sass, supra note 39, at 642. A Kentucky survey found few judges who had significant success with conciliation efforts. Comment, supra note 256, at 573. New York matrimonial specialists were similarly unimpressed with the results achieved by the state's short-lived Conciliation Bureau. McLaughlin, Court-Connected Marriage Counseling and Divorce—The New York Experience, 11 J. Fam. L. 517, 529 (1971); Comment, New York's New Divorce Law: Beyond the Sixth Commandment, 5 Colum. J.L. & Soc. Prob., Aug., 1969, at 1, 8.

Some detractors regard conciliation programs as merely the price that has to be paid to mollify critics of liberalized divorce grounds. See R. Levy, supra note 193, at 119-20; Seidelson, supra note 227, at 62-63; Turner, supra note 29, at 75.

353. See, e.g., Baum, supra note 351, at 67 (in 1961 and 1962 over half the couples who had contact with the Wayne County [Michigan] Circuit Court Marriage Counseling Service were reconciled, and of the couples who completed counseling, two-thirds were reconciled); Krom, supra note 216, at 160 (reporting Judge Pfaff's testimony that there was a 64% reconciliation rate for cases submitted to the Los Angeles Court of Conciliation); Hansen, And Time Went By, Trial Judges' J., Oct., 1965, at 8 (after adoption of statewide conciliation procedures the proportion of divorce cases dropped in Milwaukee County, Wisconsin, went from 39% to 48%). Other reports have not been as optimistic. See, e.g., the New York experience reported in McLaughlin, supra note 352.

354. "You can make reconciliation rates say anything you want them to, depending on what you base them." M. Wheeler, supra note 50, at 107-08 (quoting Dorothy Maddi). See also C. Foote, R. Levy & F. Sander, supra note 26, at 1094-95 n.81.

In recent years the Lancaster County Conciliation Court has reported that over 50% of the couples petitioning for conciliation in a given year were not divorced by the end of that year. 1977 CONCILIATION CT. REP., supra note 329, at 5, 7, 22; 1976 id. at 8. As these figures admittedly did not consider that the divorce actions of many of these couples would not be heard until the next year, they are of little value.
intervention, the self-selected nature of the group that has received counseling, and the transient nature of many reconciliations.

Data measuring the effectiveness of Nebraska's conciliation procedures are scarce. A Lancaster County Conciliation Court follow-up study revealed that as of May 23, 1975, sixty percent of all couples who had some contact with the Lancaster County Conciliation Court, including those who withdrew their petitions prior to the initial conference, had been granted a decree of dissolution. How many of the forty percent that were not yet divorced procured a decree after May 23, how many were reconciled, how many reconciliations lasted an appreciable length of time, and how many reconciliations would have occurred without the aid of the conciliation court is unknown.

Of the forty-eight couples whom the Judges' Questionnaire indicated had failed to receive a decree of dissolution at the initial divorce hearing and who presumably were referred for further

355. See note 329 supra.
356. See Maddi, supra note 132. This sophisticated study of the Los Angeles Conciliation Court found that "the interlocutory decree rate of couples who sought the services of the Conciliation Court was significantly lower than that of couples who did not seek such services . . . ." Id. at 549. However, the difference between the rates may well have been due to the self-selected nature of the group that petitioned for conciliation, rather than the impact of the conciliation court experience. Much of the difference between the rates evaporated when controlled for certain characteristics, e.g., desire for counseling, duration of marriage, presence of children, length of marriage. Moreover, since less than 5% of the total sample filed petitions for conciliation, the impact of this group's lower decree rate on the total decree rate was negligible. Id. at 549.
357. But see 1972 CONCILIATION CT. REP., supra note 329, at 1 ("Follow-up studies, although not refined, indicate that approximately 87% of those who have used the Husband-Wife Agreement are still together following the conciliation conference efforts."); Elkin, supra note 351, at 67 (three out of four couples reconciled through the Los Angeles Conciliation Court were still living together one year later). The source of the figures cited in the Lancaster County Conciliation Court Report is not identified. It is not clear whether these figures are from Lancaster County or even from Nebraska.
358. Extrapolated from 1974 CONCILIATION CT. REP., supra note 329, at 9, 14. Of those who completed the counseling process in 1974, 72.9% were divorced as of May 23, 1975. Id. at 14.
359. If the parties reconcile they are encouraged to sign a 30-page Husband-Wife Agreement, which is set out in part at 5 W. MOORE, NEBRASKA PRACTICE § 4148 (Supp. 1978). The agreement contains clauses on, e.g., "Nagging" and "The Importance of Love-Making," as well as a "Family Prayer." The document is incorporated in a court order and, in theory, is enforceable by the contempt sanction. Id. For the use of such agreements in other jurisdictions see C. FOOKE, R. LEVY & F. SANDER, supra note 26, at 1093-94 & nn.79-80; M. WHEELER, supra note 50, at 109-10; Elkin, supra note 351, at 66-67; Henderson, Marriage Counseling in a Court of Conciliation, 3 FAM. L.Q. 6, 10-11.
360. See note 241 & accompanying text supra.
counseling, only five were known to have reconciled. While this is a late stage in the divorce process to be attempting conciliation, these couples probably were selected because chances for reconciliation were promising.

Even though counselors are consulted before the hearing, it might be too late for them to use their skills effectively if the divorce process already has begun, although many reconciliations do occur after one of the spouses has filed suit. From 1973 to 1977, about seventy-five percent of the petitions for reconciliation in the Lancaster County Conciliation Court were filed while a divorce action was pending and about eighty percent were filed after the couple had separated. Although a sizeable minority of couples who employ the services of the conciliation court do so while the parties are still living together and prior to the initiation of any dissolution proceedings, the court would like to see this

361. Judges' Questionnaire, supra note 15, question 3(d). The ultimate resolution of one case was not reported. One out-state judge, who regards the provisions enabling judges to order counseling as the strength of the Nebraska no fault divorce process, referred 11 couples for counseling, two of whom reconciled. He reported that in another year, eight out of nine referrals resulted in reconciliations. Id. The power to continue cases or refer them for conciliation can be abused if used indiscriminately, although this judge's relatively successful record indicates that this is not the case here. The provision of Washington's no fault law, requiring entry of a decree if one party still maintains that the marriage is irretrievably broken after the expiration of a specific time period for reflection and counseling, see note 274 & accompanying text supra, has been praised for tempering "[a]ny unwarranted judicial optimism regarding the usefulness of delay or counseling." Holman, supra note 272, at 44.

362. Marriage Guidance Councils are unanimous in saying that their chances of success are greatest if their help is sought at an early stage in disputes between husband and wife. These chances are greatly diminished by the time that either party has resorted to legal advice, and have dwindled almost, but not quite, to vanishing point by the time that a petition is filed.

Law Commission, supra note 93, at 17. A number of Iowa judges and attorneys have attributed that state's lack of success with its conciliation procedures to the fact that the required counseling comes too late in the divorce process. Sass, supra note 39, at 642.

363. "The filing of a divorce action is all too often a desperate cry for help and does not always represent a true desire to terminate the marriage. When this anguished cry is not heard or heeded, all too often we find the tragedy of the unnecessary divorce." 1969-1970 Conciliation Ct. Rep., supra note 329, at 3. See also H. O'Gorman, supra note 156, at 99; Ralls, supra note 161, at 26 ("at least half the people who start divorce suits are really hoping something will stop them before it is too late"); Sass, supra note 39, at 652 (according to the averaged responses of Iowa attorneys to a survey question, 43% of marital complainants are actually seeking help for their marriages and not dissolutions).


number substantially increased.\textsuperscript{366}

High quality, sympathetic, and understanding counselors are essential to an effective conciliation program. Twenty-two of the judges who responded to the survey felt that there were counseling or conciliation services in their district to which they confidently could refer the parties.\textsuperscript{367} Some among the eight who lacked confidence in their local mental health facilities were emphatic in their displeasure, labeling the counseling provided "almost never effective" and "uniformly ineffectual" and dismissing the few private counselors available as too expensive.\textsuperscript{368} Even among those judges who responded favorably, there was some dissatisfaction. Included in both groups were judges who indicated that few of the couples who appeared before them had received any counseling at all.\textsuperscript{369} If counseling and conciliation are to be the major brakes on improvident divorces under Nebraska's irretrievable breakdown statute, it is obvious that the professional mental health services available to many rural Nebraskans must be upgraded.\textsuperscript{370}

Saving marriages is not the only function that conciliation courts and other mental health professionals involved in the divorce process are asked to fulfill. Initially, their goal is to help the spouses clarify what it is they really want to do and to aid them in

\textsuperscript{366} See text accompanying notes 387-388 \textit{infra}.
\textsuperscript{367} Id. In some cases, when the need for counseling is pressing, out-state couples may be referred to counselors in Lincoln and Omaha. Id.
\textsuperscript{368} See note 312 & accompanying text \textit{supra}.
\textsuperscript{369} Many attorneys "counsel" their divorce clients. Others feel that this is not their proper role. Few have had the training that would equip them for comprehensive marriage counseling. As effective counseling often requires the participation of both parties, an attorney's participation in this process raises many ethical questions. See generally J. Areen, \textit{Cases and Materials on Family Law} 343-68 (1978); V. Church, \textit{Behavior, Law and Remedies: Introducing the Juro-Psychologist} (1965); H. Freeman \& H. Weihofen, \textit{Clinical Law Training—Interviewing and Counseling} 169-240 (1972); H. O'Gorman, \textit{supra} note 156, at 145-51; M. Wheeler, \textit{supra} note 50, at 113-15; Alexander, \textit{Public Service by Lawyers in the Field of Divorce}, 13 \textit{Ohio St. L.J.} 13 (1952); Callner, \textit{Boundaries of the Divorce Lawyer's Role}, 10 \textit{Fam. L.Q.} 389 (1977); Conway, \textit{supra} note 332; Embacher \& Johnson, \textit{supra} note 242; Harper \& Harper, \textit{Lawyers and Marriage Counseling}, 1 \textit{J. Fam. L.} 73 (1961); Johnson, \textit{supra} note 196; Marder, \textit{The Need for an Expanded Role for the Attorney in Divorce Counseling}, 4 \textit{Fam. L.Q.} 280 (1970); Mussehl, \textit{From Advocate to Counselor: The Emerging Role of the Family Law Practitioner}, 12 \textit{Gonzaga L. Rev.} 443 (1977); Steinberg, \textit{The Therapeutic Potential of the Divorce Process}, 62 A.B.A.J. 617 (1976); Walzer, \textit{The Role of the Lawyer in Divorce}, 3 \textit{Fam. L.Q.} 212 (1969); Watson, \textit{The Lawyer as Counselor}, 5 \textit{J. Fam. L.} 7 (1965). \textit{See also} Divorce Reform Act, 1969, c. 55, § 3(1) (England) (a soliciter acting for a petitioner for divorce is required to certify whether he or she has discussed the possibility of reconciliation with the petitioner and has given the petitioner names and addresses of persons qualified to help effect a reconciliation).
exploring the various ways through which these goals can be achieved. As part of this process "a great deal of the Counselor's energy and efforts are devoted to helping frightened, suspicious and frustrated humans unburden themselves." If the decision is made to seek a divorce, the counselor's task is to help the family terminate the marriage with dignity; with a minimum of trauma, hatred, and bitterness; and with as little pain as possible inflicted on the children. At this stage it is important that the parties focus their attention away from the problems of the past and toward the roles they will be assuming in the future. Conciliation courts can assist in this process by helping the parties settle the collateral issues of custody, visitation, property, and support in a manner which will minimize tensions and facilitate healthy relationships among the former spouses and their children. Moreover, it is felt that the insights gained through this process will reduce the risks of failure should either party marry again.

It is widely believed that the services conciliation agencies provide are beneficial. Counseling or conciliation procedures of one form or another have been incorporated into most recent divorce reform legislation. Yet, these programs are rarely funded or staffed at a level that enables them to fulfill effectively all of the various missions that have been assigned to them. The dissatisfaction with the available counseling facilities expressed by many of the judges who preside over courts in the less-populated counties of Nebraska attests to this predicament.

The problem is not confined to rural areas, however. Throughout its history the Lancaster County Conciliation Court has been plagued with monetary and staffing problems. During the court's first five years it operated without a full-time director, first using volunteers and later employing a part-time counselor. It now has a full-time conciliation counselor, but in 1977 the court's limited budget would not allow him to attend the annual meeting of the Association of Family Conciliation Courts or participate in any continuing education programs.

372. See generally M. Wheeler, supra note 50, at 115-16; Baum, supra note 351, at 67-68; Elkin, supra note 351, at 64.
373. "Until now few legislatures have really put their money where their platitudes are." M. Wheeler, supra note 50, at 116.
374. See text accompanying notes 367-68 supra.
375. The Douglas County Conciliation Court has had similar problems. Reportedly the county board has failed to appropriate adequate funds. Hearings, supra note 130, at 42 (testimony of Senator J. James Waldron).
377. The court had no conciliation counselor during the first four months of 1976. See 1976 id. at 3; 1975 id. at 3. During the first three months of 1976 no appointments for counseling were made. 1976 id. at 1.
378. 1977 id. at 1.
Although "the Conciliation Court is most productive when it becomes immediately available in a time of crisis," by 1973 "the waiting period prior to the first counseling contact [had been] stretched beyond any reasonable understanding of crisis-centered counseling." In August the delay was nine weeks and the vast majority of consultations were limited to one session. Through the implementation of new procedures designed "to accommodate more families and shorten the waiting period," the delay has been reduced to "a comfortable ten days to two weeks," although the short-term nature of the court's counseling program usually permits only two appointments. Further indication that the situation has improved can be found in the fact that in 1977 forty-one percent of the families served by the Lancaster County Conciliation Court did not have any minor children, even though these cases are to be accepted only when "the work of the court in cases involving minor children will not be seriously impeded."

While the Conciliation Counselor has expressed the wish that the court "could provide help for marital difficulties much earlier than is presently the case," it has been forced to "wait until the damage is extensive before [its] help is sought because couples were unaware of [its] services." Placing brochures in public places where troubled couples are likely to see them might help remedy this problem, but "distribution and replacement of the brochures would be a near impossible task," as funds to publicize the court's services have not been forthcoming. Another concern is that "[v]ery few families receive any post-dissolution counseling in the important areas of child visitation or custody," even though such counseling "is often a necessity if children are to have healthy and happy relationships with divorced parents," and "may be advisable in order to achieve an effective and happy future marriage for one or both of the spouses."

In view of this record it is highly unlikely that Nebraska would ever initiate an extensive statewide counseling program in an effort to reduce the divorce rate. Considering the enormous cost and

379. 1973 id. at ii.
380. Id. at 6.
381. Id.
382. 1975 id. at 6.
383. 1976 id. at 5.
384. 1977 id. at 5.
385. Id. at 22.
388. Id.
389. 1976 id. at 5.
390. 1977 id. at 1.
391. Id. at 5.
392. Id. at 6.
doubtful efficacy of such a program, this is for the best. If, however, Nebraska is concerned that decisions to continue or terminate a marriage be informed and reflective and that the harmful effects of divorce be minimized, it should take steps to assure that well-publicized, competent, and affordable marriage and divorce counseling services are available to all those who want them throughout the state.

F. "It is the intent of the legislature that a spouse who has been handicapped socially or economically by his or her contributions to a marriage shall be compensated for such contributions at the termination of the marriage . . . ." 394

Five of the judges who responded to the Judges' Questionnaire felt that there conceivably could be some circumstances under which they would deny a petition for the dissolution of a marriage even though the marriage was irretrievably broken and every reasonable effort to effect reconciliation had been made. 395 While the discretion to deny a divorce, even where the requisite showing of breakdown has been made, exists in England 396 and a few other

393. Although there may be other reasons for supporting or establishing a conciliation service similar to the one examined in this study, the impact on the overall decree rate is not one of them . . . . [U]nless legislatures are willing to fund conciliation programs with large staffs capable of serving a significant portion of the population seeking divorce, the impact on the decree rate is bound to be minimal. Nor is it clear that serving a larger portion of the divorce-seeking population would have a significant impact. Maddi, supra note 132, at 551-52 (footnote omitted).


396. (1) The respondent to a petition for divorce in which the petitioner alleges [that the parties to the marriage have lived apart for a continuous period of at least five years immediately preceding the presentation of the petition] may oppose the grant of a decree nisi on the ground that the dissolution of the marriage will result in grave financial or other hardship to him and that it would in all the circumstances be wrong to dissolve the marriage.

(2) Where the grant of a decree nisi is opposed by virtue of this section, then,—
(a) if the court is satisfied that [the petitioner has no other ground for divorce], and
(b) if apart from this section it would grant a decree nisi, the court shall consider all the circumstances, including the conduct of the parties to the marriage and the interests of those parties and of any children or other persons concerned, and if the court is of opinion that the dissolution of the marriage will result in grave financial or other hardship to the respondent and that it would in all the circumstances be wrong to dissolve the marriage it shall dismiss the petition.

(3) For the purposes of this section hardship shall include the loss of the chance of acquiring any benefit which the respondent might acquire if the marriage were not dissolved.
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countries, no such power is conferred by a Nebraska statute.

Those jurisdictions which have enacted provisions of this type have done so, in part, out of concern for the spouse, who through no fault of his or her own, is deprived of the status of a married person because the outrageous conduct of his or her spouse has destroyed their marriage. Like measures of a similar nature discussed previously, such hardship clauses resurrect many of the evils of fault divorce and vest trial judges with wide discretion, without providing the objecting spouse with any appreciable benefit.

The main motivation behind these statutes is the economic protection of the unoffending spouse and the minor children. This is a legitimate and serious concern. A wife, for instance, who has devoted most of her married years to the maintenance of the home and family and who thus has not developed the skills and experience she needs to viably support herself, should not be forced to suffer economic deprivation because her husband has become disenchanted with their marriage and divorces her against her will.

Divorce Reform Act, 1959, c. 55, § 4. See also the standard proposed by the English Law Commission:

The Judge may in his discretion refuse to grant a divorce if satisfied that, having regard to the conduct and interests of the parties and the interests of the children and other persons affected, it would be wrong to dissolve the marriage, notwithstanding the public interest in dissolving marriages which have irretrievably broken down.

LAW COMMISSION, supra note 93, at 53.

397. See, e.g., those discussed in M. RHINESTEIN, supra note 35, at 342-46.

398. Cf. Abney v. Abney, 374 N.E.2d 264, 270 (Ind. Ct. App. 1978) (the Indiana Dissolution of Marriage Act "gives the trial court no alternative but to grant a dissolution once it finds an irretrievable breakdown of the marriage" even where "the effect of the dissolution will be to terminate benefits which are advantageous to one of the parties").

399. See PUTTING ASUNDER, supra note 90, at 48-56; LAW COMMISSION, supra note 93, at 21-23.

400. See notes 289-315 & accompanying text supra.

401. "The effect of this position is to add to a rule having no standards an exception having no standards, and thus to augment the court's discretion enormously." Clark, supra note 17, at 406-07.

402. See PUTTING ASUNDER, supra note 90, at 46-48; LAW COMMISSION, supra note 93, at 20-21, 23-26, 50-51. As to the protection of children in England, see the Matrimonial Proceedings and Property Act, 1970, c. 45, § 17 (the court is precluded from granting a decree absolute unless satisfied that the arrangements for the welfare of the children of the parties have been made, if it is practicable to do so, and that such arrangements are satisfactory or the best that can be devised under the circumstances).

403. See, e.g., Abney v. Abney, 374 N.E.2d 264 (Ind. Ct. App. 1978) (the wife, who was suffering from severe rheumatoid arthritis requiring costly medical treatment, had the assistance she was receiving through her husband's military benefits terminated when he divorced her). For the history of this unfortunate case, see also Abney v. Abney, 360 N.E.2d 1044 (Ind. Ct. App. 1977); Abney v. Abney, 61 Tenn. App. 521, 456 S.W.2d 364 (1970); Abney v. Abney, 222 Tenn. 160, 433 S.W.2d 847 (1968).
The appropriate solution, however, is not the adoption of discretionary and unwieldy hardship exceptions to no fault divorce grounds, but the reformation of the laws of property and support.

A detailed discussion of property and support is beyond the scope of this article. It should be mentioned, however, that the adoption of no fault divorce statutes has had a significant impact on these economic issues. In many, though not all, of the states which have embraced the new divorce reforms, the advent of no fault divorce also has brought about no fault alimony and property division. Moreover, the irretrievable breakdown standard has destroyed whatever ability one spouse had under the old law to block the granting of a divorce decree. When that power was in the hands of the economically weaker of the parties, which was usually the wife, she was able to use it to extract valuable financial concessions from her husband and guarantee herself an equitable settlement. Even so, the demise of this system, which bordered on blackmail, is not to be mourned. It was subject to enormous abuses and produced as many unjust settlements as just ones.

404. "[I]t is offensive to decency and derogatory to respect for family ties to preserve the legal shell of a dead marriage for purely monetary considerations." LAW COMMISSION, supra note 93, at 21.

405. "[I]f present inequities were successfully ironed out, the economic argument against allowing the party responsible for the breakdown of a marriage to petition would be reduced to insignificance." PUTTING ASUNDER, supra note 90, at 48.

Equitable support and property laws would not solve all problems, however. Where resources are not plentiful, divorce, and subsequent marriage, can impose financial hardships on all. Strict enforcement of hardship clauses would in effect impose a "means test" for remarriages—allowing the rich, but not the poor, to remarry. H. KRAUSE, NUTSHELL, supra note 205, at 362. Cf. Zablocki v. Redhill, 98 S. Ct. 673 (1978) (a Wisconsin statute, providing that parents having children not in their custody whom they are obligated to support may not remarry without demonstrating that they have complied with all support orders and that their children will not become public charges, violates the fundamental right to marry).

406. See generally Comment, Alimony Considerations Under No-Fault Divorce Laws, 57 Neb. L. Rev. 792 (1978); Annot., 86 A.L.R.3d 1116 (1978). In which of these groups Nebraska falls remains unclear. In Theye v. Theye, 200 Neb. 206, 263 N.W.2d 82 (1978), three of the justices of the Nebraska Supreme Court, one of whom wrote the opinion of the court, indicated that the relative fault of the parties in bringing about the breakdown of the marriage was a proper factor to consider when awarding alimony. The other four justices, in an opinion concurring in the result, disagreed. One of those four has since retired. See also Magruder v. Magruder, 190 Neb. 573, 209 N.W.2d 585 (1973). For the pre-Theye responses of the Nebraska trial judges as to whether they admit evidence of misconduct with respect to alimony and the division of property, and whether it ought to be admitted, see Judges' Questionnaire, supra note 15, questions 7 & 8, set out in the appendix.

A more equitable solution would provide for laws which protect economically dependent spouses by assuring that upon divorce their legitimate needs will be met and their direct and indirect contributions to the earning power and property of the other spouse will be recognized and compensated.\(^408\)

**VII. CONCLUSION**

In repealing Nebraska's fault divorce laws and substituting a procedure based on the irretrievable breakdown of the marriage, the Nebraska Unicameral made a fundamental change in the state's official outlook towards marriage, divorce, and the family. That such a dramatic shift in philosophy produced no statistically significant change in the state's overall divorce rate and brought about few substantial alterations in the manner in which divorces are procured serves to demonstrate the inconsiderable impact that the statutory grounds of divorce have on marriage stability. While the divorce rate has skyrocketed in recent years, this phenomenon is better explained as the product of the same social forces that produced no fault divorce laws than as the result of such laws. When the virtues of patience, understanding, and sacrifice are held in higher regard than they are in today's inward-looking society, perhaps the divorce rate will drop significantly. No law

\(^{408}\) The factors that Nebraska courts are to take into consideration when awarding alimony and dividing property are set out at Neb. Rev. Stat. § 42-365 (Cum. Supp. 1978):

> When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable, having regard for the circumstances of the parties, duration of the marriage, a history of the contributions to the marriage by each party, including contributions to the care and education of the children, and interruption of personal careers or educational opportunities, and the ability of the supported party to engage in gainful employment without interfering with the interests of any minor children in the custody of such party.

The Nebraska judges' survey asked the judges to rate 16 factors on a scale of 1 to 5, according to how important they believed each to be in the awarding of alimony. While the responses demonstrate a lack of uniformity among the individual judges, the overall results show that the judges regard the non-economic contributions of a homemaking spouse and the sacrificing of one's own career as significant determinants in the allocation of spousal support. Fault considerations were ranked last. See Judges' Questionnaire, supra note 15, question 10, set out in the appendix.

The Nebraska Supreme Court also has shown that it believes the contributions of the spouse who is not the primary wage earner to be an important factor. See, e.g., Brown v. Brown, 193 Neb. 394, 259 N.W.2d 24 (1977) (a wife who made substantial financial contributions through the early years of the marriage, who after the divorce would be caring for the minor children of the parties, and whose earning capacity, although substantial, was not as great as her husband's, should have been awarded alimony in addition to a property settlement).
can induce such attitudinal changes, but divorce laws can and should minimize the pain and acrimony of the divorce process, make competent marriage and divorce counseling available to all who desire it, and distribute equitably the economic and social costs of marital breakdown.
APPENDIX

JUDGES' QUESTIONNAIRE ON NEBRASKA'S DISSOLUTION OF MARRIAGE LAW

Total Tabulation Sheet

NAME:________________ JUDICIAL DISTRICT:________________

1. Approximately how many dissolution of marriage cases did you hear within the past year? (If you did not hear domestic relations cases during a substantial portion of the past year, please indicate the approximate number of cases you heard for the most recent one-year period that you sat on the domestic relations bench.)
   a) uncontested cases 7600 (approximately) (i.e., no contested issues)
   b) contested cases 2400 (approximately)

2. In approximately what proportion of the contested cases did one of the parties deny in court that the marriage was irretrievably broken? 3.3%

3. In how many cases did you deny the prayer of dissolution? 48
   a) How many because of failure to prove irretrievable breakdown of the marriage? *
      i) where one of the parties denied that the marriage was irretrievably broken? *
      ii) where neither party denied the marriage was irretrievably broken? *
   b) How many because every reasonable effort to effect reconciliation had not been made? *
      i) where one of the parties denied that the marriage was irretrievably broken? *
      ii) where neither party denied the marriage was irretrievably broken? *
   c) How many for other reasons? * (Please specify reasons)
   d) What was the ultimate resolution of those cases where you denied the prayer of dissolution? (i.e., did the parties reconcile, was a dissolution eventually granted, etc.?)

* Data too incomplete to report.
4. What is the average duration in time of a dissolution hearing in your courtroom
   a) in an uncontested case? 16 minutes
   b) in a contested case? 3 3/4 hours

5. a) Where there has been adequate counseling and where one or both of the parties state that the marriage is irretrievably broken and that they are unwilling to resume the marital relationship and no one has denied that the marriage is irretrievably broken, do you feel that under the law the marriage is irretrievably broken and should be dissolved?

   Yes 29  No 1

   b) Where there has been adequate counseling and where one of the parties states that the marriage is irretrievably broken and that he/she is unwilling to resume the marital relationship, but the other party has denied that the marriage is irretrievably broken, do you feel that under the law the marriage is irretrievably broken and should be dissolved?

   Yes 27  No 3

6. Where you have found the marriage to be irretrievably broken and that every reasonable effort to effect reconciliation has been made, are there any circumstances under which you still would deny the dissolution?

   Yes 5  No 25

   If yes, please indicate what those circumstances are?

7. Do you admit evidence of misconduct of the parties with respect to:
   a) breakdown of the marriage? yes 9  no 20
   b) alimony? yes 11  no 18
   c) distribution of property? yes 9  no 20
   d) child support? yes 10  no 19
   e) child custody? yes 28  no 1

8. Do you think that evidence of misconduct should be admitted with respect to:
   a) breakdown of marriage? yes 11  no 19
   b) alimony? yes 15  no 14
   c) distribution of property? yes 14  no 15
   d) child support? yes 11  no 19
   e) child custody? yes 29  no 1
9. Although there are variances among cases would you say that on the average you award the wife
   a) $\frac{1}{3}$ or less of the marital property?  0
   b) approximately $\frac{1}{2}$ of the marital property?  28
   c) $\frac{2}{3}$ or more of the marital property?  0

10. How important do you believe each of the following factors to be in the awarding of alimony? (Rate each on a scale of 1 - 5, 1 being of great importance and 5 of no importance.)

<table>
<thead>
<tr>
<th>Factor</th>
<th>of great importance</th>
<th>important</th>
<th>of no importance</th>
<th>mean rank order</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) what money or property each brought into the marriage</td>
<td>10</td>
<td>4</td>
<td>10</td>
<td>2.41 8</td>
</tr>
<tr>
<td>b) social position and living standard of each party before the marriage</td>
<td>1</td>
<td>4</td>
<td>7</td>
<td>3.64 14</td>
</tr>
<tr>
<td>c) duration of the marriage</td>
<td>18</td>
<td>4</td>
<td>6</td>
<td>1.69 4</td>
</tr>
<tr>
<td>d) number of children, their respective ages, physical or mental conditions, and parental needs</td>
<td>7</td>
<td>1</td>
<td>6</td>
<td>3.39 13</td>
</tr>
<tr>
<td>e) net worth and present income of each party</td>
<td>19</td>
<td>6</td>
<td>4</td>
<td>1.48 2</td>
</tr>
<tr>
<td>f) misconduct of each spouse</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>4.39 16</td>
</tr>
<tr>
<td>g) present physical and mental health of each party</td>
<td>18</td>
<td>4</td>
<td>7</td>
<td>1.62 3</td>
</tr>
<tr>
<td>h) ages and life expectancy of each party</td>
<td>12</td>
<td>7</td>
<td>8</td>
<td>2.03 5</td>
</tr>
<tr>
<td>i) earning capacity of each party including ability of the supported party to engage in gainful employment</td>
<td>20</td>
<td>5</td>
<td>4</td>
<td>1.44 1</td>
</tr>
<tr>
<td>j) present standard of living of each party</td>
<td>6</td>
<td>5</td>
<td>14</td>
<td>2.59 10</td>
</tr>
<tr>
<td>k) how the marital property was acquired and the effort of each in doing so</td>
<td>9</td>
<td>5</td>
<td>10</td>
<td>2.45 9</td>
</tr>
<tr>
<td>l) what each party gave up for the marriage including interruption of careers and educational opportunity</td>
<td>7</td>
<td>8</td>
<td>12</td>
<td>2.34 7</td>
</tr>
<tr>
<td>m) what each gained from the marriage including social status and career and educational opportunity</td>
<td>4</td>
<td>6</td>
<td>16</td>
<td>2.72 11</td>
</tr>
<tr>
<td>n) non-economic producing contributions to the marriage such as childrearing and homemaking</td>
<td>10</td>
<td>11</td>
<td>5</td>
<td>2.10 6</td>
</tr>
</tbody>
</table>
o) any extraordinary sacrifice, devotion, or care by either spouse in furtherance of a happy marriage or in preservation of the marital relationship  6  8  6  6  3  2.72  11
p) the desire of each to end the marital relationship  5  1  4  6  13  3.72  15

11. When a minor child is involved an attorney should almost always be appointed to represent the child's interest?
   Yes  4   No  26

12. In what percentage of cases have the parties seen marriage counselors or the equivalent before appearing before you?  55.5%

13. Are there counseling or conciliation services in your district to whom you can confidently refer the parties?
   Yes  22   No  8

14. If the petitioner testifies that he/she has seen a marriage counselor once and that the petitioner still believes that the marriage is irretrievably broken would you normally require the petitioner to undergo further reconciliation attempts?
   Yes  5   No  24
   If yes, please indicate what more you would normally require.

15. Do you believe the 60-day waiting period between service of process and trial . . .
   a) . . . is too long?  0
   b) . . . is the appropriate length?  30
   c) . . . is too short to prevent impetuous divorces?  0

16. In approximately what proportion of cases have you ordered significant changes in agreed-to property settlements?  4.6%

17. In cases where financial issues are contested do you order the parties to submit a financial statement?
   Yes  24   No  6
   (If yes and you use a standard form would you please attach a copy of that form.)

18. Are the laws of Nebraska sufficient to obtain the necessary financial data from the parties?
   Yes  28   No  2
   If no, what changes would you recommend?

19. Has the no-fault dissolution of marriage procedures led to a change in the parties' feelings of animosity toward each other as compared to Nebraska's previous law?
20. In your opinion has no-fault led to easier settlement of collateral issues or more disputes?

<table>
<thead>
<tr>
<th>Choice</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) easier settlements</td>
<td>17</td>
</tr>
<tr>
<td>b) no change</td>
<td>4</td>
</tr>
<tr>
<td>c) more disputes</td>
<td>9</td>
</tr>
<tr>
<td>i) as to financial matters</td>
<td>8</td>
</tr>
<tr>
<td>ii) as to custodial matters</td>
<td>7</td>
</tr>
<tr>
<td>iii) other (please specify)</td>
<td>0</td>
</tr>
</tbody>
</table>

21. Do you play a more active role in contested dissolution of marriage cases than in other civil cases?

<table>
<thead>
<tr>
<th>Choice</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>21</td>
</tr>
<tr>
<td>No</td>
<td>9</td>
</tr>
</tbody>
</table>

If yes, how?

<table>
<thead>
<tr>
<th>Choice</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>a) ask more questions</td>
<td>17</td>
</tr>
<tr>
<td>b) try to save the marriage</td>
<td>8</td>
</tr>
<tr>
<td>c) press for settlement</td>
<td>7</td>
</tr>
<tr>
<td>d) other (please specify)</td>
<td>0</td>
</tr>
</tbody>
</table>

22. Would you say that the present statutory approach to the dissolution of marriage is working well?

<table>
<thead>
<tr>
<th>Choice</th>
<th>Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yes</td>
<td>24</td>
</tr>
<tr>
<td>No</td>
<td>5</td>
</tr>
</tbody>
</table>

If yes, what are the major strengths?
If no, what are the major problems?