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# Articles

## Addicted to Fault: Why Divorce Reform Has Lagged in New York

J. Herbie DiFonzo  
Ruth C. Stern\*

### Introduction

From 1787 until the latter half of the 20th century, New Yorkers chafed, strained and schemed against the most restrictive of this country's divorce laws. Alone among the fifty states, New York permitted divorce on the sole ground of adultery.<sup>1</sup> Characterized as an "absurd anachronism,"<sup>2</sup> this stance was particularly puzzling in light of New York's acknowledged leadership in social reform legislation.

Despite such rigorous legal constraint, for 180 years New Yorkers contrived to dispose of their spouses with great frequency. Marital dissolution was achieved through the processes of annulment, migratory divorce, and fraudulent adultery proceedings. Advocates for reform repeatedly urged strong doses of reality on their legislators, recognizing that "a statute designed to prevent divorce in New York did not sup-

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1. Even South Carolina, which for most of its history, disallowed divorce completely (except for a brief period during Reconstruction), had liberalized its divorce grounds by 1948. See James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 917-20 (2000) (describing South Carolina divorce reform history).

2. Howard Hilton Spellman, Chairman, Address Before the New York Joint Legislature Committee on Matrimonial and Family Law (Jan. 1966), in 21 REC. OF N.Y.C.B.A. 35, at 38 [hereinafter Committee Report].

press the desire of New Yorkers for divorce."<sup>3</sup> Indeed, the issue of divorce engendered enormous controversy in New York, perhaps as much as or more so than in any other jurisdiction.<sup>4</sup> Throughout the 19th and 20th centuries, marital dissolution was strenuously debated but was, until relatively recently, stubbornly resistant to reform.

It is tempting to attribute this glacial rate of change to the power of New York's religious and conservative interest groups. But, while New York's population has, historically, been heavily Catholic, so have the populations of Massachusetts, Illinois and Pennsylvania, all of which exceed New York in recorded rates of divorce.<sup>5</sup> And, while New York's conservatives have staunchly and stridently decried the immorality of divorce, the trend toward marital breakup has, nevertheless, kept pace with their disfavor. Just as Prohibition gave rise to a spectacular era of excess, strictures against divorce have inspired corruption, evasion and myriad ways to subvert the law. In a way, New Yorkers became the victims of their own ingenuity. Had they been less successful in finding ways to exit the state of matrimony, they might have aroused greater public pressure for reform. As it was, legislators were able to achieve a pretense of moral probity by resisting reform. By dodging the issue, they insulated themselves from social controversy. And, in so doing, they perpetuated a law which "satisfied those who wanted a deterrent to divorce, recognition of the sanctity of marriage, and the preservation of the traditional norms of the nuclear family."<sup>6</sup> Thus, a population determined to consistently and creatively evade the law achieved a peculiar stasis with those who steadfastly refused to change it. The availability of out-of-state divorces provided a "safety valve" which "encouraged the retention of rigid legislation in conservative states like New York."<sup>7</sup> Judges responded to the law's severity by interpreting it liberally and permissively.<sup>8</sup> Equal and opposing forces produced a

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3. Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law Reform in New York State*, 37 BUFF. L. REV. 375, 421 (1988).

4. PAUL H. JACOBSON, *AMERICAN MARRIAGE AND DIVORCE* 114 (1959).

5. *Id.* at 117.

6. Marcus, *supra* note 3, at 417 n.159.

7. *Id.* at 422.

8. MAX RHEINSTEIN, *MARITAL STABILITY, DIVORCE, AND THE LAW* 365 (1972).

deadlock that kept New York's divorce reform in a state of paralysis.

During this 180 year period, divorce reform by no means retreated into silence and invisibility. It was, however, largely ineffective. Not until the 1960s would a series of events conspire to bring the conservative-liberal standstill to an end. While the reform was justly hailed as a deliverance from bad law, it was motivated less by a crusade for justice than by weariness and disgust with the corrupt administration of the divorce statutes.

Never having banished fault from its moral and legal consciousness, New York remains dependent upon it as a rationale for framing and resolving marital dissolution issues. Fault continues to pervade analysis of property distribution and spousal support matters. It has even achieved a certain strategic legitimacy in the eyes of those who currently oppose measures to evict fault entirely from New York's divorce law. Perhaps fault has become permanently rooted in the state's way of thinking about divorce. Or, perhaps it is viewed by some as a shield against property distribution and support statutes which fail to prevent economic inequity and injustice.

Archaic and divisive as the fault concept seems, removing it from the statutes will not remedy all conflict and unfairness emanating from divorce. The potential for economic strife persists whether or not the break-up is grounded in fault. Unless New York is prepared to accommodate the legitimate need for financial justice between the parties, the most crucial aspects of divorce will continue to elude the state's efforts at reform. Until it feels secure in withdrawing its reliance on it, the Empire State will remain addicted to fault.

In the succeeding pages, we summarize New York's history of divorce legislation and analyze the forces that, for such a prolonged period, kept reform at bay. In Part I we describe the halting development of divorce law from the 18th to the end of the 19th century. Part II focuses on the first half of the 20th century and the continuing, mostly futile, efforts to liberalize divorce law. Part III examines the ways in which New Yorkers succeeded in dissolving their marriages on their own terms, despite the strictures of the law. In Part IV, we explore the social climate and chain of events that allowed divorce reform finally

to occur in the 1960s. Part V discusses the 1980 enactment of an Equitable Distribution Law and its connection to the question of marital fault. In Part VI, we consider the prospects for achieving true no-fault divorce, and conclude that reform of the grounds of divorce is dependent on further reform of divorce finances, particularly a more equitable determination of spousal maintenance.

### I. Reform Deferred: New York Divorce Law from 1787 to 1900

In 19th century New York, there was no shortage of high-flown sentiment on the subject of marriage and divorce. At the New York *Tribune*, Horace Greeley, editor and moral conservative extraordinaire, conducted spirited dialogues in his newspaper on the sanctity of the marital bond. While he argued vigorously against marital dissolution, others would sooner "elevate marriage by excluding from its benefits those who [would] dishonor[ ] it."<sup>9</sup> For the feminists, although not united on the issue,<sup>10</sup> divorce was high on the agenda of the Woman's Rights Convention, held in New York City in 1860. And, while profound philosophical differences existed between 19th century liberals and conservatives, each side claimed superior wisdom on how best to preserve the marital institution.<sup>11</sup> In the end, whether in favor of expanding divorce grounds or strenuously opposed, both sides came to "similar self-serving conclusions"<sup>12</sup> and little was accomplished in the way of reform.

A notable exception was the Married Women's Property Act of 1848 and its 1860 Amendments. The law permitted women to own property and businesses, separate and apart from their husbands, to contract with respect to business and to keep their own earnings. Initially, the statute's impact was limited to wealthier women,<sup>13</sup> as a means of protecting their property from the creditors of spendthrift husbands.<sup>14</sup> The reforms were not

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9. NELSON MANFRED BLAKE, *THE ROAD TO RENO* 85 (1962).

10. *Id.* at 93.

11. Marcus, *supra* note 3, at 420.

12. *Id.*

13. *Id.* at 403.

14. *Id.* at 402.

intended to “degender access to property,”<sup>15</sup> and did not significantly transform “traditional marriage patterns.”<sup>16</sup> In later decades, however, the increasing economic independence achieved by women would give valuable impetus to their demand for equality.<sup>17</sup>

The law of divorce and the Married Women’s Property Acts did not develop conjointly. Notwithstanding their separate conceptual paths, the prospect of economic independence had “important symbolic and practical consequences”<sup>18</sup> on women’s views of marriage. Divorce, so stigmatizing and so rarely available, was no longer a prerequisite to a married woman’s physical and economic emancipation.<sup>19</sup> In addition to allowing for the possibility of a separate income and, thus, “a small escape hatch from oppressive marriages for some women,”<sup>20</sup> the Married Women’s Property Acts established a new legal category of property. Formerly, “family” property consisted solely of the husband’s holdings. Thereafter, all subsequent evolution of New York’s divorce law had to take the wife’s property into account as well.<sup>21</sup>

To the detriment of both men and women seeking to evade bad marriages, the concept of fault became an integral part of the struggle. Throughout our history, the family unit has been a cornerstone of American society. The specter of divorce invited threats to those most fundamental values vital to society’s preservation. As a result, “it is not surprising that, as a matter of public policy, marriage was viewed historically as either indissoluble or dissoluble only under very limited circumstances.”<sup>22</sup> As actions for divorce involved dissection of the guilty party’s moral conduct, the notion of fault became “essential to the dissolution process.”<sup>23</sup> Nowhere did this concept take root more permanently than in New York.

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15. *Id.* at 399.

16. *Id.* at 401.

17. HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 111 (1988).

18. *Id.* at 110-11.

19. *Id.*

20. *Id.* at 111.

21. *Id.*

22. Marcus, *supra* note 3, at 415.

23. *Id.* at 415-16.

The law of divorce in New York began in 1787 with a bill proposed by Alexander Hamilton.<sup>24</sup> Acting as chair of a special committee, Hamilton urged the creation of a judicial process to consider matters of divorce. At that time, the power to grant such relief resided in the legislature with no provision for a trial on the facts.<sup>25</sup> As enacted, New York's first general divorce law permitted judicial divorce on the sole ground of adultery and prohibited the guilty spouse from remarrying.<sup>26</sup> This latter provision was opposed by the Council on Revision as unduly harsh and unrealistic. The legislature overrode the Council's veto, and not until 1879 would New York lift its ban against adulterous spouses remarrying.<sup>27</sup>

New York's single-ground, fault-based divorce law remained virtually immune to revision until well into the 20th century. By the advent of the Civil War, "most of the other states liberalized their divorce codes to include physical and mental cruelty among other grounds for ending a marriage."<sup>28</sup> In New York, attempts to reform the law by broadening the grounds for divorce were defeated in 1813, 1827, 1840, 1849, 1850 and 1855.<sup>29</sup> A slight modification, issued in 1813, allowed the court to grant judicial separation on the ground of cruel and inhumane treatment. This remedy, at first available only to women, was made obtainable by husbands as well in 1824.<sup>30</sup> Legislative efforts to include divorce grounds for desertion (1813) and habitual drunkenness (1827) both failed. By 1830, however, the legislature for the first time defined five grounds for annulment: being under the age of consent, bigamy, lunacy and idiocy, force or fraud and physical incapacity (impotence).<sup>31</sup>

Throughout the first half of the 19th century, the legislature received numerous requests for private divorce bills. An

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24. 1787 N.Y. Laws ch. 69.

25. BLAKE, *supra* note 9, at 64-65. During the colonial period divorces were extremely rare in New York and only available by special action of the governor or state legislature. *See id.* at 41-45; HENRY FOSTER & DORIS FREED, *DIVORCE, SEPARATION AND ANNULMENT* 256-57 n.11 (rev. ed. 1972).

26. FOSTER & FREED, *supra* note 25, at 256.

27. *Id.* at 256 n.9; *see* BLAKE, *supra* note 9, at 65.

28. JACOB, *supra* note 17, at 30.

29. FOSTER & FREED, *supra* note 25, at 261.

30. BLAKE, *supra* note 9, at 66.

31. FOSTER & FREED, *supra* note 25, at 261-62, n.20; BLAKE, *supra* note 9, at 66-67.

1840 assembly committee on grievances criticized this course of legislating for specific individuals and urged the adoption of expanded judicial divorce grounds.<sup>32</sup>

It further condemned judicial separation (which, as it was not a dissolution, did not permit either party to remarry) as openly inviting immorality.<sup>33</sup> These efforts were unsuccessful, as were proposals in 1849 to add four additional divorce grounds: willful desertion for five years, three years' imprisonment, habitual drunkenness and incurable insanity.<sup>34</sup> Further attempts to abolish judicial separation and extend the divorce grounds were made in 1850 and 1855, to no avail.<sup>35</sup> Legislative divorce was constitutionally abolished in 1846, although the occasional special bill continued to allow for circumvention of New York's rigid law.<sup>36</sup> Between 1811 and 1903, several private divorce bills were based on grounds not available in the general statute, such as cruelty and abandonment.<sup>37</sup>

These "swirls of legislative activity"<sup>38</sup> were often accompanied by lively public discussion. During 1852-53 the pages of the New York *Tribune* resounded with vigorous debate, principally between Horace Greeley, the *Tribune's* editor, and Henry James Sr., father of the novelist Henry James and the philosopher and psychologist William James. While declaiming admiration for the divine, exalted character of marriage, James, who supported greater legitimization of divorce, averred that "marriage is very badly administered at present."<sup>39</sup> Greeley opposed liberalization of divorce as against state interest and feared it would result in "general profligacy and corruption."<sup>40</sup> Greeley carried his crusade up to the Civil War and beyond, sparring in the pages of the *Tribune* with, among others, Robert Dale Owen, an advocate of radical reform and son of a utopian socialist. As James, Owen, and other proponents of divorce reform

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32. BLAKE, *supra* note 9, at 76; RHEINSTEIN, *supra* note 8, at 38.

33. BLAKE, *supra* note 9, at 76; FOSTER & FREED, *supra* note 25, at 261-62 n.20.

34. BLAKE, *supra* note 9, at 76-77.

35. *Id.* at 77-78.

36. *Id.* at 75.

37. JACOBSON, *supra* note, 4 at 115; *see also* BLAKE, *supra* note 9, at 67-76.

38. MARCUS, *supra* note 3, at 417.

39. BLAKE, *supra* note 9, at 83.

40. *Id.* at 84.



discovered, "one of the best devices for focusing attention on the divorce question was to provoke Horace Greeley into debate."<sup>41</sup> Although generally sympathetic to most feminist concerns, Greeley regarded Elizabeth Cady Stanton's notion of non-binding marriage as "simply shocking."<sup>42</sup> Stanton, terming indissoluble marriage an absurdity, referred to the suicides of unhappy wives as well as their murders and wondered whether "all these wretched matches are made in heaven? That all these sad, miserable people are bound together by God?"<sup>43</sup> In 1861, Stanton addressed New York's Senate Judiciary Committee on the plight of married women in the 19th century. Although the committee applauded her eloquence, she could not rescue the proposed liberalized divorce bill from defeat.<sup>44</sup>

Following the Civil War, New York's divorce law changed little, and, for those seeking escape from marriage, generally for the worse. Driven by the force of a strong conservative backlash, the legislature worked at devising further obstacles to marital dissolution. In 1877, courts were authorized to deny divorce, even where adultery had been proven, if the plaintiff had connived in the procurement of evidence, condoned the offense, or was guilty of the same misconduct.<sup>45</sup> Measures passed in 1899 mandated stricter proof of adultery and, in 1902, the legislature imposed a three-month waiting period between the granting of a divorce and issuance of the final decree.<sup>46</sup>

Nineteenth century feminists such as Elizabeth Cady Stanton and Susan B. Anthony, as well as other social reformers, did much to propel the issue of divorce into the forum of public discourse. But the debate between liberal reformers and their conservative opponents only served to immure each side within its own rhetoric: "Each proclaimed with equal fervor that domestic

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41. *Id.* at 110.

42. *Id.* at 95.

43. *Id.* at 93 (quoting ELIZABETH CADY STANTON ET AL., *History of Women's Suffrage* I 720 (1881)).

44. BLAKE, *supra* note 9, at 95. Known as the Ramsey Bill, the proposed legislation attempted to revive the issue defeated the previous year, of adding desertion, cruelty and drunkenness as grounds for divorce.

45. 1877 N.Y. Laws ch. 1168; *see also* BLAKE, *supra* note 9, at 200; *see* J. HERBIE DiFONZO, *BENEATH THE FAULT LINE: THE POPULAR AND LEGAL CULTURE OF DIVORCE IN TWENTIETH CENTURY AMERICA* 55-57 (1997) (discussing the historical rationale for recrimination, connivance, and collusion).

46. BLAKE, *supra* note 9, at 200.

felicity and purity, matrimonial concord, virtue, and unblemished morals would be fostered and preserved by their respective proposals."<sup>47</sup> Despite such fervor, 19th century New York remained unable to advance beyond the debate and into legislative action. Divorce reform would have to wait for more than sixty years.

## II. Reform Deferred (Again): 1900-1960

Nelson Blake has suggested that the stubborn adhesion of New York's lawmakers to one-ground divorce reflected "not so much a stern sense of duty as an inability to give the problem of marital law more than fitful attention."<sup>48</sup> Distracted and obstructed by social and religious forces, legislators marched feebly in place. By the turn of the century, conservative pressures continued to mount,<sup>49</sup> and New York became the center of the anti-divorce movement.<sup>50</sup> Progressive Era advocates of all manner of freedoms—political, intellectual, economic, religious and sexual—co-existed with believers in strong moral and Christian traditions.<sup>51</sup> While freethinkers and libertarians were clamoring for free love and easy divorce, conservatives were constructing obscenity laws and laying the groundwork for Prohibition.<sup>52</sup>

By the late 19th century, New Yorkers were well-acquainted with the fact that other jurisdictions offered easier access to marital dissolution. The practice of traveling to another state to establish residency and procure a divorce came to be known as "migratory divorce."<sup>53</sup> Alarmed by the prevalence of disgruntled spouses taking wing for more legally hospitable habitats, New York initiated the creation of the National Conference of Commissioners on Uniform State Laws.<sup>54</sup> Composed of delegates of the states, the power of the Conference to unify

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47. Marcus, *supra* note 3, at 420.

48. BLAKE, *supra* note 9, at 64.

49. Marcus, *supra* note 3, at 423-24.

50. RHEINSTEIN, *supra* note 8, at 47.

51. *Id.* at 49. See generally WILLIAM L. O'NEILL, *DIVORCE IN THE PROGRESSIVE ERA* (1967).

52. RHEINSTEIN, *supra* note 8, at 48-49.

53. See discussion *infra* Section III.

54. RHEINSTEIN, *supra* note 8, at 47.

the laws of marriage and divorce, despite many decades and several proposed Acts, proved "negligible."<sup>55</sup>

In the early part of the 20th century, the new science of sociology, along with its "cadre of experts on the family,"<sup>56</sup> began to invade the province of divorce reform. In their zeal to improve the living and working conditions of the poor, however, social reformers came to advocate an increasingly paternalistic role for the state. The notions of the Progressive era "all but flew out the window" as reformers, previously opposed to conservative divorce restrictions, outlined "similar programs for marital restrictions."<sup>57</sup> Paradoxically, too, the relatively high post-World War I divorce rate did not portend a new era of social and economic freedom for women.<sup>58</sup> Despite modest war-time gains in the labor force, the armistice brought "large-scale regression,"<sup>59</sup> and the promise of economic independence for women proved largely illusory. Nor did the image of the 1920s footloose flapper liberate most women from traditional roles. F. Scott Fitzgerald and his Jazz Age contemporaries dismissed housework as mind-deadening drudgery. Yet, as many working women learned, housework did not yield to outside employment. In the marital home, the "new woman" continued to "perform the old tasks."<sup>60</sup>

This climate of social ambivalence was, clearly, not conducive to reform. Not surprisingly, during this era, New York's legislature "never mustered its courage for a frontal attack on the divorce problem."<sup>61</sup> Between the years of 1900 and 1933, fifteen different legislators sponsored bills to modernize the law by adding divorce grounds such as cruelty and desertion.<sup>62</sup> Almost without exception, these bills were "buried in committee."<sup>63</sup> The so-called Enoch Arden law, enacted in 1922, studiously avoided the term "divorce" but authorized a decree of

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55. *Id.*

56. LYNNE CAROL HALEM, *DIVORCE REFORM: CHANGING LEGAL AND SOCIAL PERSPECTIVES* 67 (1980).

57. *Id.* at 71.

58. JACOBSON, *supra* note 4, at 92.

59. DiFONZO, *supra* note 45, at 20.

60. *Id.* at 21.

61. BLAKE, *supra* note 9, at 201.

62. *Id.*

63. *Id.*

presumed death where spouses were missing or not heard from for five years.<sup>64</sup>

New York City Democratic lawmakers did actively support reform but, due to an apportionment of representation that discriminated against their city, they rarely controlled the legislature.<sup>65</sup> Furthermore, because of party dependence on the Catholic vote, Democrats often avoided controversial divorce issues.<sup>66</sup> After 1933, Republicans, far less dependent on Catholic support, were not so averse to running the political risks involved in promoting divorce reform.<sup>67</sup> Yet, as the divorce question remained a matter of fervent dispute, even the Republicans “preferred to duck the issue.”<sup>68</sup>

During the depression, the divorce rate slowed but desertions “skyrocketed.”<sup>69</sup> In 1934, a Republican New York City assemblyman, I. Arnold Ross, proposed a bill to add a new divorce ground of desertion. In his district Ross had been moved by “the plight of deserted wives unable to get divorces in New York unless they resorted to fraud and too poor to establish residences in other states.”<sup>70</sup> Catholic opposition to the bill, led by Charles J. Tobin, Secretary of the New York State Catholic Welfare Committee, was loud, energetic and immediate.<sup>71</sup> Despite the strong support of various bar associations and other religious organizations, the bill was defeated. For the next twenty years, the Catholic Church would prove a formidable opponent

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64. N.Y. DOM. REL. LAW §§ 220, 221 (1922); see BLAKE, *supra* note 9, at 199. Enoch Arden is the eponymous hero of a poem by Alfred Lord Tennyson. A “rough sailor’s lad/Made orphan by a winter shipwreck.” Enoch goes to sea to provide for his wife, Annie, and their children. He survives a shipwreck but remains missing for ten years. When he returns, he discovers that his wife is happily married to their childhood friend, Philip Ray, and has borne a child by him. Enoch silently suffers the pain of watching another man raise his children, and keeps his identity a secret. In his last hours, he begs a friend to tell his wife and children that he died with a blessing on his lips for them and to “say to Philip that I blest him too; He never meant us any thing but good.” ALFRED TENNYSON, ENOCH ARDEN, AND OTHER POEMS (1864), available at <http://whitewolf.newcastle.edu.au/words/authors/T/TennysonAlfred/verse/enocharden/enocharden.html>.

65. BLAKE, *supra* note 9, at 203.

66. *Id.*

67. *Id.*

68. *Id.*

69. DiFONZO, *supra* note 45, at 30.

70. BLAKE, *supra* note 9, at 204.

71. *Id.* at 206.

of divorce reform. As soon as a bill to liberalize divorce appeared before the New York legislature, a Catholic Welfare League representative would contact lawmakers to remind them that the church was opposed.<sup>72</sup>

After World War II, the country's divorce rate soared to previously unimagined heights. The postwar disruption to marital life "resulted in intolerable pressures against the flimsy dikes of the New York family laws."<sup>73</sup> In 1945, the Committee of Law Reform of the Association of the Bar of the City of New York urged liberalization of the divorce law. A bill recommending six new grounds for divorce died in committee three years later.<sup>74</sup> From 1949 to 1956, Assemblywoman Janet Hill Gordon fought persistently to form a legislative commission to study the divorce laws. When, finally, the commission was created in 1956, its power was limited and it lacked authority to recommend expansion of divorce grounds.<sup>75</sup>

At mid-20th century, the legacy of Alexander Hamilton was proving indestructible, buttressed by powerful Catholics, moralizing conservatives, paternalistic post-Progressive liberals, and faint-hearted politicians. What Mr. Hamilton might not have predicted was that, for much of its existence, his law would be continually subverted and circumvented. Despite, and because of, the law's unyielding regimen, New Yorkers would find a way to satisfy their appetite for divorce.

### III. Fraud, Corruption, and End-Runs Round the Law

Had New York truly craved a strict, orderly enforcement of its one-ground, fault-based divorce code, it would have killed all the lawyers. Rather than inhibiting divorce, the law produced a thriving trade of practitioners, specializing in divorce and acting in "cheerful disregard of legal ethics."<sup>76</sup> In 1869 the *New York Times* reported:

The husband or wife who wishes to get rid of a disagreeable partner has only to go to some sharper calling himself an attorney, who advertises his readiness to get divorces without publicity,

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72. JACOB, *supra* note 17, at 35-36.

73. BLAKE, *supra* note 9, at 211.

74. FOSTER & FREED, *supra* note 25, at 261-62, n.20.

75. *Id.*

76. BLAKE, *supra* note 9, at 190.

and who at once undertakes to do all the dirty work incidental to the case. If there is no evidence he forges or invents as much as he wants. If the man or woman against whom he is employed is innocent, he finds someone to lay all sorts of crimes to their charge.<sup>77</sup>

These attorneys plied their trade, often in well-appointed offices, along lower Manhattan.<sup>78</sup> In 1870, the *Times* exposed the details of these divorce ring operations. Lawyers "shrewdly calculated whether to bring suit in New York" or another state, customizing the charges and allegations to fit the jurisdiction.<sup>79</sup> For nearly a century, New York played host to divorce mills rife with scandal, professional perjurers and the manufacture of fraudulent divorce decrees.<sup>80</sup> Especially active was the industry of lawyers and laypersons catering to litigants in adultery proceedings. So widespread were these actions that the "number of identified adulterers reached Sodomite levels during the period prior to 1967, apparently indicating both total decay of the moral fiber and extreme clumsiness in the execution of evil intentions."<sup>81</sup> For a fee, the system furnished fabricated evidence as well as the services of a witness and correspondent. In 1934, the *New York Mirror* created a sensation with its series, "I Was the 'Unknown Blonde' in 100 New York Divorces!"<sup>82</sup> As described, the procedure called for "the husband to be caught in the act of sitting beside a scantily clad correspondent when the wife, a process server, and a private detective . . . burst into the hotel room."<sup>83</sup> The participants then performed their scripted roles in the courtroom in a hearing so routine that the referee followed a "mimeographed list of questions."<sup>84</sup>

In December, 1948, the *New York Journal-American* ran another expose of the city's divorce rings. The ensuing investigation by District Attorney Frank S. Hogan resulted in ten ar-

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77. *Id.* (quoting *Divorce Made Easy*, N.Y. TIMES, Oct. 10, 1869).

78. *Id.*

79. *Id.*

80. *Id.* at 191-92.

81. Lee E. Teitelbaum, *Cruelty Divorce Under New York's Reform Act: On Repeating Ancient Error*, 23 BUFF. L. REV. 1, 8 (1973-1974).

82. BLAKE, *supra* note 9, at 193.

83. DiFONZO, *supra* note 45, at 89.

84. BLAKE, *supra* note 9, at 193.

rests and the review of over 600 recent divorce cases.<sup>85</sup> The investigation's impact was "immediate and pronounced," cutting the number of divorce decrees issued in New York in 1949 by one third.<sup>86</sup> But the cavalcade of fraudulently-obtained divorces resumed soon after, and the rare judge who refused to accept the faked hotel evidence would "not be long hearing divorce cases."<sup>87</sup>

Since the 19th century, conservative opponents of divorce reform had hailed New York as a "model state."<sup>88</sup> But the state's stringent rules were bound to inspire the creation of mitigating practices designed to provide relief.<sup>89</sup> Two "evasive devices" were commonly used: migratory divorce and annulments.<sup>90</sup> New Yorkers in significant numbers were willing to leave home in order to procure divorces. Several states, depending on grounds and residency requirements, became popular as "divorce havens."<sup>91</sup> Before 1840, Pennsylvania and Vermont fulfilled this role, while western states were frequent destinations thereafter.<sup>92</sup> By 1870, "it was estimated that one-quarter of all divorce decrees issued in Illinois and one-sixth of those in Connecticut were arranged through New York law offices."<sup>93</sup> Jurisdictions began to compete for the interstate divorce trade by offering short residency requirements, notably Idaho, Nebraska, Nevada and Texas.<sup>94</sup> In 1922, it was posited that nearly one-third of all New York divorces had been obtained out of state.<sup>95</sup> Nevada, enthusiastically embracing the divorce business, was issuing 1,000 divorces a year by the 1920s.<sup>96</sup> In 1931, when the residency requirement was reduced

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85. *Id.* at 213.

86. JACOBSON, *supra* note 4, at 115.

87. Max Rheinstein, *Our Dual Law of Divorce: The Law in Action Versus the Law of the Books*, in *The Law School*, The University of Chicago, Conference on Divorce 41 (1952).

88. Marcus, *supra* note 3, at 421.

89. Teitelbaum, *supra* note 81, at 4-5.

90. JACOB, *supra* note 17, at 34-35.

91. FOSTER & FREED, *supra* note 25, at 259-60.

92. *Id.* at 260.

93. *Id.*

94. *Id.*

95. JACOBSON, *supra* note 4, at 116.

96. BLAKE, *supra* note 9, at 158.

from three months to six weeks, Nevada's annual output soared to 5,260.<sup>97</sup>

Compelled by constitutional full faith and credit requirements, New York courts accepted out-of-state divorces where both parties had been present.<sup>98</sup> In *ex parte* proceedings, New York courts appeared "readier than most" to apply liberal rules of estoppel, barring the absent spouse from prevailing on jurisdictional grounds.<sup>99</sup> The result was that "a considerable number of defective sister state divorces were sustained without need for inquiry into the jurisdictional claims upon which they rested."<sup>100</sup>

Americans intent on shedding their spouses were also quite willing to leave the country in order to do so. In the 1920s, France and Havana were popular havens and, later, the Virgin Islands and Mexico.<sup>101</sup> Mexican divorces were accepted in some states but not others. In 1952, one New York court declared valid a Mexican divorce where one party appeared personally and the other was merely represented by counsel.<sup>102</sup>

In 1965, the New York Court of Appeals upheld two "classic Mexican divorces"<sup>103</sup> in *Rosenstiel v. Rosenstiel*.<sup>104</sup> Essentially, the court held that recognizing the foreign decrees offended no state policy.<sup>105</sup> It also noted that, in the previous 25 years, no "New York decision has refused to recognize such a bilateral Mexican divorce."<sup>106</sup> Lee Teitelbaum pointed out that the court could have limited rejection of Mexican divorces to those made prospectively, thereby avoiding harm to those already relying on previously-issued Mexican divorces.<sup>107</sup> Furthermore, the court found no reason to discriminate against Mexican divorces in light of its having recognized bilateral Nevada divorces based on a scant six weeks' residence, often accompanied by fraudu-

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97. *Id.*

98. *See, e.g.,* *Leviton v. Leviton*, 6 N.Y.S.2d 535 (Sup. Ct.), *aff'd*, 4 N.Y.S.2d 992 (App. Div. 1938); *see also* Teitelbaum, *supra* note 81, at 5-6.

99. Teitelbaum, *supra* note 81, at 5.

100. *Id.*

101. *FOSTER & FREED, supra* note 25, at 261.

102. *Caswell v. Caswell*, 111 N.Y.S.2d 875, 876 (Sup. Ct. 1952).

103. Teitelbaum, *supra* note 81, at 5.

104. *Rosenstiel v. Rosenstiel*, 209 N.E.2d 709 (N.Y. 1965).

105. *Id.* at 712.

106. *Id.* at 710-11.

107. Teitelbaum, *supra* note 81, at 6.



lent representations as to domiciliary intent.<sup>108</sup> Teitelbaum found less than persuasive the court's logic of "inviting a type of evil that need not be suffered because one must tolerate an evil that cannot be avoided."<sup>109</sup> He concluded that the *Rosenstiel* decision is comprehensible only as a repudiation of divorce laws that no longer comported with the realities of actual divorce practices.<sup>110</sup> As Max Rheinstein saw it, "The law of the books was buried for all those who were willing to go on a one-day round-trip flight to El Paso-Ciudad Juarez."<sup>111</sup>

Migratory divorce especially appealed to the wealthy. For others, less affluent, or with no stomach for "hotel perjury,"<sup>112</sup> annulments provided another evasive route. Allegations of fraud and misrepresentation proved so varied and pliable that they succeeded in spawning one hundred and fifty grounds for annulment in New York.<sup>113</sup> At their peak, in 1946, annulments represented 3.5 percent of the country's dissolution rate.<sup>114</sup> In New York, annulments accounted for one-quarter of dissolutions during World War II and two-fifths after 1950.<sup>115</sup> New York had the nation's highest annulment rate, comprising possibly one-third of all those in the United States.<sup>116</sup> The paradox, Blake notes, "was obvious. When called 'divorce' the dissolution of marriage was still limited to the narrowest grounds. When

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108. *Rosenstiel*, 209 N.E.2d at 712.

109. Teitelbaum, *supra* note 81, at 6.

110. *Id.* The Court of Appeals highlighted the artifice at the heart of the Mexican divorces for New Yorkers, but it still allowed public interest to be shaped by public demand:

The State or country of true domicile has the closest real public interest in a marriage but, where a New York spouse goes elsewhere to establish a synthetic domicile to meet technical acceptance of a matrimonial suit, our public interest is not affected differently by a formality of one day than by a formality of six weeks.

Nevada gets no closer to the real public concern with the marriage than Chihuahua.

*Rosenstiel*, 209 N.E.2d at 712.

111. RHEINSTEIN, *supra* note 8, at 91.

112. DiFonzo, *supra* note 45, at 90.

113. BLAKE, *supra* note 9, at 196-97 (citing JOSEPH R. CLEVINGER, ANNULMENTS OF MARRIAGE: BEING A TREATISE COVERING NEW YORK LAW AND PRACTICE WITH COMPOSITE FORMS 27 (1946)).

114. JACOBSON, *supra* note 4, at 113.

115. *Id.*

116. JACOB, *supra* note 17, at 35.

called by any other name, marriage dissolution was regarded with easygoing tolerance."<sup>117</sup> Even the clergy, vocal enough on the issue of divorce yet curiously silent on the subject of annulments, appeared to offer "tacit approval."<sup>118</sup>

Shadowing this pageant of annulments, migrations, fraud and perjury was the more somber trail of desertions and separations. New York's denial of "a civilized procedure for the termination of defunct marriages"<sup>119</sup> produced a substratum of the quietly desperate. Those who were financially equipped to litigate or travel had one law, while the poor had none.<sup>120</sup> Many of these individuals resorted to "self-help"<sup>121</sup> and informally separated. Whether permanent or temporary, by private agreement or by abandonment and desertion, separations occurred frequently.<sup>122</sup> In 1940, the proportion of white women who had ever been married (excluding widows) and reported to be living apart from their husbands was one-third greater in New York than in the entire country.<sup>123</sup> Deserted spouses, often left to cope with family responsibilities, placed a significant burden on public and private welfare agencies.<sup>124</sup>

For a good many New Yorkers, even those of more modest means, divorce remained very much within the realm of possibility. By mid-20th century, the vast majority of divorce actions were uncontested and, with nothing to challenge or litigate, legal costs were relatively low. In the process, judges and their "judge-made law"<sup>125</sup> promoted a kind of social equality: "It is, perhaps, a judicial awareness of the ease with which quick solutions to marital complexities are available to those able to pay for them, and a judicial sense of fairness, that has caused our

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117. BLAKE, *supra* note 9, at 198-99.

118. HALEM, *supra* note 56, at 255. It is possible that the Catholic Church found it difficult to criticize civil annulment, as the Church had its own, quite similar, procedure. See FULTON J. SHEEN, *Preface to the Second Edition* of NULLITY OF MARRIAGE (2d ed. 1959) (acknowledging the similarities between New York's civil annulment process and the ecclesiastical procedures to declare a marriage null).

119. FOSTER & FREED, *supra* note 25, at 255.

120. Teitelbaum, *supra* note 81, at 10.

121. FOSTER & FREED, *supra* note 25, at 255.

122. JACOBSON, *supra* note 4, at 117.

123. *Id.*

124. BLAKE, *supra* note 9, at 202.

125. Richard Wels, *New York: The Poor Man's Reno*, 35 CORNELL L. Q. 303, 316 (1949-1950).

judges to turn New York into a poor man's Reno for all with sufficiently elastic consciences."<sup>126</sup>

On the books, New York's law created serious impediments to divorce. Courts, meanwhile, were busily diverting the course of marital dissolution to keep it flowing. Out of state bilateral divorces achieved easy recognition while annulments abounded. That formal divorce reform had failed to evolve did not preclude a liberal interpretation and application of the law.<sup>127</sup> More than 96 percent of marital dissolution cases were uncontested, often heard by referees.<sup>128</sup> Their findings were generally accepted by the courts, most often without review.<sup>129</sup> Thus, while New York, by statute, was the nation's premier anti-divorce state, statistics told a quite different tale. By the 1950s, New York had the lowest recorded divorce rate in the country.<sup>130</sup> But the incidence of annulments, migratory divorce, along with separations and desertions, combined to raise New York's total rate of marital disruption well above the national average.<sup>131</sup> In the 1960s, this dichotomy between "law-as-statute and law-in-action"<sup>132</sup> would finally prove too much, even for the New York legislature.

#### IV. Reform Arrives

Alexander Hamilton's eighteenth century "relic"<sup>133</sup> was not brought down by radical, feminist, or counter-culturalist causes.<sup>134</sup> In the mid-1960s, the modern feminist movement was in its early stages. Those who were engaged in seeking and practicing alternative lifestyles were not concerned with fixing the divorce problem.<sup>135</sup> And, although the public seemed to favor reform,<sup>136</sup> there was no identifiable popular movement that emerged to do battle with the old law.

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126. *Id.* at 315.

127. JACOBSON, *supra* note 4, at 115.

128. FOSTER & FREED, *supra* note 25, at 251.

129. JACOBSON, *supra* note 4, at 115.

130. *Id.* at 118.

131. *Id.*

132. Marcus, *supra* note 3, at 423.

133. RHEINSTEIN, *supra* note 8, at 256.

134. JACOB, *supra* note 17, at 33.

135. *Id.*

136. FOSTER & FREED, *supra* note 25, at 264.

The public had grown aware, however, of the schism between "formal law" (the divorce code) and "law in action" (contemporary divorce practices).<sup>137</sup> Not only did these entities scarcely resemble each other, but the "latter was frankly engaged in nullifying the former."<sup>138</sup> For years this dichotomy had masqueraded, quite successfully, as compromise. Conservatives took comfort in the strictness of the law, while liberals noted the evasions by which marriages were frequently dissolved.<sup>139</sup> Legislators of both stripes were loath to awaken "sleeping dogs"<sup>140</sup> and risk heated debates about family breakdown. By avoiding the issue and maintaining the liberal-conservative stalemate, lawmakers "lived in the best of all possible worlds."<sup>141</sup> But in 1965, the Court of Appeals upset the divorce impasse by legitimizing bi-lateral Mexican divorce in *Rosenstiel v. Rosenstiel*.<sup>142</sup> In the ensuing fallout, the "coup de grace"<sup>143</sup> was finally delivered to the long-standing liberal-conservative deadlock.<sup>144</sup>

As stated previously, for those who could afford it, procurement of a bi-lateral Mexican divorce was a matter of ease and convenience. In sanctioning these procedures, New York's highest court exposed the "inanity"<sup>145</sup> of the restrictive law and rendered it "practically worthless."<sup>146</sup> Further, it highlighted the social and economic inequities<sup>147</sup> of a law which generated dual systems, for the rich and for the poor, for those "willing to engage in subterfuge and . . . those who were not."<sup>148</sup>

Divorce reform arose out of a report, dated March 31, 1966, of the Joint Legislative Committee on Matrimonial and Family Laws, known as the Wilson Committee. Jerome Wilson was a junior legislator and member of the Democratic party's reform

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137. Teitelbaum, *supra* note 81, at 9.

138. *Id.*

139. RHEINSTEIN, *supra* note 8, at 353.

140. *Id.* at 353.

141. HALEM, *supra* note 56, at 255.

142. *Rosenstiel v. Rosenstiel*, 209 N.E.2d 709 (N.Y. 1965).

143. HALEM, *supra* note 56, at 257.

144. RHEINSTEIN, *supra* note 8, at 353.

145. *Id.*

146. *Id.* at 357.

147. FOSTER & FREED, *supra* note 25, at 264.

148. HALEM, *supra* note 56, at 257.

wing.<sup>149</sup> He collaborated with Henry H. Foster of New York University Law School in drafting both the Committee report and the proposed legislation.<sup>150</sup> In 1965, Wilson had conducted state-wide hearings attracting some media attention. Testimony revealed the extent to which the public and the legal community were repelled by hypocrisies induced by the existing law.<sup>151</sup> The Association of the Bar of the City of New York gave strong support to the bill through persuasive testimony by Howard Hilton Spellman, special committee chairman. Spellman averred that the "orgy of perjury" produced by the current law had incited judges and lawyers to a state of "virtual rebellion."<sup>152</sup> He further noted that an uncontested divorce hearing averaged about seven and one-half minutes in length and constituted a "formal farce."<sup>153</sup> Mexican divorces wholly ignored the interests of children of the marriage, as they provided for no inquiry into matters of support, custody or visitation.<sup>154</sup> The "self-help" engendered by informal separations and desertions created "irregular relationships" and illegitimate children who strained the welfare rolls.<sup>155</sup> Again and again, the Committee was made aware of how "the formal law had spawned a set of practices inconsistent with any notions of sound public policy."<sup>156</sup> Viewed in this way, divorce became something other than grist for the conservative-liberal debate. Because the issue was framed as "disjunction between law-on-the-books and law in action," divorce reform could be presented as a much-needed "*procedural*" change.<sup>157</sup> This, plus a series of auspicious events, shifted reform away from the political storm center and allowed it to proceed.<sup>158</sup>

In 1962, Governor Nelson Rockefeller, whose wife had obtained a Nevada divorce earlier that year, was re-elected by a considerable majority. That the state's highest official could

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149. JACOB, *supra* note 17, at 37.

150. *Id.* at 39.

151. Teitelbaum, *supra* note 81, at 2.

152. Committee Report, *supra* note 2, at 38.

153. *Id.*

154. *Id.* at 40.

155. *Id.* at 41.

156. Teitelbaum, *supra* note 81, at 4.

157. JACOB, *supra* note 17, at 33 [*italics in original*].

158. *Id.*; FOSTER & FREED, *supra* note 25, at 264-65.

flout the intent of the law and still garner public support was not lost on the politically observant.<sup>159</sup> Also in 1962, a U.S. Supreme Court decision required state legislative districts to be equalized through re-apportionment.<sup>160</sup> In Albany, increased representation by urban legislators served to sap the strength of upstate Republicans opposed to reform.<sup>161</sup> Pope John XXIII had "liberalized many aspects of Catholic life,"<sup>162</sup> and Cardinal Spellman, long active as power broker on New York's political scene, became older, less vigorous and less influential.<sup>163</sup> Liberal Catholics, as well as leading clergy of all faiths, gathered together in vocal support of reform.<sup>164</sup>

The proposed reform bill, sponsored at the 1966 session by the Joint Legislative Committee, was known as the "Wilson-Sutton Bill."<sup>165</sup> The resulting legislation was a compromise between the Wilson-Sutton Bill and an alternate bill proposed by Senators Travia, Hughes and Brydges.<sup>166</sup> Effective September 1, 1967, the law now provided for divorce on the grounds of adultery, cruel and inhumane treatment, abandonment for two or more years, confinement in prison for three or more years, and living apart for a period of two years or more pursuant to an agreement or a judicial separation decree.<sup>167</sup>

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159. See HALEM, *supra* note 56, at 258; see also RHEINSTEIN, *supra* note 8, at 357.

160. *Baker v. Carr*, 369 U.S. 186 (1962).

161. JACOB, *supra* note 17, at 36.

162. *Id.*

163. *Id.* at 37.

164. FOSTER & FREED, *supra* note 25, at 264. According to one New York legislator, "what finally killed the [restrictive divorce] law . . . 'was a man named John—Pope John.'" *New York Reforms Divorce*, TIMES, May 6, 1966, available at <http://www.time.com/time/magazine/article/0,9171,901868,00.html> ("With the reforming spirit of Vatican II blowing strong, New York's Roman Catholic bishops toned down their opposition to change, and the legislators scrambled into action."); RHEINSTEIN, *supra* note 8, at 325 (referring to "the position taken in the Roman Catholic church at Vatican Council II and applied by the organization of Catholic laymen in its assent to divorce law reform in New York").

165. FOSTER & FREED, *supra* note 25, at 264.

166. HALEM, *supra* note 56, at 258.

167. *Id.* at 258-59; JACOB, *supra* note 17, at 40-41; 1966 N.Y. Laws ch. 254. Judicial separation decrees require a showing of marital fault. In the alternative, parties may separate pursuant to a written agreement, filed with the Clerk of the Court, with no finding of fault. In either case, parties must live apart for the prescribed statutory period in compliance with the terms of the decree or the agreement. Once the waiting period has expired, either party may petition the court to convert the separation into a divorce. In judicial separations, either the innocent

Conservatives balked at this last provision, insisting that it was "tantamount to divorce by consent if both parties concurred and divorce by demand if one applied for conversion against the other's wishes . . . ." <sup>168</sup> In exchange for supporting the bill, conservatives demanded safeguards against easy divorce. <sup>169</sup> Filing procedures were rendered so complex that legal fees soared out of reach for many. <sup>170</sup> In addition, the two-year waiting period for conversion divorce was protracted and thus somewhat unappealing. <sup>171</sup> Further concessions exacted by conservatives included elaborate, mandatory counseling and conciliation procedures. <sup>172</sup> Ultimately, these procedures proved costly, unwieldy and ineffective, and were abolished in 1973. <sup>173</sup> A 1970 revision reduced the waiting period for conversion divorces from two years to one. <sup>174</sup>

In 1970, the New York Court of Appeals upheld the legality and retroactivity of conversion divorce in *Gleason v. Gleason*. <sup>175</sup> Explicit in the court's reasoning was the rejection of any state interest in compelling couples to remain together in marriages that were clearly defunct. Furthermore, the court concluded that the purpose of the "nonfault provision" allowing for conversion divorce was to remove issues of misconduct from the court's consideration. <sup>176</sup> In one writer's view, *Gleason* amounted to the court's having endorsed "no-fault divorce on moral and social grounds." <sup>177</sup> Another contended that, when New York sanctioned divorce based on conversion of separation agreements, "no one recognized it as no-fault." <sup>178</sup> Although a frank improvement over purely fault-based law, conversion divorce is only as good as its parties' intentions. Requiring separation pursuant

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party or the party against whom a judgment has been made may apply for conversion. See RHEINSTEIN, *supra* note 8, at 354-55; HALEM, *supra* note 56, at 259.

168. HALEM, *supra* note 56, at 259.

169. *Id.*; RHEINSTEIN, *supra* note 8, at 356.

170. HALEM, *supra* note 56, at 259.

171. *Id.*

172. RHEINSTEIN, *supra* note 8, at 356; HALEM, *supra* note 56, at 259-60.

173. JACOB, *supra* note 17, at 42.

174. 1970 N.Y. Sess. Laws 1717 (McKinney); see 1970 N.Y. Laws ch. 835 § 2. The reduction was effective in actions commenced on or after September 1, 1972.

175. *Gleason v. Gleason*, 256 N.E.2d 513 (N.Y. 1970).

176. *Id.* at 516.

177. HALEM, *supra* note 56, at 266.

178. JACOB, *supra* note 17, at 42.

to decree or agreement may well allow parties to "perpetuate the bonds of acrimony"<sup>179</sup> for malicious reasons. Where there is neither decree nor agreement, recalcitrant or spiteful spouses can consign a dead marriage to a state of limbo. The only recourse is to end the stalemate by alleging fault or moving to a state with suitable divorce grounds.<sup>180</sup>

To date, New York remains reluctant to completely renounce the marital misconduct model. Too, perhaps a "moralistic message"<sup>181</sup> is conveyed by the year-long waiting requirement for conversion divorce. Still, in adopting this approximation of no-fault, New York was credited as having joined the twentieth century<sup>182</sup> and the increasing number of states who had abandoned the "guilt principle."<sup>183</sup>

In the 1960s, while New York was wrestling with reform, England and California were also revamping their divorce statutes. To stanch the flood of spurious, fault-based divorces, each sought relief in new no-fault regimes. Believing that findings of fault obscured the true state of the marriage, each sought to dislodge it as central to the divorce equation. Only one of them entirely succeeded.

In mid-twentieth century England, divorce was available on the grounds of adultery, cruelty, desertion for three years or incurable insanity after five years confinement.<sup>184</sup> In 1956, the Royal Commission on Marriage and Divorce, chaired by Lord Morton of Henryton, produced an exhaustive report.<sup>185</sup> The Morton Commission cited the harmful effect of divorce on children and deplored easy dissolution as "fatal to stability and security in marriage . . . ."<sup>186</sup> Ten years later, the Archbishop of Canterbury announced the Church's position on divorce in *Putting Asunder: A Divorce Law for Contemporary Society*.<sup>187</sup> Ear-

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179. FOSTER & FREED, *supra* note 25, at 280.

180. *Id.*

181. HALEM, *supra* note 56, at 267.

182. JACOB, *supra* note 17, at 42.

183. RHEINSTEIN, *supra* note 8, at 366.

184. *See* DiFonzo, *supra* note 1, at 888.

185. *Id.* at 889.

186. ROYAL COMMISSION ON MARRIAGE AND DIVORCE, Report 1951-56, Cm. 9678, at 15.

187. REPORT OF THE MORTIMER COMMISSION OF THE CHURCH OF ENGLAND, PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY app. a, ¶ 19 (1966).



lier divorce law critics had recognized that marital fault resulted in divorce "upon proof of transgression, entirely without regard to the actual state of the marriage."<sup>188</sup> *Putting Asunder* proposed that, in addition to proving marital fault, a divorce petitioner should have the burden of showing that the marriage had broken down.<sup>189</sup> In lieu of *pro forma* proceedings, the court would conduct an inquest in each divorce case to determine whether the marriage, in fact, had breathed its last. Assisted by social workers, the court's inquiry would be therapeutic in nature, with mandatory reconciliation measures if appropriate. *Putting Asunder* was then referred to the Law Commission, which was statutorily mandated to review all English law. The Law Commission rejected the inquest system as highly subjective and emotionally invasive.<sup>190</sup> Rather, the Law Commission proposed that divorce be obtainable on the sole ground of marital breakdown, established by proof of one of the following: adultery, cruelty, desertion for two years, separation for two years on consent of the respondent, and separation for five years. No longer would mere evidence of fault guarantee divorce. Instead, the court retained authority, upon establishment of one of the aforementioned factors, to evaluate and determine the extent of actual marital breakdown. With minor changes, this "legislative stew of fault and no-fault" was codified in England's Divorce Reform Act of 1969.<sup>191</sup>

In California, proponents of no-fault took heart from the Church of England's endorsement of the marital breakdown standard.<sup>192</sup> Like the Archbishop's group, California reformers viewed fault-based divorce as conducive to collusion and hostility. Furthermore, it terminated marriages which might yet be viable.<sup>193</sup> Governor Edmund G. Brown was duly alarmed by California's high rate of divorce and its corrosive effect on social stability. Despite its fault-based provenance, the state's existing law was, in practice, quite lenient.<sup>194</sup> As stated by Herma Hill Kay, reformer and professor at the University of California

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188. DiFonzo, *supra* note 1, at 892.

189. *Id.* at 895.

190. *Id.* at 895-96.

191. *Id.* at 896-97.

192. JACOB, *supra* note 17, at 47; HALEM, *supra* note 56, at 237.

193. RHEINSTEIN, *supra* note 8, at 375; DiFonzo, *supra* note 1, at 902.

194. JACOB, *supra* note 17, at 46.

Boalt School of Law, "It was impossible to make divorce easier in California than it already was."<sup>195</sup>

In 1966, the Governor's Commission specifically condemned the use of fault grounds as promoting undue stigma and antagonism.<sup>196</sup> Proposing to replace the term "divorce" with "dissolution of a marriage," the Commission strongly urged abandonment of all fault grounds.<sup>197</sup> It further called for the creation of a specialized family court system, echoing the Church of England's advocacy of therapeutic divorce. This new system, envisioned as a "potent socio-legal agency,"<sup>198</sup> would furnish counseling at various stages of the proceeding. After the couple had run the gauntlet of diagnosis, investigation and counseling, the court would decide whether or not the marriage was beyond repair.<sup>199</sup>

California's Family Law Act, signed by Governor Ronald Reagan, became effective in 1970 and "came to be known as the nation's first no-fault divorce law."<sup>200</sup> It permitted dissolution of the marriage solely upon grounds of incurable insanity or irreconcilable differences leading to irremediable breakdown of the marriage.<sup>201</sup> The proposed family court system, however, did not survive legislative compromise. Not only was it expensive, but, to the disapproval of many, the complex restructuring of the courts would have replaced "a legal orientation with a curative one."<sup>202</sup>

For a while, the spirit of fault continued to hover within California's reform legislation. As enacted, the law allowed courts to hear evidence of specific acts of misconduct to assist them in establishing the existence of irreconcilable differences. The legislature repealed this provision in 1975, thereby expung-

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195. *Id.* (quoting Herma Hill Kay, interview with author, Berkley, Ca., Feb. 11, 1985)).

196. *HALEM*, *supra* note 56, at 241.

197. *Id.*

198. DiFonzo, *supra* note 1, at 900.

199. *HALEM*, *supra* note 56, at 242.

200. *JACOB*, *supra* note 17, at 59; *see* Family Law Act of 1969, ch. 1608, § 4506, 1969 Cal. Stat. 3314, 3324 (current version at CAL. FAM. CODE § 2310 (West 2004)).

201. Family Law Act of 1969, ch. 1608, § 4506, 1969 Cal. Stat. 3314, 3324 (current version at CAL. FAM. CODE § 2310 (West 2004)).

202. *HALEM*, *supra* note 56, at 243.

ing the last vestiges of fault from California's divorce law.<sup>203</sup> California's "legal and cultural transformation"<sup>204</sup> soon put no-fault on the national stage. In 1970, the National Conference of Commissioners on Uniform State Laws approved the Uniform Marriage and Divorce Act ("UMDA"). Under the UMDA, irretrievable breakdown of the marriage constituted the sole ground of divorce.<sup>205</sup> The term "irretrievable breakdown" is undefined, leading to the possibility of differing interpretations by liberal and conservative courts.<sup>206</sup>

In the realm of divorce reform, concepts of liberalism and conservatism tended to become unmoored from their traditional meanings. When California and England boldly embraced no-fault, they believed (erroneously) that they had "closed the door on easy divorce."<sup>207</sup> California's interest was not in "liberalizing divorce law in accordance with changing social attitudes . . . ."<sup>208</sup> Rather, it was attempting to preserve family stability by making divorces harder to obtain.<sup>209</sup> New York's liberals battled firmly-entrenched religious and traditional notions of family life to achieve reform.<sup>210</sup> Their modest gains, however, were essentially procedural rather than substantive,<sup>211</sup> and remained circumscribed by fault. All three, England, California and New York, staunchly proclaimed that their approval of reform was, in no way, a condonation of that great evil, divorce by consent.

It is interesting that all three jurisdictions jettisoned their elaborate systems of counseling and conciliation. This is especially surprising in view of how these systems were designed to ward off the demon of easy, consensual divorce. Their cost, in human and financial resources, was certainly a factor. But it may well be that the "sheriff and the social worker do not merge"<sup>212</sup> because the language of law adapts so uneasily to the

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203. DiFonzo, *supra* note 1, at 907.

204. *Id.*

205. UNIF. MARRIAGE & DIVORCE ACT, 9A U.L.A. 160 (1970).

206. RHEINSTEIN, *supra* note 8, at 385.

207. DiFonzo, *supra* note 1, at 903.

208. HALEM, *supra* note 56, at 239.

209. DiFonzo, *supra* note 1, at 903.

210. JACOB, *supra* note 17, at 44-45.

211. *Id.* at 33.

212. J. Herbie DiFonzo, *Coercive Conciliation: Judge Paul Alexander and the Movement for Therapeutic Divorce*, 25 U. TOL. L. REV. 535, 575 (1994).

“preset rubric” of interdisciplinary schemes.<sup>213</sup> Like fault-based divorce, the therapeutic model now appears quaint and incongruous. Perched at opposite ends of the divorce spectrum, each approach seems out of place and out of time.

New York, however, remains wedded to fault divorce. In 2004 (the last year for which data is available), New York courts awarded 58,851 divorces.<sup>214</sup> Of these, only 4,473, or 7.6 percent, were obtained under one of the two “conversion” grounds, the only no-fault alternatives.<sup>215</sup> Divorces granted on grounds of cruelty, abandonment, imprisonment, or adultery numbered 52,048, or 88.4 percent.<sup>216</sup> In short, almost 90 percent of New York divorces in 2004 were obtained under fault grounds. Recent history shows that the debate over fault divorce in the Empire State has shifted from morality to economics. To understand why New York remains unique in this regard, an exploration of divorce finance reform is in order.

#### V. Equitable Distribution and Maintenance: The 1980 Compromise

The 1966 divorce reform was unaccompanied by any change in the financial consequences of divorce. New York retained the traditional common law view that legal title to property was determinative of its ownership upon divorce.<sup>217</sup> Under this system, the husband, as the breadwinner and title holder, usually emerged from the marriage with most of the property.<sup>218</sup> The wife, who was generally left without sufficient

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213. *Id.*

214. Vital Statistics of New York State 2004, Table 50: Divorces by County of Decree and Legal Grounds, *available at* [http://www.health.state.ny.us/nysdoh/vital\\_statistics/2004/table50.htm](http://www.health.state.ny.us/nysdoh/vital_statistics/2004/table50.htm) [hereinafter Vital Statistics].

215. *Id.*; *see also* N.Y. DOM. REL. LAW § 170 (5) & (6) (McKinney 2007). Among all the states “[o]nly New York requires the finding of fault or the living apart pursuant to a legal document as the basis for a divorce.” N.Y. State Office of Court Administration, Matrimonial Commission Report 19 n. 23 (Feb. 2006), *available at* <http://www.nycourts.gov/reports/matrimonialcommissionAPPENDICES.pdf>.

216. Vital Statistics, *supra* note 214. The ground was “not stated” in 2,330 divorces, or 4 percent of the total. *Id.*

217. *See* BRETT R. TURNER, *EQUITABLE DISTRIBUTION OF PROPERTY* § 1.02, at 4 (2d ed. 1994 & Supp. 2004).

218. *See* Alan D. Scheinkman, *Practice Commentaries*, N.Y. DOM. REL. LAW, § 236 (McKinney 1999) (“In practice, the title concept worked a great hardship upon a spouse, often the wife, whose mate accumulated property during marriage and held title in his or her name only. When the marriage was dissolved, absent

property or earning potential to support herself after divorce, was theoretically entitled to permanent or long-term alimony.<sup>219</sup> In contrast with the 41 formerly "title" states, eight states adhere to the community property system, under which all income earned by either spouse or property purchased with those earnings is marital property. No matter how title is held, each spouse owns one-half of all marital property.<sup>220</sup> A ninth state, Wisconsin, is often deemed a community property state because it models its system on the similar principles of the Uniform Marital Property Act.<sup>221</sup>

Modern divorce reform began in New York, but no state followed its lead. Instead, the models which had the greatest success throughout the nation came from two sources: California's no-fault divorce law<sup>222</sup> and the original 1970 version of the Uniform Marriage and Divorce Act ("UMDA").<sup>223</sup> Using definitions typical of community property systems, the UMDA became a prototype for widely-adopted equitable distribution statutes, in which courts are directed to make a just division of marital property, based on a series of factors.<sup>224</sup> The UMDA broadly defined marital property as "[a]ll property acquired by either

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actual fraud or other ground for equity, intervention, ownership of all the property went to the title-holding spouse, notwithstanding the contributions made toward the property or toward the marriage by the non-titled spouse."); Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 697 n.47 (1990).

219. J. Thomas Oldham, *Divorce, Separation, & The Distribution of Property* § 3.02(1), at 33 (2001). On the history of alimony, showing it to be awarded in far lower amounts than the popular culture supposed, as well as both infrequently ordered and even more rarely enforced, see DiFonzo, *supra* note 45, at 62-64, 107-11; see *id.* at 62 (describing the "most striking aspect of alimony [as] its scarcity"); Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1106-07 (1989) ("[T]he husband's continuing 'duty of support' has always been more myth than reality for most divorced women").

220. See TURNER, *supra* note 217, § 1.02, at 5.

221. UNIF. MARITAL PROPERTY ACT, 9A U.L.A. (pt. I) 103 (1998).

222. See FAMILY LAW ACT of 1969, ch. 1608, § 4506, 1969 Cal. Stat. 3314, 3324 (current version at CAL. FAM. CODE § 2310 (West 2004)).

223. See DiFonzo, *supra* note 1, at 897-908 (discussing the impact of California no-fault divorce reform and the Uniform Marriage and Divorce Act, 9A U.L.A. (pt. I) 289-90 (1998)). Although only eight states have adopted the UMDA, the act has greatly influenced the terms of divorce reform for many states. *Id.* at 907 & n.176.

224. Note that one key difference between the two systems remains: unlike a community property scheme, equitable property distribution applies only at divorce; legal title continues to govern in an intact marriage. See Marsha Garrison,

spouse after the marriage . . . regardless of whether title is held individually or by the spouses in some form of co-ownership.”<sup>225</sup> As a community property state, California courts already followed similar prescriptions in allocating property upon divorce.<sup>226</sup>

Throughout the 1970s, almost all the American states outside the community property ambit adopted equitable distribution laws which deemed marriage an economic partnership and which aimed “to credit the unpaid work that the typical non-employed homemaker put into the partnership.”<sup>227</sup> The process of reforming New York divorce finances proved prolonged and controversial. Some women’s and other groups opposed the equitable distribution proposal, fearing what they deemed the excessive discretion entrusted to divorce judges.<sup>228</sup> Some legislators worried that an equitable distribution law would encourage divorce.<sup>229</sup> Proponents of reform divided into those who favored a presumption of equal division and those who opposed any suggestion of mathematical precision.<sup>230</sup> Added to a general concern over yielding too much discretionary power to the courts, it took a decade of political struggle to finally enact an equitable distribution law.<sup>231</sup> Bills proposing some form of equal or equitable property distribution were proposed in the legislature each year from 1972 until 1980.<sup>232</sup> By the time that New York adopted equitable distribution for di-

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*Good Intentions Gone Awry: The Impact of New York’s Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 628 (1991).

225. UNIF. MARRIAGE & DIVORCE ACT, 9A U.L.A. 160 (1970).

226. CAL. CIV. CODE § 5105 (current version at CAL. FAM. CODE § 751 (West 2004)) (“The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests”).

227. NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 206 (2000). Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN’S L.J. 141, 142-43 (2004) (“Sharing a life together profoundly influences the ways in which couples structure and shape their lives. . . . [M]odern family law recognizes this sharing process through its embrace of partnership marriage as the dominant theory of marriage and divorce.”).

228. See Marcus, *supra* note 3, at 441 n.266.

229. *Id.* at 441-42 n.267.

230. *Id.* at 440-41.

231. *Id.* at 440.

232. *Id.*

vorce cases in 1980, the state was one of only six remaining common law title jurisdictions.<sup>233</sup>

In the end, reform of property division in divorce was tied to a fundamental alteration in the law of alimony. Traditionally, the duty of spousal support ran only from a divorced husband to his ex-wife.<sup>234</sup> A New York statute of 1813 allowed for permanent alimony only to divorced non-adulterous wives.<sup>235</sup> Over a century and a half later, the U.S. Supreme Court declared unconstitutional such a gendered provision of spousal support.<sup>236</sup> This 1979 decision came as the heated debates over divorce finances were coming to a boil, and the Supreme Court's alimony ruling proved a prod to compromise. Although New York's alimony statute could have been rectified by the mere substitution of "spouse" for "wife," the need to revise this one aspect of the economic consequences of divorce "accelerated the drive for a more extensive reform."<sup>237</sup>

The Equitable Distribution Law was described as "the most sweeping reform of the divorce laws in [New York] since the Divorce Reform Act of 1966."<sup>238</sup> The legislature replaced alimony with "maintenance" payments, which were to be calculated to preserve the parties' standard of living during the marriage and to provide for the recipient's "reasonable needs."<sup>239</sup> Courts were encouraged by this legislation to limit the duration of maintenance payments to induce recipients to become self-supporting as rapidly as possible.<sup>240</sup>

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233. Act of July 19, 1980, ch. 21, 1980 N.Y. Laws 1225; Marcus, *supra* note 3, at 438-39 n.256.

234. See HOMER H. CLARK, LAW OF DOMESTIC RELATIONS 420-27 (1968); Chester G. Vernier & John B. Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197 (1939).

235. An Act Concerning Divorces, and for other Purposes, ch. 102, 1813 N.Y. Laws 197, 199.

236. *Orr v. Orr*, 440 U.S. 268 (1979) (striking down Alabama statute authorizing the imposition of alimony obligations on husbands in favor of wives, but not on wives in favor of husbands).

237. Marcus, *supra* note 3, at 443.

238. Scheinkman, *supra* note 218 (quoting Governor's Memorandum of Approval, 1980 N.Y. Session Laws 1863 (McKinney)).

239. Act of July 19, 1980, ch. 21, 1980 N.Y. Laws 1225.

240. A legislative memorandum explaining the new statute indicates that an award of maintenance "should rest on the economic basis of reasonable needs and the ability to pay." Garrison, *supra* note 224, at 640 (citing 1980 New York State Legislative Annual, *Memorandum of Assemblyman Gordon W. Burrows* 130) [here-

Concerns about gender equity did not fade with the passage of the Equitable Distribution Law. The focus of inquiry has centered on whether the economic partnership theory articulated in the legislation has been effectuated by the quotidian decisions of divorce courts. Both empirical data and normative scholarship—here and throughout the United States—indicate that divorce generally results in an increased standard of living for men, while exposing women and children to a significant financial decline.<sup>241</sup> Despite the dramatic changes intended by the legislation, trial courts in fact do not “view contributions to the marriage and its assets from unwaged work in the home as the equivalent of contributions to the marriage and its assets from waged work.”<sup>242</sup> In 1986, the New York State Task Force on Women in the Courts concluded that “[m]any lower court judges have demonstrated a predisposition not to recognize or to minimize the homemaker spouse’s contributions to the marital economic partnership.”<sup>243</sup> Although the Equitable Distribution Law left open the possibility that marital fault might be

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inafter *Burrows Memorandum*]. According to this Memorandum, permanent maintenance may be necessary “in marriages of long duration, or where the former spouse is out of the labor market and lacks sufficient resources, or has sacrificed her business or professional career to serve as a parent and homemaker,” Garrison, *supra* note 224, at 640, but the objective of maintenance is to “award the recipient spouse an opportunity to achieve independence.” *Id.* The Burrows Memorandum was favorably cited in a key Court of Appeals opinion recognizing the shift from permanent alimony to rehabilitative maintenance. *O’Brien v. O’Brien*, 489 N.E.2d 712, 716 (N.Y. 1985) (“The concept of alimony, which often served as a means of lifetime support and dependence for one spouse upon the other long after the marriage was over, was replaced with the concept of maintenance which seeks to allow ‘the recipient spouse an opportunity to achieve [economic] independence.’”) (citing *Burrows Memorandum*).

241. See generally D. KELLY WEISBERG & SUSAN F. APPLETON, *MODERN FAMILY LAW* 594 & n.8 (3d ed. 2006) (citing sources); see also Marcus, *supra* note 3, at 460 n.325 (citing survey results from the 1980s indicating that equitable distribution awards “reflect a judicial attitude that property belongs to the husband and a wife’s share is based on how much the husband could give her without diminishing his current life style”).

242. Marcus, *supra* note 3, at 460. Studies showed that women suffered substantial economic losses, “particularly when they had foregone wage-earning work in order to care for children and the household during marriage.” Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1239 (citing studies).

243. NEW YORK STATE TASK FORCE ON WOMEN IN THE COURTS, REPORT 121 (1986). This attitude is both pervasive and continuing. See, e.g., Cynthia Lee Sarnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513, 1515 (2005) (footnote omitted):



considered in dividing the parties' property, a 1985 Court of Appeals decision held that fault could not be considered in property division "[e]xcept in egregious cases which shock the conscience of the court."<sup>244</sup> In 1986, the legislature amended the law to allow indefinite maintenance payments in cases of older and disabled women with no job skills other than homemaking and child-rearing.<sup>245</sup> The amendment was intended to ensure that a homemaker from a long-term marriage, whose ability to find suitable employment following divorce is limited, does not experience a standard of living decrease while the other spouse's standard of living remains constant or improves.<sup>246</sup>

What was the overall effect of the divorce finance reforms in New York? A well-regarded empirical study of the impact of these laws concluded that the consequences failed to reflect the legislative intent:

Property division, where the New York law was intended to have its most significant impact, does not appear to have been affected in any major way. The likelihood and duration of alimony awards was, however, markedly reduced. While this result was, to some extent, an expectable one given the establishment of an alimony regime emphasizing rehabilitative goals, the extent of the change and the impact of the new rules on long-married and low income wives appears to have been an unintended consequence of the new law.<sup>247</sup>

The connection between the fractured results of financial reform and the controversy over a true no-fault divorce law is the subject of the next section.

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Many mothers have been stunned to learn that after years of viewing themselves as proud and valuable contributors to marriage, to family, to a new generation, the law of divorce views them as suckers. Surely this is a mistake, a mother might insist, a confusion of identities, a dialectical lapse that will be corrected as soon as it is discovered. Sadly, there is no mistake. The dispiriting message is that primary caretakers, the vast majority of whom are mothers, have been duped into providing free family caretaking at great personal economic cost; a price they must pay for their imprudent ways.

*Id.*

244. *O'Brien*, 498 N.E.2d at 750.

245. N.Y. DOM. REL. LAW § 236(B)(6) (1986).

246. *See Sperling v. Sperling*, 567 N.Y.S.2d 538 (App. Div. 1991).

247. *Garrison*, *supra* note 224, at 725.

## VI. The Prospects for No-Fault Divorce in New York

The conundrum remains: why does New York, alone in the United States, retain an overwhelmingly fault-driven divorce law? On the surface, the legal system has written gender out of the divorce equation on both property division and maintenance. Thus, it might initially appear that the objections based on economic injustice for women have been eliminated, at least as reflected in the formal legal norms. Nor can New York's fault grounds generally supply financial incentives for a putative litigant, since marital fault is not relevant to determinations of support or property division unless it is so severe as to "shock the conscience."<sup>248</sup> Yet the prospect of no-fault divorce remains controversial. This section explores the reasons why New York continues to debate an issue the rest of the country has long since put to rest.

Some women's groups have argued that enacting true no-fault divorce would harm women by allowing the generally wealthier husband to obtain a divorce before the economic and support issues are resolved.<sup>249</sup> As Marcia Pappas, President of New York's chapter of the National Organization of Women, phrased the argument, "[U]nilateral no-fault divorce . . . hurts women by removing the incentive for the moneyed spouse (who is usually the husband) to make a settlement. Instead of negotiating with a dependent spouse—whose only leverage for avoiding an impoverished post-divorce life for herself and her children may be her assent, or lack of it, to divorce—the husband can simply go to court and obtain an uncontested divorce."<sup>250</sup> Moreover, should New York adopt no-fault divorce,

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248. *O'Brien*, 498 N.E.2d at 750.

249. See, e.g., Emily Jane Goodman, *Divorce, New York-Style*, *Gotham Gazette*, Mar. 2006, available at <http://www.gothamgazette.com/article/law/20060307/13/1781> ("The fear is that a husband can simply go to court, and essentially say 'I divorce thee,' and go on his way without any court orders for property division, support, or child custody"); Christine Vestal, *NY wants a better no-fault divorce law*, *Stateline.org*, Mar. 21, 2006, available at <http://www.stateline.org/live/details/story?contentId=97537> ("New York tiptoed around the no-fault divorce issue in the past because opponents contended women would not be awarded fair alimony payments following the break up of a marriage if they lost the leverage of finding fault.").

250. Marcia Pappas, *Divorce New York Style*, *N.Y. Times*, Feb. 19, 2006. See also Maggie Gallagher, *NY Judge Would Make Divorce Too Easy*, Feb. 22, 2006, available at <http://www.theconservativevoice.com/article/12613.html> ("Unilateral

“resolution of child custody and property division can drag on for years, to the detriment of the abandoned poorer spouse.”<sup>251</sup>

From another vantage point, the Coalition of Fathers and Families New York, Inc. “vigorously opposes” no-fault divorce.<sup>252</sup> In the words of Randall Dickinson, no-fault laws “have essentially acted to empower whichever party wants out, leaving the spouse who wants to preserve the marriage powerless to prevent its dissolution and with no recourse but acquiescence.”<sup>253</sup> This critique of no-fault divorce’s supposed easy exit to unwanted marriage echoes calls by some scholars for an end to a divorce process seen as facilitating individual irresponsibility at the expense of mutuality and the welfare of children.<sup>254</sup>

Similarly, the removal of fault from divorce throughout the nation has been criticized as an inappropriate erasure of culpa-

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divorce is a bad idea whose time has passed”); *but see* Women’s Bar Association of the State of New York, No-Fault Divorce Editorial, July 13, 2006, *available at* [http://www.wbasny.bluestep.net/shared/content/story.jsp?\\_event=view&\\_id=445502\\_U127802\\_200779](http://www.wbasny.bluestep.net/shared/content/story.jsp?_event=view&_id=445502_U127802_200779) (explaining the support of the Women’s Bar Association for no-fault divorce).

251. Pappas, *supra* note 250.

252. Randall Dickinson, *Hearing Testimony of The Coalition of Fathers and Families New York, Inc.*, N.Y. State Office of Court Administration, Matrimonial Commission, Nov. 4, 2004, *available at* <http://www.fafny.org/Opinion-Legislative-files-msword/05-01-01Testimony%20II.pdf>.

253. *Id.* Dickinson added that

the single greatest factor in determining which party is most likely to initiate a divorce is the expectation of being awarded custody of the kids. Along with the kids usually comes a whole range of other financial benefits, as well, including child support, alimony, the marital residence, and one half of the remaining marital assets . . . .

*Id.* See also Maggie Gallagher, *End No-Fault Divorce: Yes*, 75 *First Things* 24-30 (Aug./Sept. 1997), *available at* <http://www.firstthings.com/ftissues/ft9708/gallagher.html> (contending that the “primary purpose [of no-fault divorce] is to empower whichever party wants out, with the least possible fuss and the greatest possible speed, no questions asked”).

254. See, e.g., Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 *J. LEGAL STUD.* 869, 871 (1994) (“The changes in the institutional structure that make marital promises unenforceable and allow opportunistic behavior are the enactment in many states of no-fault divorce with the simultaneous removal of fault (breach) as a consideration in grants of spousal support and property division”); Adriaen M. Morse, Jr., Comment, *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 *U. RICH. L. REV.* 605, 606 (1996) (“[T]he advent of no-fault divorce signaled an end to the notion of marriage as a status having at its core the concept of a contract with God and spouse, the breaking of which necessitated circumstances which were intolerable and unavoidable – fault.”).

bility, thus muddying the moral message of marriage. A movement to reverse the perceived evils of unilateral no-fault divorce has garnered popular and scholarly attention and generated numerous proposals to reinforce marital commitment and make divorce more difficult.<sup>255</sup> No-fault divorce has been denounced for eroding “the idea of marriage as a presumptively permanent relationship—as a structure of incentives for individuals to contribute to the well-being of the family, and a framework of reasonable expectations of reciprocal benefits over the lifetime of the partnership.”<sup>256</sup>

A number of commentators have been reassessing whether fault factors may still serve a legitimate purpose in no-fault divorce regimes.<sup>257</sup> Various reasons have been cited for this reconsideration of blameworthiness, including “the growing evidence that divorce often hurts children, feminists’ renewed recognition of the importance of legal protection for mothers raising children, and concerns about the economic disparities created by differences in marriage rates.”<sup>258</sup> Efforts to retrench on no-fault divorce have included the introduction of myriad legislative bills throughout the nation designed to resurrect marital fault as the heart of divorce litigation.<sup>259</sup>

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255. See, e.g., Katherine Shaw Spaht, *Beyond Baehr: Strengthening the Definition of Marriage*, 12 *BYU J. PUB. L.* 277, 279 (1998) (“To strengthen the definition of marriage it is essential that we ‘The People’ enact laws that make divorce more difficult.”).

256. William A. Galston, *Divorce American Style*, *PUB. INT. L. REV.*, Summer 1996, at 12-13.

257. See, e.g., Allen M. Parkman, *Reforming Divorce Reform*, 41 *SANTA CLARA L. REV.* 379 (2001); Jana B. Singer, *Husbands, Wives, and Human Capital: Why the Shoe Won’t Fit*, 31 *FAM. L.Q.* 119 (1997); Katherine Shaw Spaht, *Revolution and Counter-Revolution: The Future of Marriage in the Law*, 49 *LOY. L. REV.* 1 (2003); Peter Nash Swisher, *Marriage and Some Troubling Issues with No-Fault Divorce*, 17 *REGENT U. L. REV.* 243 (2004-2005); Lynne D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 *BYU L. REV.* 79 (1991); Barbara Bennett Woodhouse, *Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era*, 82 *GEO. L.J.* 2525 (1994).

258. Robin Fretwell Wilson, *Don’t Let Divorce Off the Hook*, *N.Y. TIMES*, Oct. 1, 2006, at 14LI. Wilson also contended that gay marriage advocates have played a role in this shift, in suggesting that “easy divorce,” not same-sex unions, threaten the institution of marriage. *Id.* See also Woodhouse, *supra* note 257, at 2529-30 (arguing that legal recognition of fault may “provide protection and compensation for victims of abuse [of] spousal trust”).

259. See DiFonzo, *supra* note 1, at 916-17, 927-28, 949-54 (analyzing proposals reintroducing fault divorce; none of these bills have been enacted). Another cluster of recommendations counsels couples to engage in pre-commitment bar-

Some scholars have argued, however, that fault-based divorce accentuates any bad feelings and malevolence of the parties and makes them less inclined to reconcile.<sup>260</sup> This contention “challenges the assumption that no-fault divorce . . . signaled a retreat from either a moral vision or moral discourse in family law,”<sup>261</sup> claiming instead that “fault-based proposals ultimately are destructive and counterproductive to divorcing individuals and families.”<sup>262</sup> Of course, not all fault divorces involve actual contests. But many do, and even when both spouses desire the divorce, one partner must publicly accuse the other of matrimonial misconduct.<sup>263</sup>

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gaining designed to allow them to contractually bind themselves to each other more tightly than the law currently allows. See Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 464-65 (1998) (calling for the enforcement of a wide range of private agreements regarding divorce grounds and the terms of an ongoing marriage). Covenant marriage laws, according couples the right to renounce recourse to the state's no-fault divorce law, define covenant marriage as a “lifelong relationship.” See LA. REV. STAT. ANN. § 9:272(A) (1997). Other proposals counsel mandatory waiting periods before divorce actions may be filed; delays ranging from two to five years have been specified. See James Herbie DiFonzo, *Toward a Unified Field Theory of the Family: The American Law Institute's Principles of the Law of Family Dissolution*, 2001 BYU L. REV. 923, 955 n.150 (2001) (summarizing proposals). Schedules of obligatory pre-divorce counseling sessions have been proposed. DiFonzo, *supra* note 1, at 927-28, 950-53 (providing examples). Finally, legislators and commentators have urged making divorce more difficult or even unavailable to couples with minor children. See *id.* at 927-30 (detailing proposed legislation prohibiting or severely limiting the dissolution of marriages with minor children).

260. See, e.g., Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719 (1997). Of course, there is evidence to support the notion of continued hostility between the parties in no-fault divorces as well. See, e.g., DiFonzo, *supra* note 1, at 880 (“[T]here are . . . some indications that no-fault divorce litigation is becoming more acrimonious, with the litigative fire transferred from conflicts over divorce grounds to those over children and property issues.”).

261. Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111, 1115 (1999).

262. Jane Biondi, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 611 (1999).

263. See *The Long Divorce*, N. Y. TIMES, Mar. 26, 2006, at 14LI:

Under [New York's] present law, a marriage cannot merely die. It must be killed by one spouse or the other, through adultery, cruel and inhuman treatment, or abandonment — even when none of these things have actually occurred, and even when both people agree on all the particulars.

This means, in effect, that people have to lie; they have to go before a judge, swear to tell the truth and then not tell the truth. Those who deal with these

Across the board, divorce reform proposals have been premised on the conviction that divorce is a disaster for children.<sup>264</sup> But “[r]eintroducing tough divorce laws would recreate many of the conditions that used to make divorce harder on children.”<sup>265</sup> Indeed, it seems preposterous to argue that, since divorce is often bad for children, to require that their parents accuse, prove and/or dispute fault would enhance the children’s lot. Proponents of fault divorce esteem the “collective social condemnation . . . [and] [g]uilt and shame,” which are “altogether missing in pure ‘no-fault’ divorce states.”<sup>266</sup> They rely on the unproven assertion that avoiding condemnation, guilt, and shame will motivate parents to stay together in loveless marriages in order to improve their children’s welfare. They ignore the historical record, in New York and throughout the United States, which show that generally “*divorce law bears almost no relation to the divorce rate.*”<sup>267</sup>

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issues day in and day out have concluded that pointing the finger at one spouse makes negotiations uglier, costlier and longer.

264. See DiFonzo, *supra* note 1, at 909 (“Contemporary scholarly accounts are rife with calls for an end to a divorce process seen as facilitating individual responsibility at the expense of mutuality and the welfare of children.”).

265. Nicholas H. Wolfinger, *The Mixed Blessings of No-Fault Divorce*, 4 WHITTIER J. CHILD & FAM. ADVOC. 407, 426-27 (2005).

Parents would wait longer before dissolving disastrous marriages, thereby subjecting children to more conflict. The stigma of divorce would intensify if couples again had to demonstrate legal fault in order to dissolve their marriages. Finally, parental divorce would send children a stronger message about marital commitment than it does now, thereby increasing the chances that they would end their own marriages.

*Id.* at 427.

266. Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1571 (1998).

267. Joanna Grossman, *Will New York Finally Adopt True No-Fault Divorce? Recent Proposals to Amend the State’s Archaic Divorce Law*, FINDLAW, Oct. 20, 2004, available at <http://writ.lp.findlaw.com/grossman/20041020.html> (emphasis in original). “In practice, couples simply do not stay married merely because their home state makes it hard for them to part ways. And they certainly do not become happy together merely because divorce is too difficult or too expensive to obtain.” *Id.*; see also Report by the Committee on Matrimonial Law, The Association of the Bar of the City of New York, *The Case for Amending the New York State Domestic Relations Law to Permit No Fault Divorces*, Nov. 2004, available at [http://www.abcnyc.org/pdf/report/divorce\\_memo.pdf](http://www.abcnyc.org/pdf/report/divorce_memo.pdf) (contending that no-fault divorce is not detrimental to the institution of marriage, and that fault divorce statutes result in harm both to the parties and any children). Nor do the advocates of requiring culpability in divorce address the issue of when both parties are at fault for the demise of the marriage, or when individual culpability is simply immaterial to the

As New York's Matrimonial Commission concluded, after weighing the substantial evidence provided at its public hearings and the professional experience of the Commission members, "fault allegations and fault trials add significantly to the cost, delay and trauma of matrimonial litigation and are, in many cases, used by litigants to achieve a tactical advantage in matrimonial litigation."<sup>268</sup>

That "tactical advantage" is intimately related to the fact that many courts have failed to provide adequate post-divorce financial protection for many women.<sup>269</sup> The lack of progress on this front has been largely attributed to "the unequal distribution of assets following divorce, low female participation in the labor force, and limited job skills among those who did work."<sup>270</sup> There is evidence that this inequity is being reduced as women's education and wage employment skills increase.<sup>271</sup> But the central problem stems from a fundamental economic inequality between the genders which precedes a woman's entry into marriage and follows her when she exits.<sup>272</sup> In Martha

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end of the union. See J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 CAL. L. REV. 1091, 1104-06 (1992). See also *Mani v. Mani*, 869 A.2d 904, 917 (N.J. 2005):

[C]onsidering non-economic fault can only result in ramping up the emotional content of matrimonial litigation and encouraging the parties to continually replay the details of their failed relationship. Not only is non-economic fault nearly impossible to factor into an alimony computation, but any attempt to do so would have the effect of generating complex legal issues regarding the apportionment of mutual fault, which is present in nearly all cases. That, in turn, would result in the protraction of litigation and the undermining of the goals of no-fault divorce, again without a corresponding benefit.

268. Matrimonial Commission Report, *supra* note 215, at 18. See ANDREW I. SCHEPARD, CHILDREN, COURTS, AND CUSTODY: INTERDISCIPLINARY MODELS FOR DIVORCING FAMILIES 27-44 (2004) (summarizing data showing that one of the prime correlates to how well or poorly children cope with their parents' divorce is the level of conflict manifested by the parents).

269. See Peter Nash Swisher, *The ALI Principles: A Farewell to Fault-But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse?*, 8 DUKE J. GENDER L. & POL'Y 213, 214 (2001).

270. Wolfinger, *supra* note 265, at 422.

271. See *id.* at 422-26 (describing empirical data); see also *id.* at 427 ("In the last twenty years . . . divorcées have made substantial economic gains, largely on account of their labor force participation. Divorce still takes a toll on women's incomes, but not nearly as severe as it did in the past"); Oldham, *supra* note 219, at 1109 (same).

272. See generally Laura M. Padilla, *Gendered Shades of Property: A Status Check on Gender, Race & Property*, 5 J. GENDER RACE & JUST. 361 (2002).

Fineman's telling epigram, "marriage often conceals or masks the poverty of women . . . [;] divorce removes this mask."<sup>273</sup>

New York's 1980 reforms in divorce finances were intended to alleviate the gender inequality. But they yielded "confused, inconsistent, and unexpected results."<sup>274</sup> The legal bargain struck in Albany was intended as a major boon to wives, since husbands owned the vast bulk of valuable property, and once the title regime yielded to equitable distribution, courts would divide marital property equitably. In exchange for this benefit, the legislature removed the lifetime alimony presumption. But the legislative compromise missed its target, as Marsha Garrison cogently related:

[T]he average husband's individual net worth was scarcely more than that of his wife, and the typical wife already received half of the couple's meager assets. The property distribution provisions of the new statute thus failed to provide major benefits to divorced wives. The alimony provisions of the new statute, which in vague terms authorized short-term "rehabilitative" alimony, had a major impact on divorced wives, however. But the dominant impact did not fall on wives who were the intended candidates for short-term alimony. Homemakers, the unemployed, and wives in long marriages—all described in the statute's legislative history as cases that should be treated as exceptions to the new, rehabilitative norm—saw their alimony prospects decline as much, or more, than the alimony prospects of others. The statute's ambiguous language not only permitted this result, but produced widespread variation in case outcomes as well.<sup>275</sup>

Most divorcing couples, in New York as elsewhere, have few assets to divide. "Where there is little to share, the right to share is of little consequence."<sup>276</sup> The post-divorce economic needs of most wives below the upper middle class simply cannot be achieved by equitable distribution of the marital assets.<sup>277</sup>

The income of the higher wage-earning spouse turns out to be far more valuable as an "asset" of a divorcing couple than its

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273. MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 44 (1991).

274. Garrison, *supra* note 224, at 739.

275. *Id.*

276. Oldham, *supra* note 267, at 1102.

277. In New York in the early 1990s, property subject to distribution was usually worth less than \$25,000. See Garrison, *supra* note 224, at 662-63.



marital property.<sup>278</sup> This “asset” is not subject to distribution, equitable or otherwise. To make matters worse for women, the general and rapid demise of long-term alimony in the wake of the divorce finance reforms increased the post-divorce gender economic discrepancy.<sup>279</sup> Compounding this effect are two social facts: (1) women take up by far the caretaking burdens in their families, of both minor children and elderly parents;<sup>280</sup> and (2) our society has a history of gender discrimination in pay equity.<sup>281</sup> Thus, women’s weaker economic position results, at least in part, from both discrimination and women’s more pronounced career-family dilemma.<sup>282</sup> Although studies vary, the most accepted conclusion for the alterations in the post-divorce

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278. See Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479, 1504 (2001).

279. Maintenance payments are both insufficient and frankly unintended to redress this imbalance. After the no-fault divorce revolution, the predominant norm for divorce aimed at a decisive break in the financial aspects of the marital relationship. The Uniform Marriage and Divorce Act exemplified this “clean break” theory of divorce. UNIF. MARRIAGE AND DIVORCE ACT, 9A U.L.A. (pt. I) 446 (1998). The American Law Institute (“ALI”) has more recently approved its Principles of the Law of Family Dissolution: Analysis and Recommendations (2002). In contrast with the UMDA’s emphasis on spousal need as the framework for maintenance, the ALI Principles fixed upon “compensation for losses rather than meeting needs.” Cf. UNIF. MARRIAGE AND DIVORCE ACT § 308, 9A U.L.A. 347 (1987), with ALI Principles, Principles of the Law of Family Dissolution: Analysis & Recommendations § 5.02 cmt. A (emphasis omitted) (2002).

280. See Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673 (2001) (arguing that women, who have traditionally, and who continue to, bear the burdens of the caretaking role, should be rewarded for their work by treating care as a “public value”). McClain emphasizes that “‘care as a public value’ casts a wide net,” as caretaking extends not only to children, but also elderly parents, dependent adults, and the like. *Id.* at 1683 & n.29.

281. See Andrea Sachs, *Women and Money*, TIME, Feb. 6, 2006, at 67 (illustrating the wage gap between men and women, and showing that “87% of the impoverished elderly are women, men are four times as likely as women to negotiate a first salary offer, resulting in more than half a million dollars in additional income by age 60”); see also Daniel Kuperstein, *Finding Worth in the New Workplace: The Implications of Comparable Worth’s Reemergence in the Global Economy*, 24 HOFSTRA LAB. & EMP. L.J. (forthcoming 2007) (discussing the disparity in wages between men and women and analyzing suggested legislation that grapples with the problem). For a theory why women represent a statistically lower proportion of the workforce, see Vicki Schultz, *Life’s Work*, 100 COLUM. L. REV. 1881 (2000) (arguing that mass-cultural expectations that women be nurturing wives mothers and daughters shape women’s and society’s notion of women as “inauthentic workers”).

282. See Garrison, *supra* note 224, at 726.

economic status of men and women indicate a 30 percent average decline in women's standard of living and a 10 percent improvement in men's.<sup>283</sup>

With this background, let us consider the proposal of the Matrimonial Commission. The Commission urged the state legislature to amend the Domestic Relations Law and provide for true no fault divorce.<sup>284</sup> While not endorsing any particular no-fault proposal, the Commission recommended that any new law "provide that no final Judgment of Divorce be entered until all economic issues, including equitable distribution, maintenance and child support, as well as custody are determined and those determinations are incorporated into the judgment, unless the parties consent in writing and good cause is shown."<sup>285</sup> In effect, the Commission's proposal would institutionalize the practice of some judges who currently insist on resolving the financial issues in divorce prior to granting the divorce itself.<sup>286</sup>

The Commission's no-fault divorce recommendation seeks to remedy the two most trenchant objections to current procedure. First, a moneyed spouse desirous of divorce would no longer be able to obtain a rapid dissolution and then stall interminably on the issues of maintenance and equitable distribution, forcing the less-monied spouse to expend additional and prolonged effort, time, and legal fees. With regard to counsel and expert fees, the Commission recommended empowering courts to award interim counsel fees to non-monied spouses in matrimonial matters, and to direct that marital funds be used

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283. See Stark, *supra* note 278, at 1504 n.134 (citing studies).

284. Matrimonial Commission Report, *supra* note 215, at 18. The Report noted that a minority of members "considered the issue of no-fault divorce to be one of public policy that exceeds the scope of this Commission's mandate." *Id.* at 18 n.22. This group concurred in the Report's recommendation to the extent of urging the legislature "to be mindful of the deleterious impact of fault-based divorce on matrimonial litigation and to include in any legislative change that may result the requirements defined by the majority position." *Id.* Another minority group opposed the Report's recommendation. This group considered no-fault divorce to be adverse to the interests of many litigants, "especially victims of domestic violence, and non-monied spouses who, generally, enjoy certain protections by the existence of the grounds requirement." *Id.*

285. *Id.* at 19.

286. See Goodman, *supra* note 249 ("To protect the dependent spouse and children, some judges refuse to enter the judgment of divorce until the matters of equitable distribution of property, child support, maintenance for the non-monied spouse (almost always the wife) can be adjudicated or agreed upon.").

to pay the interim fees of attorneys and experts for either party or both parties.<sup>287</sup> The Commission also suggested a streamlined procedure for enforcing via a court's contempt powers the failure to pay court-ordered attorney's fees.<sup>288</sup> Acknowledging the large proportion of unrepresented litigants in contested matrimonial cases, the Commission recommended "both an expansion of the assigned counsel program and increased funding to groups providing civil legal services, so as to provide counsel to the low - and moderate-income litigants presently representing themselves before Supreme Court in divorce, custody, parenting time and related matters."<sup>289</sup>

Second, the Commission addressed the other more troubling fallout from New York's 1980 compromise on divorce finances: the inadequacy of current maintenance awards to redress the post-divorce gender imbalance. The Commission acknowledged the "[s]ignificant frustration and dissatisfaction . . . voiced by the public and the bar respecting the award of maintenance and the perception that these awards vary unpredictably from court to court with little or no guidance, often resulting in feelings of injustice and unequal treatment by the system."<sup>290</sup> But a majority of the Commission opposed the creation of spousal maintenance guidelines.<sup>291</sup> What the Commission recommended instead was a two-part handling of the issues relating to New York's treatment of a spouse's "enhanced earnings capacity."<sup>292</sup> Noting that New York is the only state to recognize enhanced earning capacity as an asset subject to equitable distribution, the Commission summarized the objections to the practice: "the intangible nature of the 'asset', the speculative nature of its 'value' including the unfairness of creating a non-modifiable award based on a projection of earnings, the cost of

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287. Matrimonial Commission Report, *supra* note 215, at 64-65.

288. *Id.* at 65. Further, with the aim of discouraging certain dilatory tactics in the collection of maintenance awards, the Commission also recommended that court-ordered payments of maintenance, child support, and attorney's fees be excepted from the automatic stay provisions of CPLR 5519 (a)(2) and (3). *Id.* at 37.

289. *Id.* at 58.

290. *Id.* at 66.

291. *Id.* The Commission Report concluded meekly that the issue of maintenance guidelines "deserved greater attention." *Id.*

292. See generally *Grunfeld v. Grunfeld*, 731 N.E.2d 142 (N.Y. 2000); *McSparrow v. McSparrow*, 662 N.E.2d 745 (N.Y. 1995); *O'Brien v. O'Brien*, 489 N.E.2d 712 (N.Y. 1985).

the valuation process, the problems of double counting when coupled with maintenance and child support awards and the multitude of litigation spawned by this concept that has increased the cost and the length of matrimonial proceedings.”<sup>293</sup> The Commission called for elimination of this rule.<sup>294</sup>

But the Commission recognized “the need to address one spouse’s contributions to another’s career and increased earning capacity in any ultimate award on divorce.”<sup>295</sup> Thus, in place of the current treatment of enhanced earning capacity, the Report proposed that a trial court be empowered by statute to “consider a spouse’s contributions to the development of a spouse’s enhanced earning capacity in arriving at the equitable distribution of the remaining marital property and, in cases where it is appropriate, . . . order maintenance that does not cease upon remarriage.”<sup>296</sup> To this end, several amendments to Domestic Relations Law, section 236B, were recommended.<sup>297</sup>

These proposals are intended to induce trial courts to replace enhanced earnings awards (as part of equitable distribution) with increased maintenance awards (crediting non-economic career and career potential contributions). This effort responds to the concern of those who oppose no-fault divorce for fear that women – usually the less-monied gender – will con-

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293. Matrimonial Commission Report, *supra* note 215, at 66.

294. *Id.* The Report noted that a minority of the members favored retention of the current method of disposition of enhanced earnings capacity. *Id.* at 66 n.57.

295. *Id.* at 66.

296. *Id.* The Commission observed that trial courts are currently authorized to award maintenance in a form that is non-taxable to the spouse receiving the payments and nondeductible to the spouse making the payments. *Id.*

297. The Commission proposed to amend DRL § 236B(5)(D)(6), which sets forth the factors a court must consider in determining an equitable distribution of the marital property, by adding language removing enhanced earning capacity as an asset subject to division, but directing the court to “consider the direct or indirect contributions to the development during the marriage of the enhanced earning capacity of the other spouse.” Matrimonial Commission Report Appendices, at App. L, available at <http://www.nycourts.gov/reports/matrimonialcommissionAPPENDICES.pdf>. In the statutory sections pertaining to maintenance, the Commission recommended amending DRL § 236B(6)(a)(8) by adding language authorizing the trial court, “in considering the contributions to the career or career potential of the other party,” to award maintenance “payable for a period of time subsequent to the remarriage of the party receiving the maintenance.” *Id.* Finally, amendment of DRL § 236B(6)(c) was proposed to make it clear that a court award of maintenance based upon such contributions to career or career enhancement may continue beyond the recipient spouse’s remarriage. *Id.*

tinue to be short-changed by divorce courts.<sup>298</sup> However, the Commission's proposals may not sufficiently allay those concerns. A significant component of the rationale for eliminating the treatment of enhanced earning capacity as an asset was—in the Commission's own words—the “speculative nature of its ‘value.’”<sup>299</sup> But the Commission's alternative is equally uncertain. By rejecting maintenance guidelines and suggesting only that trial courts premise a maintenance award in part on a spouse's contribution to the career and career potential of the other spouse, the Commission's proposals are asking economically-disadvantaged spouses to take on faith what experience has shown to be a legal system indisposed to redress the post-divorce imbalance.

Matrimonial law does not, of course, cause gender inequity. And economic justice is not achievable entirely within divorce law.<sup>300</sup> The Commission is to be credited for recognizing that equitable distribution of marital property is generally inadequate to the task of re-balancing the spousal books at divorce. On the issue of maintenance reform, the Commission contemplates a reappraisal and partial reversal of the ‘clean break’ notions from those heady days at the birth of modern no-fault divorce. But the Commission's proposals fall far short of assuring that the divorce law protects “the justifiable expectations of marriage partners . . . based on marital commitment and day-to-day sharing.”<sup>301</sup> In sum, the prospects for achieving a true no-fault divorce law in New York hinge on whether reforms of maintenance go far enough. The Matrimonial Commission has spoken. Now the political process will decide.

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298. See text at notes 249-51 *supra*.

299. Matrimonial Commission Report, *supra* note 215, at 66.

300. See Garrison, *supra* note 224, at 726 (footnote omitted):

[D]ivorce law should distribute the economic burden of divorce so as to protect wives who have been economically disadvantaged by long-term reliance on the marital relationship. Divorce law should not, of course, be seen as a primary strategy for correcting women's lack of economic equality. Even though women's weaker economic position results in part from conflicts between career and family, marriage neither bears primary responsibility for the problem, nor is divorce law capable of providing a cure.

*Id.*

301. *Id.*

### Conclusion

In the “twisting path”<sup>302</sup> of New York divorce reform, whether of grounds or economics, the notion of fault has made an appearance at every bend of the road. That fault continues to be featured is largely a product of the state’s political and moral traditions. It remains to be seen whether twenty-first century New York will finally be able to let go of fault as a leveraging factor and envision a system of equity without recrimination.

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302. BLAKE, *supra* note 9, at 189.

