

Toward a More Perfect Dissolution: The History of American Divorce Law and Its Ghosts in Contemporary Practice

by

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No-fault divorce isn't all it's cracked up to be. It is generally understood to mean that, regardless of what disputes exist regarding the *mechanics* of divorce (such as property distribution and custody), a court will not question a married person's *right* to divorce. A court will not require that a person prove that his or her spouse was at "fault" during the marriage to convince a judge or jury of the marriage's objective lack of viability.

This conventional understanding is wrong. The authors came to learn as much several years ago when our client's right to a no-fault divorce was subjected to a four-day trial in which the sole issue was whether she had irreconcilable differences with her husband and there was no reasonable prospect of reconciliation. The court would not accept her verified pleading at face value. Rather, over a four-day trial, she was forced to testify to her innermost perceptions and intimate details of her marriage before the court would grant her divorce. When her (by then, ex-) husband appealed—essentially asking the appellate court to force her back into the marriage—the appellate court affirmed the divorce, but also affirmed that the trial was a proper one and reversed the trial court's award of attorneys' fees to our client for the husband's bad faith position.¹ Thus, even in no-fault divorce, litigants in New Jersey can subject their divorce-seeking spouses to withering trials where they are effectively forced to prove the fault-infused reasons they want a divorce.

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¹ Steiner v. Steiner, 269 A.3d 454 (N.J. Super. Ct. App. Div. 2021).

It turns out this case was unusual but not unique. Indeed, while all U.S. jurisdictions have so-called no-fault divorce statutes,² similar cases have played out in other jurisdictions, and this exact scenario could happen under the governing statutes and case law in almost all of them.

What seemed to these authors to be the anachronism of this reality is what prompted this article's dive into the history of divorce, and particularly into the evolution of no-fault divorce. "You have to know the past to understand the present," Carl Sagan advised.³ Knowing the history preceding the present era of liberalized divorce helps explain extant burdens on that right lurking behind nearly all U.S. "no-fault" divorce regimes.

Historically, barriers to divorce have fallen as women's rights have advanced. Both men and women have equally strong interests in the freedom to move on from their unhappy marriages. Forcing parties to establish fault causes delay, drives up legal costs, and imposes anguish on those who are fighting for the freedom to end what are undoubtedly unhappy marriages. It has historically been, most notably, powerful *men*—Henry VIII and Ronald Reagan—who have liberalized the right to divorce.⁴ Yet, it is *women* who have historically borne disproportionate burdens from legal barriers to divorce. Restrictions on divorce ensured women's economic and social dependency on men, if not men's control over women. This is the reason no-fault divorce was the foundational principle for women's equality advocated at the first Women's Rights Convention in Seneca Falls in 1848.

And, just as women's rights have advanced on a non-linear and often ill-defined path throughout history, so too has no-fault divorce. Part I of this article explores this uneven history in the United States from the colonial period to the early republic, with its patchwork of statutes and common law, through the development of fault-based divorce statutes to the no-fault revolution of the late twentieth century and its backlash. To a large extent, this history, with its advances and retreats, mirrors the history of women's rights

² See *infra* Part II, generally, for citations to no-fault provisions in all fifty states.

³ Carl Sagan, *The Earth as a Planet*, The Royal Institution Christmas Lecture (1977), <https://www.youtube.com/watch?v=aAxvxIOwnWM>.

⁴ See *infra* discussion in text in Part I.

because divorce law has largely been guided by societal judgments about women's roles and women's power to decide for themselves whether to end a marriage.

Part II delineates how the ghosts of the past continue to shape divorce in America, such that the barriers to divorce exist even in the no-fault world. As of November 2024, when this article was written, all fifty states and the District of Columbia have no-fault divorce statutes, yet significant variations exist and there is no settled right to divorce without proving at least some fault in all but four United States jurisdictions. Jurisdictions are categorized into four clusters: 1) "Hybrid Jurisdictions" that retained their fault grounds alongside no-fault grounds for divorce; 2) supposedly pure "No-Fault Jurisdictions," most of which actually involve some fault because they permit trials on the cause of action like that described above; 3) "Pre-Divorce Separation States," which do not scrutinize parties' reasons for divorce but may still impose significant barriers to exit; and 4) jurisdictions that may actually require findings of fault, which include those states that have covenant marriages and those that require both parties to consent before a court can grant a divorce without a finding of fault. The current patchwork of divorce legislation reflects the push and pull between modern-day liberalizers and a growing host of politicians and activists arguing for a return to fault-based regimes out of concern that liberal divorce harms families and children.

From the vantage point of family law practitioners, no-fault divorce is a generally better policy for clients who are seeking to free themselves from their marriages as painlessly as possible. But this article does not set out to argue that cause. The proposition that individuals have rights to exit their marriages without proving fault (even if fault is considered in custody or economic considerations) is the premise—and the promise—behind every state's no-fault divorce statute. It is the current state of matrimonial practice and, generally, it serves clients best not to question whether, at the end of their proceeding, they will remain in a marriage that at least one spouse believes is dead enough to have merited a divorce complaint.⁵

⁵ This, of course, assumes lawyers are not representing parties who seek to keep their spouses trapped in marriages from which they want to exit.

Ultimately, no-fault divorce has always been about people's lives—the lives of those who are chained to troubled marriages, their children, and all those touched by their divorce litigation. Legal restrictions on the right to divorce implicate many of the same concerns as forced marriage. Both invite abuse. After separation, litigation is one of the few remaining ways a divorce-seeking spouse remains trapped in the marital relationship, and no litigation speaks to such entrapment more than forcing the divorce-seeking spouse to fight for his or her right to leave what would be a forced marriage if divorce is not granted.⁶ While the American no-fault divorce revolution has brought significant progress, there is still much room for improvement.

I. The History of American Divorce

What do Henry VIII and Ronald Reagan have in common? They both ushered in new laws because of their own experiences in the abrogation of their first marriages. Henry VIII, of course, famously broke with the Roman Catholic Church when the Pope refused to annul his marriage to Catherine of Aragon, which resulted in Parliament's Act of Supremacy in 1534 and ushered in the Protestant reformation of England.⁷ As significant as this was for Henry VIII and his five subsequent wives, it did not liberalize divorce laws for anyone else at the time.⁸

For centuries before and after that time, divorce was essentially a legal chastity belt fastened most tightly on women. While men could divorce on the grounds of their spouses' adultery, women could not do the same.⁹ Restrictions on divorce ensured women's economic and social dependency on men. Historically, such restrictions fulfilled two gendered objectives: reinforcing

⁶ See, e.g., Emmaline Campbell, *How Domestic Violence Batterers Use Custody Proceedings in Family Courts to Abuse Victims, and How Courts Can Put a Stop to It*, 24 UCLA WOMEN'S L.J. 41, 42 (2017); Lisa Aronson Fontes, *It's Post-Separation Legal Abuse, Not High Conflict Divorce*, PSYCH. TODAY (Jan. 18, 2022).

⁷ See generally ANTONIA FRASER, *THE WIVES OF HENRY VIII* (1993); *The Reformation Parliament*, The History of Parliament, <https://www.historyofparliamentonline.org/schools/content/parliament/ks3-reformation-parliaments-reformation-parliament>.

⁸ See generally *The Reformation Parliament*, *supra* note 7.

⁹ See *infra* discussion in text at notes 27 & 40.

wives' subordination to their husbands and protecting women from "the most harmful implications of their inferior status."¹⁰

In the United States, until California enacted America's first no-fault divorce legislation in 1969, divorce had in America always required the would-be exiting party to prove the other's fault. Fault-based regimes were generally applied with a double standard, even though most were facially gender-neutral, where "women were subject to much stricter standards of purity than men."¹¹ A single act of infidelity by a man was often insufficient to set a wife free; not so the other way around.¹² One New Jersey court in 1876 held that a husband's forcing himself sexually on his wife, whose medical condition had rendered it extremely painful for her, was not sufficiently "grave and weighty" to warrant her marital freedom.¹³

Some writers have speculated that California Governor Ronald Reagan signed the nation's first no-fault divorce law in 1969, ostensibly eliminating the need for parties to fabricate spousal wrongdoing to pursue a divorce and instead permit parties to merely cite irreconcilable differences, because he was angry that his first wife, actress Jane Wyman, had sued him for divorce in 1948 on the ground of "mental cruelty."¹⁴ Eleven years after signing that

¹⁰ RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* 172, 179 (1988) (arguing that fault divorce envisioned that women needed not equality, only paternalistic protection from the worst physical and moral effects of their marital subordination); Karin C. Yefet, *Divorce as a Formal Gender-Equality Right*, 22 U. PA. J. CONST. L. 793, 807 (2020); see also Joanna Alexandra Norland, *When the Vow Breaks: Why the History of French Divorce Law Sounds a Warning About the Implications for Women of the Contemporary American Marriage Movement*, 17 WIS. WOMEN'S L.J. 321, 332, 346 (2002) (observing that while opponents of divorce "contended that they aimed to protect women from abandonment, the focus of their concerns was the potential of the wife to disrupt the social order by abandoning the nest.").

¹¹ Yefet, *supra* note 10, at 809-10.

¹² *Id.*

¹³ *English v. English*, 27 N.J. Eq. 71 (N.J. Super. Ct. 1876). Upon appeal, the court ruled: "Our action is founded on the history of the married life of these parties, the affection this husband has always manifested for his wife, and his repentance for his misconduct; so far as we can judge of human conduct he is sincere, and looking at the entire case, with its own peculiar circumstances, we are of the opinion that this divorce should now be refused." *English v. English*, 27 N.J. Eq. 579 (1876).

¹⁴ See, e.g., W. Bradford Wilcox, *The Evolution of Divorce*, 1 NAT'L AFF. (Fall 2009), <https://www.nationalaffairs.com/publications/detail/the-evolution-of-divorce>; Patt Morrison, *California Settled the No-Fault Divorce Question*

no-fault divorce legislation, Ronald Reagan was elected the first divorced President of the United States. By 1979, forty-seven states had adopted some form of no-fault divorce, and by 1985, all but one state—New York—had done so.¹⁵ New York joined the other forty-nine states in 2010.¹⁶

There has been regressive movement as well, including calls by political leaders and commentators, including the Speaker of the U.S. House of Representatives, to end no-fault laws, and consideration by various state legislative bodies of doing so.¹⁷ This section reviews the history of American divorce to put into context today's "some fault" divorce landscape, which will be discussed in Part II.

A. *The Roots of American Divorce Law*

At the time of English colonists' arrival in Virginia and Massachusetts Bay Colony in the early seventeenth century, virtually no mechanism in England existed to dissolve the bonds of matrimony; it was a rare privilege granted primarily to the upper classes and was generally accessible only to men. In England, ecclesiastical courts, not judicial courts, had granted annulments and divorces "*a mensa et thoro*" (i.e., from table and bed), but neither severed the marital tie, thereby prohibiting remarriage.¹⁸ It was merely a separation that was available only on the gross misconduct of the other spouse, and it put women

Decades Ago. Why Is It Back in the News?, L.A. TIMES, May 24, 2024, <https://www.latimes.com/california/story/2024-05-24/california-settled-the-no-fault-divorce-question-decades-ago-why-is-it-back-in-the-news>.

¹⁵ New York was the last state to adopt a no-fault regime—in 2010. *See, e.g.*, Lauren Guidice, Note, *New York & Divorce: Finding Fault in a No-Fault System*, 19 J. L. & POL'Y 787, 788-89 (2011) (noting that New York's no-fault legislation "comes twenty-five years after South Dakota, the most recent state to pass a no-fault divorce law, did so in 1985"); *Paterson Signs No-Fault Divorce Bill*, N.Y. TIMES, Aug. 16, 2010, at A14.

¹⁶ *Id.*

¹⁷ Morrison, *supra* note 14; AJ Willingham, *What Is No-Fault Divorce, and Why Do Some Conservatives Want To Get Rid of It?*, CNN.COM, Nov. 27, 2023, <https://www.cnn.com/2023/11/27/us/no-fault-divorce-explained-history-wellness-cec/index.html>.

¹⁸ K. Kelly Weisberg, "*Under Greet Temptations Heer*": Women & Divorce in Puritan Massachusetts, 2 FEMINIST STUD. 183, 185 (1975).

at a disadvantage courtesy of coverture laws that did not allow them to hold any assets, whether earned or inherited, in their own name. Only parliamentary divorces, which were rarely granted,¹⁹ terminated a marriage.²⁰

Puritans who settled the Massachusetts Bay Colony adopted the Reformation view that marriage was a civil contract based on the mutual consent of the parties, and accordingly, divorce should be under the jurisdiction of civil courts rather than ecclesiastical ones.²¹ By the mid-seventeenth century, in what would become the Commonwealth of Massachusetts, courts were empowered to hear and determine all causes of divorce.²² The most prevalent

¹⁹ *Id.* The most notorious request for a divorce by act of Parliament concerned Henry VIII's divorce from Catherine of Aragon, after the Pope refused to annul the union. Eventually, it was the Archbishop of Canterbury, an appointee of Henry, who granted an annulment in 1534—after Parliament, at Henry's behest, declared the Church of England the official religion, and named Henry as its Supreme Head, thereby severing ties with the Catholic Church. Notwithstanding Henry's five subsequent marriages, it was not until 1688 that remarriage was permitted following a parliamentary divorce. These divorces remained rare because of the exorbitant costs involved, rendering them available to only the upper classes—and generally only to men. *Id.* at 184.

²⁰ *Id.*

²¹ Judith Areen, *Uncovering the Reformation Roots of American Marriage & Divorce Law*, 26 YALE J.L. & FEMINISM 29, 30 (2014) (“[C]olonists were persuaded to rely for the time being on judicial rather than legislative oversight of family matters; not only did magistrates continue to perform marriages in Massachusetts Bay without explicit legislative authorization, but colonial courts, in clear violation of the ecclesiastical laws of the Church of England, began granting divorces in 1643.”). Areen points out that while Martin Luther was originally against divorce, “by 1522, he changed his mind and declared that there is a scriptural support for divorce on the grounds of either adultery or desertion.” *Id.* at 35 (citing Martin Luther, *The Estate of Marriage*, in 45 LUTHER'S WORKS: II THE CHRISTIAN IN SOCIETY 17, 30-33 (Walter I. Brandt ed., trans., Fortress Press 1962) (1522)). Unlike prevailing Catholic dogma, Luther's view also proclaimed that marriage should be for companionship and love, not merely for purposes of procreation, *id.* at 40, and that marriage is a contract, rather than a sacrament, that should be controlled by secular, rather than “greedy” religious, authorities, *id.* at 40-41 (citing Martin Luther, *The Babylonian Captivity of the Church*, in 36 LUTHER'S WORKS: II WORD AND SACRAMENT 3, 97 (Abdel Ross Wentz ed., A.T.W. Steinhauser trans., F. Ahrens & A. Wentz revs., Fortress Press 1959) (1520)).

²² A BIOGRAPHICAL SKETCH OF THE LAWS OF MASSACHUSETTS COLONY FROM 1630 TO 1686 IN WHICH ARE INCLUDED THE BODY OF LIBERTIES OF 1641 AND THE RECORDS OF THE COURT OF ASSISTANTS 1641-44, at 14 (William H. Whitmore, ed., Rockwell & Churchill, City Printers, 1890) [hereinafter A BIOGRAPHICAL SKETCH].

grounds for divorce were desertion, adultery, incest, and extreme cruelty; the most prevalent causes for voiding a marriage (annulment) were bigamy, affinity,²³ and husband's impotence.²⁴ In the 1600s, the Massachusetts and Connecticut colonies each approved about one divorce per year.²⁵

Although some argue that the first divorce in America was granted to Elizabeth Luxford in 1639,²⁶ that was an annulment and the first true divorce was granted to Anne Clarke in 1643 in Boston, on the grounds of adultery and desertion, but only because the adultery was accompanied by the ground of desertion *and* her husband's statement under oath that he had no plans to return to her.²⁷ In Massachusetts between 1639 and 1692, it appears that 31 of the 40 petitions for divorce or annulment were granted, and of the 143 divorce petitioners who filed for divorce between 1692 and 1774, 82 petitions were granted either a divorce, annulment, or separation.²⁸

The first codified provision for something like equitable distribution appears to have been a 1641 Massachusetts law stating

²³ "Affinity" is typified in modern consanguinity laws, which every state and territory in the United States has adopted in some form. Most states confine the restriction to blood relatives of varying degrees, but some states still prohibit marriages between in-laws and other non-blood relatives.

²⁴ GEORGE ELLIOT HOWARD, 2 A HISTORY OF MARITAL INSTITUTIONS 333 (Table) (U. of Chicago Press 1904). This table was gleaned, in part from A BIOGRAPHICAL SKETCH, *supra* note 22, which was published by Order of the City Council of Boston.

²⁵ Morrison, *supra* note 14.

²⁶ See, e.g., *Colonial Divorce Was Not an Unheard-of Act*, FLAG FAMILY LAW BLOG (Oct. 15, 2017), <https://www.flagfamilylaw.com/blog/2017/october/colonial-divorce-was-not-an-unheard-of-act>. ("However, no divorces were granted until 1638 [sic], when Mrs. James Luxford sued on account of her husband's bigamy."); Cristina Egana, *The Luxford Legacy: The First Divorce in American History*, LEVEY LAW GROUP BLOG (Sept. 14, 2023), <https://thelevylawgroup.com/the-luxford-legacy-the-first-divorce-in-american-history/> ("While some sources erroneously credit Denis and Anne Clarke with the first recorded divorce in 1643, it was actually a couple by the names of James and Elizabeth Luxford who hold this dubious honor. Their divorce proceedings began on December 3, 1639, in the Massachusetts Bay Colony Court of Assistants.").

²⁷ Egana, *supra* note 26 (noting "women were required to prove multiple grounds while men needed only one").

²⁸ GLENDA RILEY, DIVORCE: AN AMERICAN TRADITION 16-17 (Oxford U. Press 1991).

that a wife, assuming she was an “innocent party,” would retain her dower rights if her husband died and did not leave her “a competent portion of his estate.”²⁹ Note, however, that adultery was a capital offense punishable by death.³⁰ The Massachusetts legislature adopted legislation in 1692 affirming the principle of civil, as opposed to ecclesiastical, marriage and divorce.³¹ Connecticut had done so in 1665 when it united with New Haven to become a single colony, authorizing its Court of Assistants, later known as Superior Court, to grant divorces on the basis of fraudulent contract, adultery, absence of seven years’ duration, or willful desertion for a period of three years.³² Rhode Island passed its divorce statute in 1650, authorizing the General Assembly to grant divorces on a single cause of action: adultery.³³

Divorce records during the colonial period in the middle colonies are fragmentary and divorce statutes were largely non-existent.³⁴ New York’s legal system evolved from its initial Dutch system to a hybrid of Dutch and English common law.³⁵ Throughout the middle colonies, attitudes toward divorce were more akin to the Southern Colonies’ conservatism than to New England’s broader liberalism.³⁶ New Jersey’s statute book was silent on divorce, but Pennsylvania appears to have authorized bills for complete dissolution.³⁷

The Southern Colonies’ conservatism, practically, meant no true divorces. Virginians, unlike their New England counterparts,

²⁹ A BIOGRAPHICAL SKETCH, *supra* note 22, at 51. Interesting to note: the only other provision pertaining to women was: “Everie married woeman shall be free from bodilie correction or stripes by her husband, unlesse it be in his owne defence upon her assault. If there be any just cause of correction complaint shall be made to Authoritie assembled in some Court, from which onely she shall receive it.” *Id.*

³⁰ *Id.* at 55 (“94. Capital Laws. 9. If any person committeth Adultery with a married or espoused wife, the Adulterer and Adulteress shall surely be put to death.”).

³¹ RILEY, *supra* note 28, at 13-14.

³² *Id.* at 19.

³³ *Id.* at 22.

³⁴ *Id.* at 23.

³⁵ See Joan R. Gunderson & Gwen V. Gampel, *Married Women’s Legal Status in Eighteenth-Century New York & Virginia*, 39 WM. & MARY Q. 1, 115 (Jan. 1982); see also HOWARD, *supra* note 24, at 383-85.

³⁶ HOWARD, *supra* note 24, at 376.

³⁷ *Id.* at 385-86.

clung to traditional Anglican notions about the sanctity of marriage and the resolution of problems in the marriage.³⁸ Only consensual separation and a form of separate maintenance were available.³⁹ Ecclesiastical courts allowed “divorce from bed and board,” which did not permanently sever the bonds of matrimony and provided limited grounds, such as female adultery or male cruelty accompanied by some other cause.⁴⁰ Shortly before America declared her independence from England, around 1772, Thomas Jefferson began preparing to file a case before the Virginia General Assembly for a permanent divorce (*a vinculo matrimonii*) on behalf of Dr. James Blair, not on traditional ecclesiastical grounds like adultery, because that was not an issue, but because his 19-month marriage was turbulent. Perhaps this would have ushered permanent divorce into the southern colonies, but Blair died before the petition was submitted. The document apparently contained many of the same concepts Jefferson would utilize in his draft of the Declaration of Independence a few years later, based on independence and the pursuit of happiness.⁴¹

Other southern colonies also adopted the English way of looking at divorce, including predominately Roman Catholic Maryland, as opposed to New England’s Reformation approach to marriage as a civil contract. During the colonial period, the Maryland legislature considered and rejected adopting divorce legislation, although it did order separate maintenance for aggrieved wives.⁴² Because of a lack of legislation concerning divorce throughout the southern colonies, separation, both formal and informal, appears to have been widespread.⁴³

³⁸ E.g., Jan Lewis, *Domestic Tranquility and the Management of Emotion Among the Gentry of Pre-Revolutionary Virginia*, 39 WM. & MARY Q. 1, 135 (Jan. 1982).

³⁹ GEORGE E. HOWARD, 3 A HISTORY OF MATRIMONIAL INSTITUTIONS 31 (U. Chicago Press 1904), available online through Project Gutenberg at <https://www.gutenberg.org/cache/epub/49276/pg49276-images.html>.

⁴⁰ Glenda Riley, *Legislative Divorce in Virginia, 1803 - 1850*, J. EARLY REPUBLIC 51, 52 (Spring 1991).

⁴¹ *Id.* at 53-54.

⁴² James S. Van Ness, *On Untieing the Knot: The Maryland Legislature and Divorce Petitions*, 67 MD. HIST. MAG. 2, 171-73 (Summer 1972).

⁴³ RILEY, *supra* note 28, at 28.

B. *The Development of Divorce Law in the United States from 1776 to the 1960s*

Although the Supreme Court has established the right to marry as fundamental in all states,⁴⁴ marriage is and has been considered a contractual relationship subject to state regulation under states' police powers reserved by the Tenth Amendment.⁴⁵

Following independence, states continued to apply the English common law doctrine of coverture, pursuant to which once a woman married, she was treated as non-existent legally and her rights were "suspended" or "consolidated" into those of her husband's.⁴⁶ In other words, it was a status designed by men to give them absolute authority over all aspects of the marital-familial relationship: make all decisions for the family, physically chastise wives if they disagreed with or "disobeyed" husbands, supervise wives' actions, dominate wives' bodies, determine whether wives could bear children, and control wives' domestic labor.⁴⁷ Attitudes in the southern colonies—with the notable exception of South Carolina, which had no divorce statute even into the late nineteenth century—began to change to be more in line with the New England approach, although it was more likely influenced by liberalization

⁴⁴ See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 646 (2015) (same-sex couples have the right to marry); see also *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (inter-racial couples have the right to marry); *Turner v. Safley*, 482 U.S. 78, 96 (1987) (prisoners have a right to marry); *Skinner v. Okla. ex rel. Williamson*, 316 U.S. 535, 541 (1942) (forced sterilization of criminals is unconstitutional because "marriage and procreation are fundamental to the very existence and survival of the race").

⁴⁵ *Loving*, 388 U.S. at 7 (holding that while the lower court found that "marriage has traditionally been subject to state regulation without federal intervention, and, consequently, the regulation of marriage should be left to exclusive state control by the Tenth Amendment," such state regulation is not unlimited and must not interfere with the equal protection and due process requirements of the Fourteenth Amendment).

⁴⁶ Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude, and the Thirteenth Amendment*, 4 YALE J. L. & FEMINISM, 207, 207, 208 n.9 (1991).

⁴⁷ Yefet, *supra* note 10, at 480-81; see also Nancy F. Cott, *Divorce and the Changing Status of Women in Eighteenth-Century Massachusetts*, 22 WM. & MARY Q. 586, 611-12 (1976) (noting that wives owed husbands strict obedience in all matters); Reva B. Siegel, *Valuing Housework: Nineteenth-Century Anxieties About the Commodification of Domestic Labor*, 41 AM. BEHAV. SCIENTIST 1437, 1462-65 (1992) (noting that a wife's duty at common law was to submit to and serve her husband).

of divorce happening in England than by the practices of the northern colonies.⁴⁸

States in the post-revolutionary period came to legislate and regularly, even if not frequently, grant divorces. New York adopted a general divorce law in 1787. The only ground was adultery, but it did provide for complete dissolution by an innocent spouse “in like manner as if the party convicted was actually dead,” and it authorized the chancellor to order an award for the care and maintenance of children and for an innocent wife’s alimony.⁴⁹ While New Jersey’s divorce history before Independence paralleled New York’s, following the adoption of the Constitution, the state liberalized its divorce law to provide for divorce on the grounds of consanguinity, adultery, desertion for a term of seven years, or bigamy, and for divorce from bed and board only on the ground of extreme cruelty by either spouse.⁵⁰

Pennsylvania enacted its divorce statute in 1785, providing for complete divorce from the bonds of matrimony only where, at the time of marriage, a party was impotent or otherwise physically incompetent; a party knowingly entered into a bigamous marriage; a spouse committed adultery; or a spouse willfully and maliciously abandoned the other spouse for four years without just cause.⁵¹ Those four causes of action only remained in force throughout the nineteenth century; for other causes—namely, a husband’s abandonment of his family, turning his wife out of the house, extreme cruelty that endangered a wife’s life, or visiting “such indignities on her person as to render her condition intolerable and life burdensome, thereby forcing her to withdraw from his house and family”—only separation was available.⁵² Delaware did not authorize absolute divorce until 1832, when its superior court was authorized to grant such in its discretion, or partial divorce or merely alimony, in cases of bigamy, willful abandonment for three

⁴⁸ See generally HOWARD, *supra* note 39, at 31-39.

⁴⁹ *Id.* at 102.

⁵⁰ *Id.* at 106 (citing Act of Dec. 2, 1794: Paterson, LAWS OF N.J., 133, 134 (1800)).

⁵¹ *Id.* at 108 (citing Act of Sept. 19, 1785: LAWS OF THE COM. OF PA., 102-106 (1803)).

⁵² *Id.*

years, male impotency at the time of marriage; adultery, and extreme cruelty.⁵³

Maryland was the first southern state to grant a divorce and, in 1790, freed John Sewell from the bonds of matrimony after his wife, Eve, had borne a mulatto child from an adulterous relationship.⁵⁴ By the 1830s, the Maryland legislature was granting about thirty divorces a year.⁵⁵ Virginia did not have a divorce law until 1803;⁵⁶ by 1841, the grounds for absolute divorce in Virginia included desertion, cruelty, adultery, abandonment, “just cause for bodily fear,” and “any other cause for which a limited divorce is authorized by the principles of ecclesiastical law,” which likely meant coercion of a minor and consanguinity/affinity.⁵⁷

In the late nineteenth into the twentieth century, several enterprising states, mostly western ones, capitalized on the barriers imposed on divorce in the rest of the country and revised their residency requirements to shorten the length of time a person must reside in the state to satisfy the residency requirement for a divorce. This development allowed for migratory divorce, by which people would move to the state temporarily for the express purpose of obtaining a quick divorce.⁵⁸ Before Nevada became known as the place to go after it allowed quick divorces with short residency periods in 1931, South Dakota had been known as the Divorce Colony, particularly during the late nineteenth and early twentieth centuries, when most other states had onerous divorce laws.⁵⁹ Even before it became a state in 1889, the Dakota Territory had the country’s biggest increase in divorces in a four-year period between 1882 and 1886, a rate of 6,691%, and Sioux Falls became a top divorce destination, with women filing twice as often as

⁵³ *Id.* at 112 (citing LAWS OF DEL. 148-50 (1832)).

⁵⁴ Van Ness, *supra* note 42, at 174-75. Eve’s punishment: “his wife and her child were condemned to servitude, and sold.” *Id.* at 175.

⁵⁵ See generally *id.* at 171-75.

⁵⁶ RILEY, *supra* note 28, at 36.

⁵⁷ *Id.* at 41.

⁵⁸ See David F. Cavers, *Migratory Divorce*, 16 SOC. FORCES 96-107 (1937).

⁵⁹ Dave Kindy, *When Divorce Was Widely Banned, Desperate Women Went to South Dakota*, WASH. POST (July 2, 2022), <https://www.washingtonpost.com/history/2022/07/03/south-dakota-divorce-capital/>.

men.⁶⁰ Accordingly, the divorce rate rose considerably faster in the American West than it did elsewhere in the United States.⁶¹

Widespread concern about these rising divorce rates led to demands for restrictive measures and uniform laws that would limit divorce throughout the nation.⁶² In 1906, President Theodore Roosevelt proposed a constitutional amendment to enable Congress to set national marriage and divorce standards, but the effort failed. After World War I and in the interwar years, the divorce rate rose, notwithstanding a temporary pause in that rise during the Great Depression in the 1930s.⁶³ Meanwhile, during this same period, American jurisdictions had vastly different disparate divorce laws. Forty-seven states and the District of Columbia granted divorces for adultery; South Carolina banned absolute divorce in its constitution; forty-six states permitted desertion or abandonment grounds; forty-two permitted cruelty; thirty-eight permitted drunkenness or addiction to drugs; and forty-two permitted imprisonment for a felony.⁶⁴ The disparities extended to migratory divorce. In Nevada, one could file a petition for divorce after only six weeks of residency; in Massachusetts, one had to wait five years.⁶⁵

These disparities along with the rising divorce rates explain the extant social pressures that were alleviated by the Supreme Court's 1942 decision in *Williams v. North Carolina*, which relaxed the minimum contacts standard in divorce cases and held that any decree obtained in a state in which only the plaintiff is domiciled is entitled to the protection afforded by the Fourteenth Amendment's full faith and credit clause.⁶⁶ Under this new constitutional

⁶⁰ *Id.*

⁶¹ See generally Henry Pang & Sue Mary Hanson, *Highest Divorce Rates in Western United States*, 52 SOCIO. & SOC. RSCH. 2, 228-36 (Jan. 1968); see also generally RILEY, *supra* note 28, at 85-107.

⁶² Laura Oren, *No-Fault Divorce Reform in the 1950s: The Lost History of the "Greatest Project" of the National Association of Women Lawyers*, 36 LAW & HIST. REV. 4, 847, 857-58 (Nov. 2018).

⁶³ *Id.* at 861.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. amend. XIV, art. IV, § 1.

standard, a divorce that was afforded full faith and credit in other jurisdictions made it possible for one spouse to obtain a divorce without the other spouse's consent or even presence at the proceedings.⁶⁷ Before *Williams*, a party could be considered married in one state, but not married in another, or, worse yet, children of a union might be legitimate in one state but not in another if one of the divorced parties remarried and had other children.⁶⁸

C. The “No-Fault” Revolution

The pressures created by changes in societal expectations about marriage and divorce, and concomitant rising divorce rates, together with the vast disparities between the different divorce laws in different states, made the country receptive to both more uniform and more liberalized divorce laws.⁶⁹ As Professor Laura Oren writes, “the law on the books was growing ever more out of sync with the practice of law as well as with popular expectations about marriage and divorce.”⁷⁰

In 1947, the National Association of Women Lawyers (“NAWL”) undertook to draft the first model bill for a no-fault divorce that would no longer require a “wronged person” for a divorce to be granted.⁷¹ It was not alone. In 1948, President Harry Truman convened a Family Life Conference,⁷² for which the American Bar Association (ABA) accepted the invitation to submit a report on American divorce laws.⁷³ The committee that authored the report concluded that the laws were a “mess” and that “society, by and large, has practically made up its mind to ignore the law.”⁷⁴ The final report of the ABA's delegation to

⁶⁷ See *Williams v. North Carolina*, 317 U.S. 287, 299 (1942) (“[I]t is plain that each state, by virtue of its command over its domiciliaries and its large interest in the institution of marriage, can alter within its own border the marriage status of the spouse domiciled there, even though the other spouse is absent.”).

⁶⁸ See James D. Sumner, Jr., *Full Faith & Credit for Divorce Decrees—Present Doctrine and Possible Changes*, 9 VAND. L. REV. 1, 1-5 (1955).

⁶⁹ See Oren, *supra* note 62, at 863.

⁷⁰ *Id.*

⁷¹ Ashawnta Jackson, *The Lost History of No-Fault Divorces*, JSTOR DAILY (Dec. 5, 2022), <https://daily.jstor.org/the-lost-history-of-no-fault-divorce/>.

⁷² Oren, *supra* note 62, at 865.

⁷³ *Divorce Laws: Remedies for Abuses and Scandals Are Sought*, 34 AM. BAR ASS'N J. 195, 196 (Mar. 1948).

⁷⁴ *Id.*

the conference explained that a dissolving family was already broken before divorce, rather than by that legal remedy, and it was therefore necessary to change from a focus on punishment to one based on treatment.⁷⁵ By 1952, the NAWL published in its *Women Lawyers Journal* its “Proposed Uniform Divorce Bill” that did not incorporate genuine no-fault grounds, but sought to supplant fault with a “therapeutic approach” that encouraged spouses “to collaborate in rebuilding for the future welfare of the family.”⁷⁶ Versions of the NAWL’s model bill were introduced in a handful of states between 1953 and 1958 without success.⁷⁷

Although NAWL’s model was not the basis for California’s no-fault Family Law Act in 1969 or the Uniform Marriage and Divorce Act (UMDA) adopted by the National Conference of Commissioners of Uniform State Laws (NCCUSL) the year after,⁷⁸ it is no coincidence that a women’s organization spearheaded the effort to enact no-fault divorce legislation and, at the same time, was not ultimately successful in having their version enacted. No-fault divorce had long been a complicated woman’s rights issue. One of the early vocal champions of more liberal divorce laws was nineteenth-century women’s rights advocate Elizabeth Cady Stanton, who proclaimed that “there is no other human slavery that knows such depths of degradation as a wife chained to a man whom she neither loves nor respects, no other slavery so disastrous in its consequences on the race, or to individual respect, growth and development.”⁷⁹

⁷⁵ *Id.* (concluding that that “the premise of our divorce laws is punishment,” which “[u]nder modern conditions . . . leads to abuses and downright injustice, and “[t]heir collateral product is to force normally decent people to commit perjury or adultery”); see also Oren, *supra* note 62, at 869 (citing Paul W. Alexander, *Family Life Conference Suggest New Judicial Procedures and Attitudes toward Marriage and Divorce*, 32 J. AM. JUDICATURE Soc’y 38 (1948)).

⁷⁶ Oren, *supra* note 62, at 877 (citing *Toward Uniform Divorce Laws*, WOMEN LAW. J. 16 (“Introduction”) (1952)).

⁷⁷ *Id.* at 878.

⁷⁸ *Id.* at 849 (describing how the NCCUSL first refused to consider the NAWL’s proposal because the NAWL was not a section of the American Bar Association, and even after it surpassed that hurdle by establishing the Family Law Section, the NCCUSL “continued to bypass the women lawyers and their bill”).

⁷⁹ Elizabeth Cady Stanton, *Home Life* (1875), in THE ELIZABETH CADY STANTON-SUSAN B. ANTHONY READER 133 (Ellen Carol DuBois, ed., rev. ed. 1992).

Stanton and other liberal thinkers believed that the key tenets of emancipation and freedom for women were “self-ownership within marriage and a right to divorce if the marriage became degrading.”⁸⁰ When Stanton and approximately 300 other individuals interested in women’s rights gathered at Seneca Falls, New York in 1848, that body identified “marital bondage” and restrictions on escape therefrom as the major sources of women’s subordination.⁸¹ By 1860, at the Tenth National Women’s Rights Convention, Stanton advocated no-fault divorce, which she felt would eliminate “legalized prostitution of coerced marital intercourse and unwilling maternity.”⁸² Yet, Stanton ultimately was unable to gain support among other women’s rights activists for her proposal to liberalize divorce law.⁸³

The reason no-fault divorce was a woman’s rights issue is because at-fault divorce regimes were understood to reinforce sex-role stereotypes that created separate spheres of influence for men and women.⁸⁴ Even proving fault had two standards: for example, where adultery was the cause of action, a woman was usually required to demonstrate her husband had multiple infidelities plus some other wrong, while a man often needed to show only one adulterous encounter to obtain a divorce.⁸⁵ Moreover, judges frequently applied gender-neutral legal authority in ways that reflected their own biases regarding gender and class roles. Some of them, for example, in the context of divorce proceedings, assumed a woman was obliged to endure physical violence as a normal part of marriage. On the other hand, criminal prosecutions of physical violence were more intense for poor men, but the same violence by poor men against poor women was seen

⁸⁰ Yefet, *supra* note 47, at 485 (quoting Elizabeth B. Clark, *Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America*, 8 LAW & HIST. REV. 25, 34 (1990)).

⁸¹ *Id.* at 486 (citing JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 139 (1991)).

⁸² *Id.* (quoting Ellen Carol DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution 1820–1878*, in A LESS THAN PERFECT UNION: ALTERNATIVE PERSPECTIVES ON THE U.S. CONSTITUTION 104, 111 (Jules Lobel, ed., 1988)).

⁸³ See generally Clark, *supra* note 80, at 38-43.

⁸⁴ Yefet, *supra* note 10, at 807-09.

⁸⁵ *Id.* at 810.

as a reason to limit women's entitlement to marital freedom.⁸⁶ Another example of this mindset, was allowing the defense of condonation to block a battered woman's divorce petition in New York State. Even though the court found that the husband had "choked [his wife]; committed severe personal violence upon her, and struck her a blow with his fist upon the left temple; severing the temporal artery, and endangering [her] life," it nevertheless found that because the wife had stayed in the marital home, she had "implic[d] a forgiveness of such treatment."⁸⁷

Such double standards in New York divorce cases continued into the twenty-first century, at least until New York finally adopted a no-fault provision in 2010. For example, an appellate court in New York reversed a trial court's grant of divorce to a poor, battered wife on the ground of cruel and inhuman treatment despite her having proved that her husband verbally and physically abused her, holding her continued cohabitation with her abuser against her despite the poverty that kept her tied to him.⁸⁸ Similarly, a wife subjected to physical abuse and marital rape from her long-time husband, who slammed her up against walls repeatedly, was granted a divorce by the trial court, but the appellate court reversed, ruling that "[r]eprehensible and highly offensive behavior . . . is not necessarily sufficient to establish the cruel-and-inhuman-treatment ground for divorce."⁸⁹

In addition to what often amounted to a higher burden for women, at-fault divorce also encouraged perjury, often with the assistance of legal counsel, by couples who wanted to end their marriages despite the fact that neither spouse had engaged in the required misconduct.⁹⁰ One legal scholar concluded that this widespread practice of testifying to fabricated acts of cruelty, desertion, or adultery in a fault-based system "endanger[ed] the

⁸⁶ Siegel, *supra* note 47, at 2134.

⁸⁷ *Davies v. Davies*, 37 N.Y. 45, 46, 48 (N.Y. Sup. Ct. 1869).

⁸⁸ *Palin v. Palin*, 624 N.Y.S.2d 630, 632 (N.Y. App. Div. 1995).

⁸⁹ *Gross v. Gross*, 836 N.Y.S.2d 166, 167 (N.Y. App. Div. 2007) (holding that "in a marriage of long duration a 'high degree' of proof of cruel and inhuman treatment is required").

⁹⁰ See Peter N. Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 270-71 (1997); see also Max Rheinstein, *The Law of Divorce and the Problem of Marriage Stability*, 9 VAND. L. REV. 633 (1956); Walter Wadlington, *Divorce Without Fault Without Perjury*, 52 VA. L. REV. 32, 32 (1966) (arguing that a fault-based divorce regime is inherently dishonest).

integrity and reputation of the bar, [brought] into disrespect the law and its administrators, and create[d] an undemocratic discrimination between those who can, and those who cannot, pay for the services of a divorce specialist.”⁹¹

Law professor Julia Simon-Kerr believes that judges who heard divorce cases in a fault-based system were aware that perjury was routine.⁹² She opined that there were a number of factors that made it obvious that perjury, collusion, and fraud were involved in divorce proceedings, including the large number of uncontested cases, large percentage of unnamed co-respondents, large numbers of defendants and hotel room women who opened the door while scantily clothed, the common occurrence of a defendant’s friend testifying against him, and the period between the alleged act of adultery and service of process was unusually short.⁹³ As one New York Supreme Court judge described a typical divorce case: “She is always in a sheer pink robe. It’s never blue—always pink. And he is always in his shorts when they catch them.”⁹⁴ Given these blatant lies that were used to satisfy legal standards, it is hardly surprising that practitioners called for reforms to save the integrity of the legal process and to allow “humane and dignified divorce to couples who were certain that their marriage was dead.”⁹⁵

California’s Family Law Act arose from the state legislature’s inquiry into divorce reform in 1963, the same year Betty Friedan first published her landmark feminist work, *The Feminine Mystique*, as well as from the Governor’s Commission on the Family established by Governor Jerry Brown in 1966, which proposed the

⁹¹ Rheinstein, *supra* note 90, at 634. Professor Rheinstein noted that many in the legal profession at the time were concerned about the widespread use of collusive practices in divorce cases, the fabricated evidence presented as true, material evidence withheld, and perjured witness oaths.

⁹² Julia Simon-Kerr, *Systemic Lying*, 56 WM. & MARY L. REV. 2175, 2192 (2015).

⁹³ *Id.* (quoting Note, *Collusive and Consensual Divorce and the New York Anomaly*, 36 COLUM. L. REV. 1121, 1130 & n.65 (1936) (citing statistics showing that in a sample of around 485 divorce cases, witnesses testified that the male appeared nude in 21 cases and the female appeared nude in 55 cases; the male appeared in underwear in 119 cases and the female appeared in a negligee in 67 cases)).

⁹⁴ *Id.* (citing John G. Rogers, *Divorce Court: “Nothing but Perjury and Collusion,”* N.Y. HERALD TRIB., at 19 (Oct. 1, 1965)).

⁹⁵ Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 17 (1990).

elimination of fault grounds for divorce, property division, and issues of support.⁹⁶ With the NCCUSL's UMDA promulgated the following year, "the no-fault divorce revolution had begun in earnest."⁹⁷ Within a decade of the passage of California's no-fault divorce provision, forty-seven states had already adopted some version of no-fault divorce, and by 1985, that number increased to forty nine.⁹⁸ In the four decades since, even while New York became the fiftieth state to offer no-fault divorce in 2010, there has been regressive movement as well, discussed more fully in Part II.

II. History's Ghost's in Present Day Divorce

Divorce today can be a lengthy and arduous process regardless of any challenges one spouse might bring to the other's very right to get a divorce in the first place. Disputes regarding distribution of property, spousal support, and custody take significant time and expense to resolve.⁹⁹ Undoubtedly, where the grounds for divorce are disputed as well, the divorce takes an even greater toll—it will take longer, cost more, intrude more into parties' private lives, and, where abuse is involved in the parties' relationship, keep more victims tethered to their abusers.¹⁰⁰ As discussed above,

⁹⁶ Donna S. Hershkowitz & Drew R. Liebert, Assembly Judiciary Comm., Cal. St. Legis., *The Direction of Divorce Reform in California: From Fault to No-Fault . . . And Back Again?*, <https://ajud.assembly.ca.gov/sites/ajud.assembly.ca.gov/files/reports/1197%20divorcereform97.pdf>.

⁹⁷ Oren, *supra* note 62, at 879.

⁹⁸ New York was the last state to adopt a no-fault regime—in 2010. *See, e.g.*, Guidice, *supra* note 15, at 788-89 (noting that New York's no-fault legislation "comes twenty-five years after South Dakota, the most recent state to pass a no-fault divorce law, did so in 1985"); *Paterson Signs No-Fault Divorce Bill*, *supra* note 15.

⁹⁹ *See* Christy Bieber, *The Average Cost of Divorce in 2020*, ASCENT (Nov. 16, 2020), <https://www.fool.com/the-ascent/research/average-cost-of-divorce/>; Geoff Williams, *Cost Breakdown of a Divorce*, U.S. NEWS & WORLD REPORT (Dec. 21, 2020 11:24 AM), [https://money.usnews.com/money/personal-finance/family-finance/articles/cost-breakdown-of-a-divorce -](https://money.usnews.com/money/personal-finance/family-finance/articles/cost-breakdown-of-a-divorce-); *see also* Olga Khazan, *The High Cost of Divorce*, ATLANTIC (June 23, 2021), <https://www.theatlantic.com/politics/archive/2021/06/why-divorce-so-expensive/619041/> (saying attorneys' fees alone to help with a divorce can cost \$10,000 to \$20,000).

¹⁰⁰ New York, for example, adopted no-fault divorce with the intention of addressing "[s]ubstantial evidence, derived from the public hearings . . . and professional experience . . . conclud[ing] that fault allegations and *fault trials* add significantly to the cost, delay, and trauma of matrimonial litigation and are, in

reducing these burdens has been held out as a purpose of no-fault divorce.

Yet, although every state and the District of Columbia now claim to have no-fault divorce, all but two jurisdictions—the District of Columbia and Maryland, thanks to amendments they enacted in late 2023 and early 2024—permit an objecting spouse to delay, if not completely veto, his or her spouse’s bid for freedom by inserting considerations of fault into even no-fault divorce proceedings. To reflect how this plays out, we divide the legislative landscape into the four regions discussed in the introduction to this article: 1) “Hybrid” jurisdictions; 2) supposedly pure “No-Fault Jurisdictions,” all but a few of which are more aptly characterized as “Some Fault States”; 3) “Pre-Divorce Separation States”; and 4) jurisdictions in which fault may be required.

A. *Hybrid Jurisdictions*

Thirty states provide all divorcing parties the option of proceeding on either fault grounds (such as adultery, extreme cruelty) or no-fault grounds (such as irreconcilable differences, incompatibility, or irretrievable breakdown of the marriage).¹⁰¹ In these jurisdictions, the inquiry into the grounds for divorce is

many cases, used by litigants to achieve a tactical advantage.” *Miller Commission Report to the Chief Judge of the State of New York* 18 (Feb. 2006), <https://ww2.nycourts.gov/sites/default/files/document/files/2018-06/matrimonialcommission-report.pdf> (emphasis added).

¹⁰¹ These states include: Alabama (ALA. CODE § 30-2-1); Alaska (ALASKA STAT. § 25.24.050); Connecticut (CONN. GEN. STAT. ANN. § 46B-40); Delaware (DEL. CODE ANN. tit. 13, §§ 1503-1505); Georgia (GA. CODE ANN. § 19-5-3); Idaho (IDAHO CODE ANN. §§ 32-603, 616); Indiana (IND. CODE § 31-15-2-3); Kansas (KAN. STAT. ANN. § 23-2701); Maine (ME. REV. STAT. ANN. tit. 19-A, § 902); Massachusetts (MASS. GEN. LAWS ANN. ch. 208 §§ 1, 1A); Mississippi (MISS. CODE ANN. §§ 93-5-1, 93-5-2); Missouri (MO. REV. STAT. §§ 452.305, 452.320); New Hampshire (N.H. REV. STAT. ANN. §§ 458:7, 458:7-a); New Jersey (N.J. STAT. ANN. § 2A:34-2); New Mexico (N.M. STAT. ANN. § 40-4-2); New York (N.Y. DOM. REL. LAW § 170); North Carolina (N.C. GEN. STAT. ANN. § 50-6); North Dakota (N.D. CENT. CODE § 14-05-03); Ohio (OHIO REV. CODE ANN. § 3105.01); Oklahoma (OKLA. STAT. ANN. tit. 43, § 101); Pennsylvania (23 PA. CONS. STAT. ANN. § 3301); Rhode Island (R.I. GEN. LAWS §§ 15-5-2, 15-5-3.1); South Carolina (S.C. CODE ANN. § 20-3-10); South Dakota (S.D. CODIFIED LAWS § 25-4-2); Tennessee (TENN. CODE ANN. § 36-4-101); Texas (TEX. FAM. CODE ANN. §§ 6.001-007); Utah (UTAH CODE ANN. § 81-4-405); Vermont (VT. STAT. ANN. tit. 15, § 551); Virginia (VA. CODE ANN. § 20-91); and West Virginia (W. VA. CODE §§ 48-5-201-202).

cursory if both parties agree that they are incompatible or that a similar no-fault ground exists. If they do not agree on that point, however, the divorce-resistant spouse can potentially force a trial on the existence of a fault ground.¹⁰²

Given the nature of such a system, it inevitably happens that courts find themselves mired in the details of an inefficient (to say the least) fault proceeding because one party asserts fault even though the other wishes to proceed on no-fault grounds and there is no question a divorce will be granted. Because the legislatures in Hybrid Jurisdictions have chosen to retain fault grounds for divorce, courts cannot do anything to avoid allowing parties to plead and proceed on fault grounds if they so desire.¹⁰³

To be sure, asserting fault may serve a strategic purpose in states where fault is a factor in property distribution, but even then it is not necessary to plead fault as a cause of action.¹⁰⁴ Further, in many Hybrid Jurisdictions, fault is not a factor in property distribution or alimony, so there is no conceivable purpose other than for the fault-asserting parties to have the emotional satisfaction of airing their grievances in court or the strategic benefits from delaying their spouses' freedom, their spouses' receipt of their share of the marital assets, or both.

¹⁰² Not included in this category are those states whose statutes provide a no-fault option, but allow both parties to waive it or one party to veto it because (1) the state requires the consent of both parties before no-fault divorce can be granted, or (2) it permits parties to at the time of marriage waive their future right to no-fault divorce by entering into a covenant marriage. Those states are discussed in Part D below.

¹⁰³ See, e.g., *Sadeeshkumar v. Venugopal*, 310 A.3d 689, 694 (N.J. Super. Ct. App. Div. 2024) (holding that, where the wife had pled irreconcilable differences, it was error to deny the husband's motion to amend to assert a counterclaim based on extreme cruelty and irreconcilable differences); see also *Palermo v. Palermo*, No. 2010/15824, 2011 WL 7711557, at *12, 950 N.Y.S.2d 724 (Table) (N.Y. Sup. Ct. Oct. 20, 2011) ("In deciding the grounds for divorce ..., the legislature can do what it wishes The legislature can proceed at its own speed"); *Perlberger v. Perlberger*, 626 A.2d 1186, 1193-95 (Pa. Super. Ct. 1993) (affirming the denial of divorce on fault grounds but granting the divorce on no-fault grounds).

¹⁰⁴ See *Mick-Skaggs v. Skaggs*, 766 S.E.2d 870 (S.C. Ct. App. 2014) (both parties sought divorce on the grounds of adultery where it acted as a bar to alimony, but the court granted the divorce on the no-fault ground of separation and the appellate division affirmed, holding "because the granting of a divorce to Wife on the ground of adultery would not have dissolved the marriage any more completely, we need not alter the family court's decision on this issue").

In *Rich v. Acrivos*,¹⁰⁵ a Pennsylvania court confronted that exact situation. A wife filed a complaint and the required affidavit “stating that the parties had lived separate and apart for at least two years, and that the marriage was irretrievably broken.”¹⁰⁶ The husband alleged fault-based grounds for divorce, including adultery and desertion, and appealed when the court, following a hearing, granted the divorce.¹⁰⁷ As the court commented,

[i]t is apparent . . . that Mr. Acrivos is consumed by the perceived injustice of his former wife’s actions and distressed by her ability to obtain a no-fault divorce. As difficult as it may be, Mr. Acrivos needs to accept the fact that his marriage ended in divorce, stop his relentless pursuit of his ex-wife and move forward with his life.¹⁰⁸

The appellate court further advised that the trial court could have proceeded without a hearing, under Pennsylvania’s statute that expressly permits it to do so if grounds for divorce are established under the law’s no-fault provisions.¹⁰⁹

Courts may be understandably frustrated with the inefficiency of having to try an at-fault divorce when an asserted no-fault ground is already satisfied. *Mahar v. Clark*¹¹⁰ exemplifies that. There, during a six-day trial, the court tried the cause of action where the husband had pled irreconcilable differences, and the wife had pled extreme cruelty. Given that New Jersey precludes fault from being considered in equitable distribution, it was proposed that the wife dismiss her claim for extreme cruelty to “save the time,” but she refused.¹¹¹ After the close of the husband’s case, the trial court limited the wife’s testimony on her counterclaim, such as by asking her to summarize instead of read each alleged act of cruelty and denying the wife’s request to call witnesses to establish each act of extreme cruelty.¹¹² Clearly frustrated, the judge told the wife some of her testimony was “unnecessary” and “delaying the trial,” and that he “wouldn’t allow [her] to bring[] lay witnesses on

¹⁰⁵ 815 A.2d 1106 (Pa. Super. Ct. 2003).

¹⁰⁶ *Id.* at 1107.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1109.

¹⁰⁹ *Id.* (citing 23 PA. CONS. STAT. § 3301(e)).

¹¹⁰ Docket No. A-2212-20, 2022 WL 1397373 (N.J. Super. Ct. App. Div. May 4, 2022)

¹¹¹ *Id.* at *1, *3.

¹¹² *Id.* at *8.

a cause of action.”¹¹³ The court ultimately granted a dual judgment of divorce on the grounds of irreconcilable differences, holding that the wife had “failed to produce any ‘legitimate’ or ‘substantial proofs’ supporting the claim” of extreme cruelty.¹¹⁴ The appellate court affirmed. Notwithstanding the wife’s complaint that she had been denied the opportunity to put on her proofs, the court reasoned: “The trial court . . . used its authority . . . to expedite the proceedings. . . . The court afforded defendant the opportunity to present evidence of the alleged extreme cruelty, about which defendant herself testified and gave examples.”¹¹⁵

B. *The “No Fault” (but Mostly “Some Fault”) States*

As of September 2024, the only grounds for divorce in eighteen states and the District of Columbia are no-fault grounds like incompatibility, irreconcilable differences, and, in the case of North Carolina, separation.¹¹⁶ Yet only two of these jurisdictions—Maryland and the District of Columbia—preclude a court from delaying no-fault divorce or scrutinizing and ruling on the sufficiency of a party’s reason to seek a divorce.¹¹⁷ That is, when a party in the District of Columbia or Maryland verifies that he or she seeks to end a marriage because it is broken, the court must conclude it is broken, without further delay or inquiry into whether the marriage should be maintained against the petitioning party’s wishes.¹¹⁸ This development is recent.

¹¹³ *Id.* at *7-*8.

¹¹⁴ *Id.* at *8.

¹¹⁵ *Id.* at *9.

¹¹⁶ These states are: California (CAL. FAM. CODE § 2310); Colorado (COL. REV. STAT. § 14-10-106); District of Columbia (D.C. CODE § 16-904); Florida (FLA. STAT. ANN. § 61.052); Hawaii (HAW. REV. STAT. §§ 580-41, 580-42); Illinois (750 ILL. COMP. STAT. ANN. 5/401); Iowa (IOWA CODE ANN. § 598.17); Kentucky (KY. REV. STAT. ANN. § 403.170); Maryland (MD. CODE ANN., FAM. LAW § 7-103); Michigan (MICH. COMP. LAWS ANN. § 552.6); Minnesota (MINN. STAT. ANN. § 518.06); Montana (MONT. CODE ANN. § 40-4-104); Nebraska (NEB. REV. STAT. § 42-361); Nevada (NEV. REV. STAT. § 125.010); North Carolina (N.C. GEN. STAT. ANN. § 50-6); Oregon (OR. REV. STAT. § 107.025(1)); Washington (WASH. REV. CODE ANN. § 26.09.030); Wisconsin (WIS. STAT. ANN. § 767.315); and Wyoming (WYO. STAT. ANN. § 20-2-104). In some of these states, such as California and Wyoming, insanity or incapacity are additional grounds, but these are not categorized as fault grounds for purposes of this article.

¹¹⁷ D.C. CODE § 16-904; MD. CODE ANN., FAM. LAW § 7-103.

¹¹⁸ *Id.*

Maryland amended its divorce statute to eliminate fault grounds and empower one spouse to obtain a divorce in this manner in October 2023; the District of Columbia did so effective January 2024.¹¹⁹

The other jurisdictions that lack fault grounds for divorce, as well as fifteen of the Hybrid jurisdictions—*i.e.* a total of thirty states—allow a court to inquire into the cause of action for divorce when one party objects to a no-fault divorce, *even when fault is not asserted*.¹²⁰ None of them are “pure no-fault” states; at best, they are “some fault” states because their citizens may find their right to divorce subject to a trial in which the court will determine whether they have met their burden of showing that the facts of

¹¹⁹ *Id.*

¹²⁰ Those states are: Alabama (ALA. CODE § 30-2-1(9)); Arizona (ARIZ. REV. STAT. ANN. § 25-312); California (CAL. FAM. CODE § 2311); Colorado (COLO. REV. STAT. ANN. § 14-10-110); Connecticut (CONN. GEN. STAT. ANN. § 46b-40(c)); Delaware (DEL. CODE ANN. tit. 13, § 1503); Florida (FLA. STAT. ANN. § 61.052; *Ryan v. Ryan*, 277 So.2d 266 (Fla. 1973) (“We do not view the matter of dissolution as being such a simple, unilateral matter of one mate simply saying ‘I want out.’ All of the surrounding facts and circumstances are to be inquired into”)); Hawaii (HAW. REV. STAT. §§ 580-41, 42); Idaho (IDAHO CODE ANN. § 32-611); Indiana (IND. CODE § 31-15-2-15); Iowa (IOWA CODE ANN. § 598.17); Kansas (*see Gordon v. Gordon*, 545 P.3d 328 (Kan. 1976) (courts will try the issue of whether parties are incompatible if they do not agree on the issue)); Kentucky (KY. REV. STAT. ANN. § 403.170); Massachusetts (MASS. GEN. LAWS ch. 208, § 1A); Michigan (MICH. COMP. LAWS ANN. § 552.6); Minnesota (MINN. STAT. § 518.13); Missouri (MO. REV. STAT. § 452.305, 452.320); Nebraska (NEB. REV. STAT. § 42-361); New Hampshire (N.H. REV. STAT. ANN. §§ 458:7, 458:7-a); New Jersey (*see Steiner*, 269 A.3d at 459); New Mexico (*see Joy v. Joy*, 734 P.2d 811, 814 (N.M. 1987) (“a party alleging incompatibility as a basis for dissolution of marriage must present evidence to establish the fact of incompatibility”)); North Dakota (N.D. CENT. CODE § 14-05-09.1; *Larson v. Larson*, 234 N.W.2d 861, 865 (N.D. 1975) (finding evidence before the court, including the parties’ testimony, supported trial court’s finding of irreconcilable differences sufficient to dissolve the marriage)); Oklahoma (OKLA. STAT. ANN. tit. 43, §101; *Vandervort v. Vandervort*, 134 P.3d 892, 894 (Okla. Civ. App. 2005) (“Incompatibility must be established ‘by proof, objective in its character’”)); Oregon (*see In re Dunn*, 511 P.2d 427, 429 (Or. Ct. App. 1973) (establishing a test for courts to use to evaluate incompatibility)); Pennsylvania (23 PA. CONS. STAT. ANN. § 3301); Rhode Island (R.I. GEN. LAWS §§ 15-5-2, 15-5-3.1(b)); Utah (*see Haumont v. Haumont*, 793 P.2d 421, 427 (Utah Ct. App. 1990) (one must show proof of irreconcilable differences)); Vermont (VT. STAT. ANN. tit. 15, § 551(7)); Washington (WASH. REV. CODE ANN. § 26.09.030); and Wyoming (WYO. STAT. ANN. § 20-2-104; *Grosskopf v. Grosskopf*, 677 P.2d 814, 817 (Wyo. 1984) (courts consider fault in determining who is the “aggrieved party on the grounds of irreconcilable differences”).

their marital relationship justify its dissolution, proofs that necessarily incorporate considerations of fault.

“Some fault” divorce is the phrase Justice Richard A. Dollinger used to describe such schemes in the 2011 New York case of *Palermo v. Palermo*.¹²¹ There, the plaintiff wife had separated and filed for divorce from her husband in 2000, ten years before New York adopted no-fault divorce, and she endured—and lost—a jury trial in which she claimed that her husband’s treatment of her was cruel and inhuman.¹²² In 2011, shortly after New York adopted no-fault divorce, she filed for divorce again, this time on no-fault grounds.¹²³ Her husband asserted he had the right to a trial on that issue because, although New York’s no-fault divorce law provides that divorce may be grounded on one party’s sworn declaration that their relationship had “broken down irretrievably for a period of at least six months,” another statute provides for “a right to trial by jury of the issues of the grounds for granting divorce.”¹²⁴

Justice Dollinger recognized the “apparent collision of the no-fault entitlement . . . and the trial right” under these statutes and concluded that the legislature intended to provide estranged couples with an easy, “incontestable basis” for dissolution to avoid the issues that arise from fault-based grounds, where couples are often “forced to invent false justifications” to obtain a divorce.¹²⁵ “False accusations and the necessity to hold one partner at fault often result in conflict within the family. The conflict is harmful to the partners and destructive to the emotional wellbeing of children. Prolonging the divorce process adds additional stress to an already difficult situation.”¹²⁶

To construe the statute to permit the husband’s trial right outweighed the wife’s right to divorce based solely on her sworn declaration would require a trial in which the “parties describe their intensely personal lives in public, before their families and the courts.”¹²⁷ The court recognized that this would become

¹²¹ 2011 WL 7711557, at *7.

¹²² *Id.*

¹²³ *Id.*; N.Y. DOM. REL. LAW § 170(7).

¹²⁴ 2011 WL 7711557, at *7; N.Y. DOM. REL. LAW § 173.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at *6.

essentially a fault trial that “leads to a counterproductive, if not absurd result: a jury trial on the question of whether the party has properly sworn to the irretrievable breakdown, a fact which is readily apparent to the court upon a review of the face of the pleadings.”¹²⁸

Justice Dollinger went on to illustrate what he viewed as the absurdity of a trial on the cause of action for a divorce based on no-fault grounds, as it would inquire into the following intrusive fault-centered factors antithetical to the intent behind no-fault divorce:

How far “broken” does the marriage have to be to be irretrievable? What proof is necessary? Is the court empowered to decide that a marriage can be repaired even if one party states, under oath, that it is their “view” that the marriage cannot be repaired? Does the court, in deciding whether a marriage is irretrievable, decide the sincerity—or veracity—of a spouse who states, under oath, that he or she no longer wants to be married? Is any court prepared to state: “the court finds that even though one party says that they want to be divorced, I find that the marriage is not broken?” How will the court determine whether a spouse’s belief that marriage is broken is justified? What facts are necessary to establish that a spouse has a good faith belief that the marriage is broken? Is reconciliation a factor? What proof is required to show some possibility of reconciliation? How significant does the “possibility of reconciliation” have to be for the court to conclude that it is significant enough to decline to grant the divorce? Is the court required to find that one spouse is telling the truth about the “possibility of reconciliation” while making the corollary decision that the other is not being truthful when he or she says that reconciliation is not possible?¹²⁹

The court held that “the evil that [no-fault] legislation was designed to eliminate—public trials on fault—will continue into future divorce cases”¹³⁰ if one party were permitted to examine the other spouse’s “‘belief’ about their marriage or their ‘views’ of the possibility of reconciliation.”¹³¹ It would result in “New York courts [being] plunged into an endless evaluation of people’s beliefs and inner most perceptions of their marriages because . . . there are no objective specific standards for evaluating the ‘possibility of reconciliation.’”¹³² Justice Dollinger would not do it. Although *Palermo*

¹²⁸ *Id.*

¹²⁹ *Id.* at *7-*8.

¹³⁰ *Id.* at *7.

¹³¹ *Id.*

¹³² *Id.*

is an unreported trial court decision, and other equal courts in New York had held differently prior to *Palermo*, New York courts since *Palermo* have followed its conclusion that a party's sworn certification that a marriage is irretrievably broken is not an issue to be tried.¹³³

That is not the case in the thirty "some fault" states. Many of those states' statutes are silent as to whether a court must make findings to establish no-fault grounds are met, but courts have held that is the case.¹³⁴ Other states' statutes expressly provide that no-fault divorce may be granted upon a court making "findings" that the no-fault ground exists.¹³⁵ And still others more explicitly

¹³³ See, e.g., *Stancil v. Stancil*, 1 N.Y.S.3d 917 (N.Y. Sup. Ct. 2015).

¹³⁴ In New Jersey, for example, N.J. STAT. ANN. § 2A:34-2(i) does not say court findings are needed to establish irreconcilable differences, but the Appellate Division in *Steiner*, 269 A.3d at 459, held that "whatever ground [for divorce] asserted must be proven by the party seeking divorce." Likewise, Oklahoma's statute does not require court findings to establish "incompatibility," yet the appellate court in *Vandervort*, 134 P.3d at 894, held that "[i]ncompatibility must be established 'by proof, objective in its character, of causes to which marital disharmony is attributed [and cannot be] bottomed on a mere subterfuge or afterthought [without] a substantial foundation.'" (citation omitted). The courts have taken similar approaches in Oregon and Utah, whose statutes also do not require court findings. See *Dunn*, 511 P.2d at 429 (stating that the Oregon test for irreconcilable differences is "(1) whether or not such difference is one that reasonably appears to the court to be in the mind of the petitioner an irreconcilable one, and (2) whether or not the court concludes that the breakdown of that particular marriage is irremediable."); *Haumont*, 793 P.2d at 427 (holding that while fault is not a required showing to establish irreconcilable differences in Utah, one must show proof of irreconcilable differences).

¹³⁵ See, e.g., ALA. CODE § 30-2-1(9) (ruling that courts must find an "irretrievable breakdown of the marriage"); ARIZ. REV. STAT. ANN. § 25-312 (divorce shall be granted if the court makes findings that a ground exists, including that the marriage is irretrievably broken); CONN. GEN. STAT. ANN. § 46b-40(c) (requiring a court "finding" of irretrievable breakdown, incompatibility, adultery, or one of a number of other grounds); DEL. CODE tit. 13, § 1503 (requiring a court finding of grounds for divorce and providing that failure to establish that a marriage is irretrievably broken is a defense to a divorce action); VT. STAT. ANN. tit. 15, § 551(7) (stating that a divorce may be entered on no-fault grounds if a "court finds that the resumption of marital relations is not reasonably probable"); WASH. REV. CODE ANN. § 26.09.030 (providing for proceedings in the event a party's claim that the marriage is irretrievably broken is contested). In *Eversman v. Eversman*, 496 A.2d 210 (Conn. App. Ct. 1985), the Connecticut appellate court described the detailed testimony regarding extramarital affairs and reconciliation attempts on which the court relied in "finding" that a marriage had broken down irretrievably.

require courts to consider “all relevant factors” or hold hearings whenever there is a dispute about irreconcilable differences or similar no fault grounds.¹³⁶

The liberalizing approach *Palermo* effectively established for New York, the last state to adopt no-fault divorce, stands in stark contrast to the approach taken by California, the first state to adopt no-fault divorce.

Not long after California gave its citizens the right to no-fault divorce, its Supreme Court took away the promise of easier divorce, at least for many divorcing couples, in *In re Marriage of McKim*.¹³⁷ There, the California Supreme Court held that “the court, not the parties, must decide whether the evidence adduced supports findings that irreconcilable differences do exist and that the marriage has broken down irremediably and should be dissolved,” and rely on the “subjective state of mind of the parties” in making that decision.¹³⁸ The determination is “not a ministerial one,” a California appellate court held very soon after.¹³⁹ The way this approach can lead to fault-infused trials on supposedly no-fault divorce is demonstrated in *In re Marriage of Greenway*, where an appellate court affirmed a divorce being granted, but only because the husband’s claim about irreconcilable differences was justified by “substantial evidence.”¹⁴⁰ At trial, the husband said repeatedly that he was trying “to stop [his wife] from further interfering with his medical care. He explained his relationship with [her] had been bad ‘for the last thirty years’ . . . he did not like

¹³⁶ See, e.g., COLO. REV. STAT. ANN. § 14-10-110 (requiring a court finding of irretrievable breakdown and, if contested, to “consider all relevant factors, including the circumstances that gave rise to the filing of the petition and prospect of reconciliation”); HAW. REV. STAT. §§ 580-41, 42 (requiring findings and stating that if either party contests that the marriage is irretrievably broken, the court shall have hearing to “consider all relevant factors, including the circumstances that gave rise to the filing of the complaint and the prospect of reconciliation”); KY. REV. STAT. ANN. § 403.170 (providing that if either party denies that marriage is irretrievably broken, the court shall make findings after considering “all relevant factors, including the circumstances that gave rise to filing the petition and the prospect of reconciliation”); ME. REV. STAT. ANN. tit. 19-A, § 902(2) (stating that if one party opposes a divorce, the court may “may require both parties to receive counseling”).

¹³⁷ 493 P.2d 868, 872 (Cal. 1972).

¹³⁸ *Id.*

¹³⁹ *In re Marriage of Walton*, 104 Cal. Rptr. 472, 480 (Cal. Ct. App. 1972).

¹⁴⁰ 158 Cal. Rptr. 3d 364, 383 (Cal. Ct. App. 2013).

when she visited him . . . he did not think their relationship could be restored.”¹⁴¹

Other recent cases in “some fault” jurisdictions have at trial delved even farther into the inner workings of parties’ marriages and their mutual grievances in order to adjudicate whether no-fault grounds have been proven. For example, in 2022, the Idaho court in *Bettwieser v. Bettwieser* found the following “substantial reasons to discontinue the marriage” on the ground of irreconcilable differences: the parties’ “different religious beliefs,” the husband’s exclusion of the wife from household decisions or family rulemaking, the husband’s “very controlling nature,” providing as an example that he would not let his wife play mixed-doubles tennis with other men and noting that his controlling nature “interfered in [the wife’s] ability to interact with her own family.”¹⁴²

The year prior, New Jersey’s Appellate Division in *Steiner* effectively endorsed courts considering fault-laden inquiries in trials about no-fault divorce. There, it affirmed the trial court’s authority to conduct a probing four-day trial into irreconcilable differences—and reversed the trial court’s award of counsel fees to the wife for the husband’s bad faith—where the wife had filed for divorce based on irreconcilable differences; the husband had counterclaimed for the same relief in a verified complaint; in the interim, he had sought restraining orders against the wife; and then withdrawn his counterclaim and demanded a trial on the cause of action.¹⁴³ Despite these facts, the court held, the four-day trial had been appropriate because “divorce isn’t available on mere request or demand.”¹⁴⁴

To prove that “divorce isn’t available on mere request or demand,” the appellate court devoted four pages of its opinion to the evidence adduced at trial about the parties’ grievances against one another.¹⁴⁵ These included: the wife “felt controlled by [her husband]”; and that she had “never been treated as a partner”; she did not like how her husband treated their children and “unfairly favored their son . . . over their three daughters”; she objected

¹⁴¹ *Id.*

¹⁴² Docket No. 48656, 2022 WL 17174960 (Idaho Ct. App. Nov. 23, 2022).

¹⁴³ 269 A.3d at 457-61.

¹⁴⁴ *Id.* at 459.

¹⁴⁵ *Id.*

to how he made “financial decisions without her knowledge or input,” and gave examples of specific loans he gave and what the wife believed were the unfair provisions in the husband’s will; he “treated her as if she were ‘not important’”; “he was never willing to ‘share control’ over money”; he refused marriage counseling; he spoke to her in a way that “disturbed” her, citing specific comments he made; she felt “mistreated” and that the husband had a “lack of respect” for her; “there’s no affection . . . anymore . . . [n]o touching”; and, the wife testified, there had been a physical altercation early in the marriage where the husband “twisted [her] arm behind [her] back.”¹⁴⁶ She defended against charges that her complaints were not sufficient grounds for divorce because, for example, three years earlier she and her husband had hosted a “family dinner for their grandson . . . and a breakfast after Yom Kippur the following month,” explaining it was not because the parties were happily married but rather for the sake of appearances in front of the grandchildren.¹⁴⁷ For his part, the husband admitted on the stand that—withstanding his forcing this four-day trial—the parties did, indeed, “now have irreconcilable differences”; they had “significant disagreements”; and their marriage was “not harmonious.”¹⁴⁸ He even testified that he felt his wife “harasses him on a regular basis” and “disagree[d] with him ‘morning, noon, and night.’”¹⁴⁹

Similar examples of fault-infused no-fault divorce trials abound. For example, in *John v. Fritz-Klaus*, a Wisconsin case, where the wife believed the marriage was salvageable, the husband had to testify to the nature of the parties’ problems and the “‘thousands of hours of introspection . . . talking to family and friends, and attending the counseling sessions’” that led him to the conclusion that the marriage was irretrievably broken and could not be saved by any amount of counseling.¹⁵⁰ In *Gordon v. Gordon*, the wife challenged irreconcilable differences at trial, and the Kansas Supreme Court’s opinion reflects consideration of evidence showing “over eight years” of “strife and serious disagreements

¹⁴⁶ *Id.* at 459-60.

¹⁴⁷ *Id.* at 461.

¹⁴⁸ *Id.* at 123-24.

¹⁴⁹ *Id.* at 124.

¹⁵⁰ 917 N.W.2d 232, at *3 (Wis. Ct. App. 2018).

between the parties.”¹⁵¹ In *Szramkowski v. Szramkowski*, a Missouri case in which a husband had denied his wife’s claim that their marriage was irretrievably broken, the court’s conclusion to the contrary reads like findings of fault, including such findings as that the husband had “verbally abused” the wife and physically assaulted her during the marriage.¹⁵²

C. *Pre-Divorce Separation States*

In several states, a specified period of separation is either the only no-fault ground for divorce or the only ground for divorce.¹⁵³ This can be a double-edged sword for the party seeking a divorce. Although the exit may be easier if the court is not inquiring into the grounds for divorce, the length of the waiting period and concomitant ramifications can be onerous.

For example, in South Carolina, a Hybrid Jurisdiction, the only no-fault ground for divorce is that the parties have lived apart without cohabitation for a period of one year prior to the filing of a divorce complaint.¹⁵⁴ Across the border in North Carolina, a “Pure No-Fault Jurisdiction,” the only ground for divorce is a continuous separation for one year prior to instituting suit.¹⁵⁵ The Hybrid Jurisdictions of Virginia and West Virginia also require one year separation “without interruption” prior to a no-fault divorce,

¹⁵¹ 545 P.2d at 330.

¹⁵² No. ED 93149, 2010 WL 2284222, *6 (Mo. Ct. App. June 8, 2020).

¹⁵³ These states include: Arkansas, providing fault-based grounds and no-fault ground other than insanity such as being eighteen continuous months without cohabitation (ARK. CODE ANN. § 9-12-301(5)); Louisiana, providing for fault based grounds, with the only no-fault ground being continuous separation of between 180 and 365 days, depending on whether there are minor children of the marriage (LA. CIV. CODE art. 103, 103.1); North Carolina, providing for no fault-based grounds, and that the only grounds for divorce are insanity or separation of one consecutive year on the application of either party (N.C. GEN. STAT. ANN. § 50-6); South Carolina, providing fault-based grounds and no no-fault ground other than continuous separation for one year (S.C. CODE ANN. § 20-3-10); Virginia, creating fault-based grounds and no no-fault ground other than continuous separation for one year (VA. CODE ANN. § 20-91); and West Virginia, providing for no fault-based grounds, and stating that the only grounds for divorce is separation for one year without interruption (W. VA. CODE ANN. § 48-5-202).

¹⁵⁴ S.C. CODE ANN. § 20-3-10.

¹⁵⁵ N.C. GEN. STAT. ANN. § 50-6; *Bruce v. Bruce*, 339 S.E.2d 855, 856 (N.C. Ct. App. 1986) (one year period applies to the time prior to filing suit).

while Arkansas requires a pre-complaint separation of eighteen months, and Louisiana requires between six months and one year, depending on whether there are children of the marriage.¹⁵⁶

In these Pre-Divorce Separation States, therefore, one can still be sentenced to remain married for years before the right to be unmarried vests. The burden this waiting period places on the divorcing spouse can be significant. In South Carolina and Virginia, for example: no alimony may be awarded if a spouse commits adultery before the signing of a written settlement agreement or entry of a permanent order for maintenance, support, and/or property settlement;¹⁵⁷ and the offense of adultery includes sex with another after physically separating from one's spouse.¹⁵⁸ Thus, South Carolina and Virginia may deny a spouse who is seeking to exit a marriage on no fault grounds the ability to date (and have sex, or date in a manner that a court could conclude involved sexual activity) during the length of the statutory separation period; the right to alimony; or both.¹⁵⁹ In *McElveen v. McElveen*, for example, the South Carolina Court of Appeals held that a divorcing husband had not proven by a clear preponderance of the evidence that his wife's post-separation relationship with another man was adulterous, but based on an exhaustive review of the evidence adduced, it was an "extremely close case."¹⁶⁰ This prospect may drive divorcing parties in these states to allege fault-based grounds, which do not have such waiting periods.¹⁶¹

Separation as grounds for divorce is more liberalizing in other states, giving parties an alternative to pleading irreconcilable

¹⁵⁶ See *supra* notes 101, 153.

¹⁵⁷ S.C. CODE ANN. § 20-3-130(A); VA. CODE ANN. § 20-107.1(B).

¹⁵⁸ S.C. CODE ANN. § 16-15-70; VA. CODE ANN. § 18.2-365.

¹⁵⁹ See *Krause v. Krause*, No. CH90-19, 1990 WL 751283, *3 (Va. Cir. Ct. Sept. 14, 1990) (explaining that although ordinarily "fault bars spousal support," pursuant to VA. CODE ANN. § 20-107.1, the court may still award spousal support notwithstanding the existence of a fault ground "if the court determines from clear and convincing evidence that a denial of support ... would consistent a manifest injustice, based on the respective degrees of fault ... and the relative economic circumstances of the parties."). Adultery is also a bar to alimony in North Carolina, but North Carolina defines adultery as sex outside the marriage before separation, meaning there is no penalty for *pendente lite* sex. N.C. GEN. STAT. ANN. § 50-16.1A(3).

¹⁶⁰ 506 S.E.2d 1, 9 (S.C. Ct. App.1998), *disapproved on other grounds*, *Wooten v. Wooten*, 615 S.E.2d 98, 108 (S.C. 2005).

¹⁶¹ See S.C. CODE ANN. § 20-3-10; VA. CODE ANN. § 20-91(A).

differences and a way to avoid the scrutiny of the grounds for divorce reflected in the cases discussed above. For example, Illinois requires a court to find that “reconciliation ha[s] failed or future attempts at reconciliation would be impracticable and not in the best interests of the family” in order to grant divorce on the ground of irreconcilable differences, but holds that if parties have been separated for six months prior to the entry of judgment, “there is an irrebuttable presumption that the requirement of irreconcilable differences has been met.”¹⁶² Ohio only permits divorce based on incompatibility with consent; otherwise divorce may be granted without judicial inquiry into the parties’ relationship upon a showing of a one year separation without interruption.¹⁶³ Wisconsin, a “Some Fault Jurisdiction,” is similar, but more onerous in that the separation period must have begun twelve months prior to commencement of the action, whereas Ohio permits it to be twelve months prior to the judgment of divorce.¹⁶⁴

Of course, requiring a person to vacate his or her home, in many states long before even filing, is a barrier to divorce. A person may not be able to afford to leave. If the separation period begins before filing suit, it means that one must leave the marital home to trigger the separation period before having the ability to file suit for divorce and give rise to a claim for *pendente lite* support. Alternatively, where children are involved, separating before filing for divorce implicates custody as well as the children’s wellbeing. And, of course, a person may not want to leave because she or he is attached to the home and wants to keep it after divorce.

Many courts hold that the separation period does not necessarily require either spouse to vacate the marital home; rather, the inquiry turns on whether they were living substantively separate lives. For example, in *Scott v. Scott*, the Vermont Supreme Court held that “[c]ontinued residence in the same dwelling is but one factor to be considered with others in determining the nature of the relationship between the parties.”¹⁶⁵ While the court acknowledged

¹⁶² 750 ILL. COMP. STAT. ANN. 5/401.

¹⁶³ OHIO REV. CODE ANN. § 3105.01(J), (K).

¹⁶⁴ WIS. STAT. ANN. § 767.315; *Harding v. Harding*, No. 85022, 2005 WL 1406293, *3 (Ohio App. June 16, 2005) (holding one year period refers to that amount of time “prior to the granting of a divorce”).

¹⁶⁵ 586 A.2d 1140, 1142 (Vt. 1990) (quoting *Buxton v. Buxton*, 527 A.2d 660, 663 (Vt. 1987)).

that some other states had “concluded that the fact that the parties have continued to live under the same roof precludes a finding that they have lived apart,”¹⁶⁶ the court instead looked to cases from D.C. and Delaware holding that “the ‘essential thing’ is not separate roofs, but separate lives,” and “‘a couple may live separate and apart even under the same roof.’”¹⁶⁷ Thus, in *Scott*, the Vermont Supreme Court reversed a judgment granting a divorce to the wife, finding that she had not carried her burden of showing that the parties had lived separate and apart for six months, as her own evidence showed that at relevant times, she and her husband had slept in the same bed, watched television together, and held themselves out as husband and wife.¹⁶⁸

D. *Jurisdictions That May Require Fault*

Some states provide mechanisms that negate no-fault provisions entirely.

Mississippi and Tennessee permit no-fault divorce only if both parties consent, thereby empowering the objecting party to veto his spouse’s bid to end the marriage without scrutinizing fault.¹⁶⁹ In West Virginia, one only has a unilateral right to a no-fault divorce (i.e., without first obtaining the other party’s consent) after a year’s separation; pursuing a no-fault divorce earlier than that requires both parties’ consent as in Mississippi or Tennessee.¹⁷⁰ South Dakota’s statute is not quite so onerous in its consent requirement. There, a court may not grant a no-fault divorce without consent or unless one party has not made a general appearance, but even where there is no consent, a court may decree the parties divorced if they have not reconciled after a thirty-day waiting period.¹⁷¹

Courts often apply the consent requirement strictly. For example, the Mississippi Supreme Court has held:

[t]he parties must do more . . . than implicitly consent to a divorce on the grounds of irreconcilable differences and raise issues in their pleadings.

¹⁶⁶ *Id.* (citing *Oxford v. Oxford*, 373 S.W.2d 707, 708 (Ark. 1963); *Lillis v. Lillis*, 201 A.2d 794, 796-97 (Md. 1964)).

¹⁶⁷ *Id.* (quoting *Boyce v. Boyce*, 153 F.2d 229, 230 (D.C. Cir. 1946); *Heckman v. Heckman*, 245 A.2d 550, 551 (Del. 1968)).

¹⁶⁸ *Id.*

¹⁶⁹ TENN. CODE ANN. § 36-4-103.

¹⁷⁰ W. VA. CODE §§ 48-5-201, 202.

¹⁷¹ S.D. CODIFIED LAWS § 25-4-172.

The additional statutory requirements for a valid mutual consent are: (1) The consent must be in writing and signed personally by both parties (2) the consent must state that the parties voluntarily consent to permit the court to decide the issues upon which the parties are unable to agree; (3) the consent must specifically set forth the issues upon which the parties are unable to agree; and (4) the consent must state that the parties understand that the decision of the court shall be a binding and lawful judgment.¹⁷²

That means that, as the Court of Appeals of Mississippi held in *Reno v. Reno*, mere verbal consent, not reduced to a writing satisfying the statutory requirements, is insufficient and precludes the grant of a divorce on the grounds of irreconcilable differences.¹⁷³

Finally, Arizona, Arkansas, and Louisiana enacted covenant marriage statutes¹⁷⁴ that allow couples to waive their future rights to no-fault divorce before they even say, "I do." As one scholar put it, they can "live to regret it when Dr. Jekyll turns into Mr. Hyde."¹⁷⁵ Those who choose covenant marriages in these states are required to undergo pre-marital counseling and commit to having available only limited grounds if a divorce is sought.¹⁷⁶ All three states require a two-year separation to obtain a divorce in a covenant marriage unless certain conditions are met (for example, allowing for immediate divorce where there is domestic violence).¹⁷⁷ This two-year separation period is longer than that applicable to non-covenant marriages in these states.¹⁷⁸

¹⁷² *Cassibry v. Cassibry*, 742 So. 2d 1121, 1124 (Miss. 1999) (citing *Cook v. Cook*, 725 So. 2d 205, 206 (Miss. 1998); *Massingill v. Massingill*, 594 So. 2d 1173, 1177 (Miss. 1992)).

¹⁷³ *Reno v. Reno*, 119 So. 3d 1154, 1155-56 (Miss. Ct. App. 2013); *see also, e.g.*, *Perkins v. Perkins*, 787 So. 2d 1256, 1264 (Miss. 2001) (holding "that the statutory requirements . . . were not met in this case and that the chancellor exceeded his authority in granting a divorce on the ground of irreconcilable differences").

¹⁷⁴ ARIZ. REV. STAT. ANN. § 25-901; ARK. CODE ANN. § 9-11-803; LA. REV. STAT. ANN. § 9:272.

¹⁷⁵ *Marriage Options, Louisiana Style*, CEDAR RAPIDS GAZETTE, Aug. 13, 1997, at 2A.

¹⁷⁶ ARIZ. REV. STAT. ANN. §§ 25-901(B)(2), 903; ARK. CODE ANN. § 9-11-803(a)(1); LA. REV. STAT. ANN. §§ 9:272(C), 273(A)(2)(a).

¹⁷⁷ ARIZ. REV. STAT. ANN. § 25-903(5); ARK. CODE ANN. § 9-11-808(a)(4); LA. REV. STAT. ANN. § 9:307(a)(5).

¹⁷⁸ ARIZ. REV. STAT. ANN. § 25-312(B) (no required separation period where marriage is irretrievably broken); ARK. CODE ANN. § 9-12-301 (18-month separation period); LA. CIV. CODE ANN. art.103.1 (180-day separation period where there are no minor children, 365-day separation period where there are minor children).

Courts strictly apply the requirements for a covenant marriage.¹⁷⁹ In the Arizona case of *Phillips v. Schwartz*,¹⁸⁰ the wife petitioned for dissolution of the parties' covenant marriage, alleging that the husband "had been emotionally and physically abusive toward her and the child, and he 'consistently abused alcohol' during the marriage,"¹⁸¹ both of which are grounds for divorce under Arizona's covenant marriage statute.¹⁸² After a hearing on *pendente lite* issues, the trial court found that the wife's evidence did not satisfy any of the grounds for divorce set forth in the statute.¹⁸³ However, the court stayed the matter under the provision of the statute allowing for a divorce after two years of separation, since the requisite two years had not yet elapsed.¹⁸⁴ The appellate court reversed, holding that the trial court had exceeded its authority in considering the two-year separation ground because it was not pled in the wife's complaint.¹⁸⁵ The appellate court also held that the trial court erred in essentially deciding the case on the merits at an initial temporary-order hearing: "there is no requirement that the court must decide whether any of those grounds alleged in the petition have been proven at the *outset* of a proceeding. And because a finding on at least one ground is necessary for a final decree the parties are entitled to engage in the litigation process, including disclosure and discovery, before a final determination."¹⁸⁶

The jurisdictions in this last category are the furthest from pure no-fault divorce. Whereas, as discussed above, other jurisdictions provide litigants opportunities to insert fault into

¹⁷⁹ See, e.g., *Thomas v. Thomas*, 263 So.2d 515, 516 n.2 (La. Ct. App. 2018) (noting, in a child support case that "[t]he record reflects no divorce has been granted because neither party has filed pleadings under the proper provisions for a covenant marriage"); *Dickson v. Cook*, 2021 Ark. App. 196, 196 (Ark. Ct. App. 2021) (noting that trial court had granted the husband's motion to dismiss because the parties had not been separated a sufficient length of time to satisfy the covenant marriage statute, though noting that an independent divorce had been granted on other grounds in the interim).

¹⁸⁰ 530 P.3d 627 (Ariz. Ct. App. 2023).

¹⁸¹ *Id.* at 629.

¹⁸² ARIZ. REV. STAT. ANN. § 25-903(4), (7).

¹⁸³ *Phillips*, 530 P.3d at 629.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 630.

¹⁸⁶ *Id.* at 631 (emphasis in original).

their purportedly “no fault” claims, many would-be divorcees in these states will find themselves without the ability to even assert claims for no-fault divorce, and instead be forced to proceed on fault grounds.

III. Final Reflections

No-fault divorce is not all it’s promised to be given that nearly all states’ no-fault divorce laws give divorce-resistant spouses the opportunity to demand a trial on the grounds for divorce, which, first, threatens the divorce-seeking spouse with the prospect of being forced to remain in a marriage if she or he does not prevail, and second, opens the door to the fault-laden scrutiny of the grounds for divorce that no-fault divorce was intended to eliminate. Yet, the history also reveals how very far America has come—from nearly all unhappy marriages being *de facto* prisons because divorce was so rarely granted, to the relative freedoms people now have to follow their hearts either into marriage, or out of it.

Studies have shown how no-fault divorce can play a positive role. A 2019 study shows that, rather than encouraging divorce, laws that make divorce easier and quicker result in an *increase* in the number of marriages by at least 9%.¹⁸⁷ Professors Justin Wolfers and Betsey Stevenson famously studied the impact of no-fault divorce laws and in 2006 published research finding an 8 to 16% decrease in female suicide rates after states enacted no-fault divorce laws, as well as an approximately 30% decrease in intimate partner violence among both men and women, and a 10% reduction in women murdered by their partners.¹⁸⁸ Reducing barriers to divorce has also been found to reduce the dangers and costs associated with leaving an abusive marriage, thus enhancing the welfare of all family members by reducing the conflicts that lead to stress and violence when a couple is fighting frequently.¹⁸⁹

¹⁸⁷ Misty L. Heggeness, *The Upside of Divorce? When Laws Make Divorce Easier, Research Shows Women Benefit, Outcomes Improve*, U.S. CENSUS BUREAU (Dec. 18, 2019), <https://www.census.gov/library/stories/2019/12/the-upside-of-divorce.html>.

¹⁸⁸ Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress*, 121 Q.J. ECON. 267, 286 (2006).

¹⁸⁹ *Id.*

This is not to ignore the criticisms. Beginning in the 1980s and increasing in the 1990s, numerous articles criticizing the no-fault regime began appearing in books, law journals, newspapers, and social science publications. One study concluded that about 70% of divorces occur in low-conflict marriages, and only the remaining roughly 30% of divorces end up benefiting the children of those marriages.¹⁹⁰ And, of course, even if there were no dispute that “easier divorce” is a good thing, these authors agree that the no-fault divorce laws today, as implemented, hardly make divorce easier for many litigants.

While the pushback against no-fault divorce began decades ago, it has ramped up in the past several years. Conservative politicians and policymakers have begun a counter-revolution, trying to make it harder to end marriages by calling for restrictions on or even eliminating no-fault divorce laws. Indeed, some of these individuals have argued that no-fault divorce has “harmed men and even destroyed the fabric of society.”¹⁹¹ In addition to the three states that passed covenant marriages, discussed above, some states are discussing repealing or restricting no-fault divorce laws. For example, in its 2022 party platform, the Texas Republican party asked the state legislature to, among other things, “rescind unilateral no-fault divorce laws [and] to support covenant marriage.”¹⁹² In early 2023, Louisiana’s Republican Party debated whether to recommend to the state legislature eliminating no-fault divorce, although that initial draft was sent

¹⁹⁰ PAUL R. AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* 220 (Harvard U. Press 1997). This book is based on information contained in ALAN BOOTH ET AL., *MARITAL INSTABILITY OVER THE LIFE COURSE* (1993), <https://web.stanford.edu/group/ssds/dewidocs/icpsr3812/cb3812.y00.pdf>, and presents the results of longitudinal data examining how changes in the family over time influence the psychological and social well-being of children as they enter young adulthood. It also relies on the results of other studies about intimate relationships, social integration, psychological well-being, socioeconomic attainment, etc.

¹⁹¹ Anna North, *The Christian Right Is Coming for Divorce Next*, Vox (June 13, 2024), <https://www.vox.com/today-explained-newsletter/354635/divorce-no-fault-states-marriage-republicans..>

¹⁹² Tessa Stuart, *The Next Front in the GOP’s War on Women: No-Fault Divorce*, ROLLING STONE (May 2, 2023), <https://www.rollingstone.com/politics/politics-features/stephen-crowder-divorce-1234727777/>.

back to committee for more work¹⁹³ and has apparently not yet been submitted. In January 2024, a bill was introduced to eliminate no-fault divorce in Oklahoma.¹⁹⁴ Nebraska's Republican Party platform proposes that no-fault divorce be limited to couples who have no children.¹⁹⁵ The push and pull between more and less restrictive approaches to divorce is hardly new, as the history shows, and it largely explains the current landscape. That the United States has a patchwork of supposedly "no-fault" divorce laws, and nearly all of them permit fault considerations to be put to trial as a potential barrier to divorce, reflects the fact that divorce laws mirror this country's competing values—including women's rights, human freedoms, family values, and judicial efficiency, to name only a few. Practitioners must continue to do their best to navigate their clients through these changing social tides while courts and legislatures continue to grapple with the elusiveness of a perfect dissolution.

¹⁹³ Julie O'Donoghue, *Louisiana Republican Party Considers Backing Elimination of No-Fault Divorce*, LOUISIANA ILLUMINATOR (Jan. 11, 2023), <https://lailluminator.com/2023/01/11/louisiana-republican-party-considers-backing-elimination-of-no-fault-divorce/>.

¹⁹⁴ Arwa Mahdawi, *Far-Right Republicans' Latest Target? No-Fault Divorce*, THE GUARDIAN (June 15, 2024), <https://www.theguardian.com/commentisfree/article/2024/jun/15/republicans-no-fault-divorce>.

¹⁹⁵ Nebraska GOP website, *Family*, <https://ne.gop/family/> (last visited Jan. 20, 2025).