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# No-Fault Laws and At-Fault People

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Absent transaction costs, the Coase Theorem suggests that divorce reform would work no change in the frequency of divorce but perhaps would alter the distribution of marital wealth. However, divorce does involve substantial process costs, which no-fault lowered. This paper explores the question of what happened to state divorce rates because of the legal changes wrought by the family law revolution that began in the 1970s, isolating the effect of the legal variable from other demographic and social factors that might also explain the variation in divorce rates across states and across time. © 1998 by Elsevier Science Inc.

## I. Introduction

Divorce law reform is in the air. For the first time in memory, moreover, reformers are seeking to strengthen barriers to divorce. In the past, divorce reform always meant easier divorces. But today, reformers seek the repeal of no-fault divorce laws, which they say have weakened the family.<sup>1</sup>

Between 1969 and 1985, every state liberalized its divorce laws. The change was largely complete by 1979, when only two states required proof of fault before granting the divorce. Divorce rates almost doubled during this period, as may be seen in Figure 1. This was unsurprising, because the move to no-fault laws reduced the cost of divorce and sapped spousal incentives to invest in their marriage. However, the claim that no-fault divorce laws result in a long-term increase in divorce rates has been challenged. Elizabeth Peters has argued that, because of Coasian bargaining, divorce levels should

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<sup>1</sup>Wark, John T. "Finding Fault." *Detroit News*, February 13, 1996.

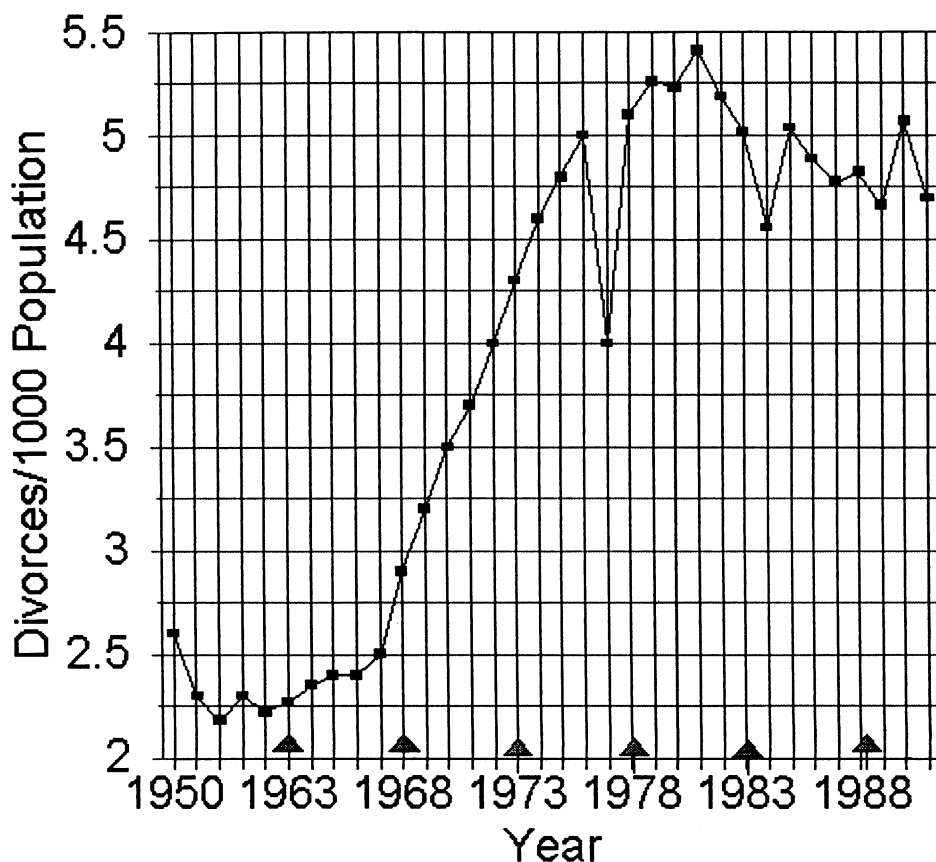


FIG. 1. U.S. divorce rates.

not be affected by the legal regime.<sup>2</sup> In support of this position, she conducted a panel study and reported that no-fault laws were not correlated with higher divorce rates.

This article takes issue with these claims. We suggest that divorce levels are dependent on the legal regime and that they are lower in states that penalize marital fault. Our results differ from those of Peters primarily because of differences in our definitions of "no fault." No fault for Peters meant that fault was irrelevant in the dissolution proceedings, whether or not it affected the division of assets or alimony award. But this is short sighted, because one would expect less fault and fewer divorces when fault bears a financial penalty. Accordingly, we define "no fault" to mean that fault is irrelevant at both dissolution and at financial settlement.

Our results suggest a policy response to increased divorce levels. Social conservatives argue persuasively that increased divorce levels have harmed women and children and coarsened civil society. Their efforts to condition the grant of the divorce on a finding

<sup>2</sup>Peters, H. Elizabeth. (1986). "Marriage and Divorce: Informational Constraints and Private Contracting." *American Economic Review* 76:437.

of fault might nonetheless fail, as fresh start norms are deeply ingrained in America.<sup>3</sup> A more promising strategy, with broader appeal, might seek to reintroduce fault into property awards, while retaining no-fault standards in the dissolution proceedings. Our findings suggest that such a change would effectively reduce divorce rates.

## II. Fault and No Fault

No state today requires fault for the dissolution of a marriage. Many states have adopted the no-fault standards of the Uniform Marriage and Divorce Act,<sup>4</sup> in which the only ground for granting a dissolution is that the relationship is "irretrievably broken." For example, the Colorado statute provides that the "petition . . . shall allege that the marriage is irretrievably broken," and that "[d]efenses to divorce and legal separation . . . , including but not limited to condonation, connivance, collusion, recrimination, insanity, and lapse of time, are hereby abolished."<sup>5</sup>

Several empirical studies report a short-term increase in divorce rates after such statutes were enacted.<sup>6</sup> This result is what one would have expected. Because no-fault laws reduced the cost of divorce,<sup>7</sup> some couples whose marriages were failing postponed divorce until the new law took effect. The result was a blockage in the divorce pipeline just before enactment, and a surge immediately afterwards.

There is less agreement about the long-term effects of no-fault divorce laws. The most well-known paper, by Elizabeth Peters,<sup>8</sup> reported that no-fault laws had virtually no influence on the probability of a couple's divorcing between 1975 and 1977. More recently, other economists have criticized the Peters study. Douglas Allen reported that Peters' no-fault predictor was significantly and positively correlated with divorce when he omitted data from three states that moved to no-fault during the period of the Peters study, and which Peters had labeled as fault states.<sup>9</sup> In response, Peters faulted Allen for omitting regional variables and a predictor that Allen had employed as a proxy for fixed-state effects.<sup>10</sup> A study by Martin Zelder reported that a no-fault variable was not correlated with increased divorce levels.<sup>11</sup> However, when the variable was multiplied by a measure of expenditures on children, the new interactor was associated significantly with increased divorce levels. From this, Zelder concluded that divorce law irrelevance does not hold when the parties have children.<sup>12</sup>

<sup>3</sup>The popular objections to fault grounds, including the distasteful and collusive process of "staged" grounds, are discussed in Herbert Jacobs, *The Silent Revolution*, University of Chicago Press, 1988.

<sup>4</sup>9A U.L.A. § 305.

<sup>5</sup>Colo. Rev. Stat. § 14-10-107 (1995).

<sup>6</sup>See Marvell, Thomas B., (1989). "Divorce Rates and the Fault Requirement." *Law & Society Review* 23:543, 544; Paul A. Nakonezy, Robert D. Shull, and Joseph Lee Rodgers. (1995). "The Effect of No-Fault Divorce Law on the Divorce Rates Across the 50 States and Its Relation to Income, Education and Religiosity." *Journal of Marriage and the Family* 57:477.

<sup>7</sup>Mnookin, Robert H., and Lewis Kornhauser. (1979). "Bargaining in the Shadow of the Law: The Case of Divorce." *Yale Law Journal* 88:950.

<sup>8</sup>Peters, *supra* note 2.

<sup>9</sup>Allen, Douglas W., (1992). "Marriage and Divorce: A Comment." *American Economic Review* 82:297. See also, Allen Parkman, (1992). "Unilateral Divorce and the Labor Force Participation Rate of Married Women, Revisited." *American Economic Review* 82:671.

<sup>10</sup>Peters, H. Elizabeth. "Marriage and Divorce: Reply." *American Economic Review* 82:686.

<sup>11</sup>"Inefficient Dissolutions as a Consequence of Public Goods: The Case of No-Fault Divorce." *Journal of Legal Studies* 22:503.

<sup>12</sup>About 60% of married couples have children. Elizabeth Scott, (1990). "Rational Decisionmaking about Marriage and Divorce." *Virginia Law Review* 76:9, 94, at note 8.

All of these studies employed a no-fault variable that ignored whether or not fault affected the financial award. States were labeled as no-fault even though fault was penalized, which narrowed the difference between the divorce rates in fault and no-fault states. This plausibly explains the failure to detect significantly lower divorce levels in fault states.<sup>13</sup> Accordingly, we define “no fault” to mean that fault is irrelevant at both the dissolution and financial settlement states. This permits a sharper picture of fault requirements than the above studies. Table 1 gives our list of fault and no-fault states, together with the year that no-fault laws were adopted.

As we define fault, a law is no-fault if matrimonial fault is irrelevant for dissolution, for the division of assets, and for alimony. For example, we view the Montana statute as a true no-fault law. Because the state has adopted the Uniform Marriage and Divorce Act state, fault is irrelevant at dissolution. In addition, the Montana statute provides that the “maintenance order shall be in such amounts . . . as the court deems just, without regard to marital misconduct, and after considering all relevant facts.”<sup>14</sup> By contrast, we regard the Virginia law as a fault statute. Although a Virginia divorce may be granted on either fault or no-fault grounds, in awarding alimony the judge is enjoined to “consider the circumstances and factors which contributed to the dissolution of the marriage, specifically including adultery and any other ground for divorce.”<sup>15</sup> Western states have generally adopted no-fault standards, whereas eastern and southern states continue to penalize fault (see Figure 2).

The claim that divorce rates are independent of the fault regimes in divorce asks one to look at the divorce decision from an *ex post* perspective, at the time of divorce, when sentiments have hardened and the parties have determined their course of action. At that point, it is said, the parties can always bargain around legal rules, as the Coase theorem suggests. In a fault regime, when a husband wants a divorce more than his wife wants to preserve the marriage, he can bribe her to consent to the divorce; in a no-fault regime, when a wife wants to preserve a marriage more than her husband wants a divorce, she can bribe him to stay married. Assume, for example, that a husband would pay up to \$300 for a divorce, whereas his wife would pay up to \$100 to preserve the marriage. They will then divorce, whatever the legal regime. In a fault regime, the wife will agree to sue for (or consent to) divorce on fault grounds for a payoff of between \$100 and \$300. In a no-fault state, the husband will unilaterally initiate divorce proceedings, rejecting the wife's offer of \$100 to remain married.

There are, however, two reasons why Coasean irrelevance might not hold. First, the wife might be unwilling to bribe the husband to stay married because a promise not to

<sup>13</sup>We preferred our definition of fault to that of the 1996 American Law Institute (ALI) Principles of Family Dissolution—Analysis and Recommendations 60 (Tentative Draft No. 2). Our list of fault states differs from that of the ALI Report in three respects. First, unlike the ALI, we label a state as a fault state if divorces may be obtained on fault grounds, because this permits the innocent party to introduce marital misbehavior into settlement negotiations. By contrast, the ALI looks only to fault as it involves alimony or property distribution. *Id.* at 17. This difference affects three states. See Alaska Rev. Stat. § 25.24.050 (1995); Maine Rev. Stat. Ann. tit 19, § 691 (1995); and N.M. Stat. Ann. § 40-4-1 (1996). Second, our list is based on the 1979 to 1990 period, whereas the ALI list is from 1996. Fault is penalized in fewer states today than during the period of our study. Delaware, Illinois, and Kentucky all moved to no-fault between 1979 and 1990. Third, we excluded Nevada from our study as an outlier because it is a national divorce haven.

<sup>14</sup>Mont. Code Anno. § 40-4-203 (1995). The “relevant facts” might refer to the parties’ age or earning capacity but not to matrimonial fault.

<sup>15</sup>Va. Code Ann. § 20-107.1 (1995). Labeling the law as fault or no-fault sometimes required an examination of case law to see whether fault was penalized in states where the parties were given the option of seeking a divorce on either fault or no-fault grounds.

TABLE 1. Year of adoption of no-fault regimes

Alabama	0	Montana	1975
Alaska	0	Nebraska	1972
Arizona	1974	Nevada	0
Arkansas	0	New Hampshire	0
California	1969	New Jersey	0
Colorado	1971	New Mexico	0
Connecticut	0	New York	0
Delaware	1979	North Carolina	0
Florida	1978	North Dakota	0
Georgia	0	Ohio	0
Hawaii	1972	Oklahoma§	1975
Idaho	0	Oregon	1971
Illinois*	1984	Pennsylvania	0
Indiana	1973	Rhode Island	0
Iowa	1971	South Carolina	0
Kansas†	0	South Dakota	0
Kentucky‡	1987	Tennessee	0
Louisiana	0	Texas	0
Maine	0	Utah	0
Maryland	0	Vermont	0
Massachusetts	0	Virginia	0
Michigan	0	Washington	1973
Minnesota	1974	West Virginia	0
Mississippi	0	Wisconsin	1977
Missouri	0	Wyoming	0

Notes: States that have not enacted law making fault irrelevant for all purposes are denoted by a 0.

\**Harambasic v. Harambasic*, 370 NE2d 1251, 1255 (Ill App 1977) (eliminating fault from grant of alimony); Ill Comp Stat Ann § 5/501 (adding irreconcilable differences as ground for divorce).

†In re *Marriage of Sommers*, 792 P2d 1005, 1008 (Kan 1990) (defining divorce statute as including fault in the "breach of marital duty" section).

‡*Moss v. Moss*, 639 S.W.2d 370, 371 (Ky Ct App 1987) (stating that alimony was to be granted without regard to fault).

§*Smith v. Smith*, 847 P2d 827, 829 (Ok 1993) (stating that fault has not been used in the granting of alimony since passage of the 1975 law).

||*Dixon v. Dixon*, 319 NW2d 846, 849-50 (Wis 1982) (finding fault irrelevant in the granting of alimony since passage of no-fault divorce law).

seek a divorce is unenforceable at law.<sup>16</sup> The husband might pocket the bribe and bring a petition the next day in a no-fault regime. Second, the preferences of the parties might be endogenous and affected by the divorce law regime. The amount that the wife might be willing to pay in a no-fault regime to maintain the marriage (in dollars or complaint behavior) might be less than the minimum amount that she would accept to surrender her veto rights in a fault regime. The economist refers to this difference as an endowment or income effect, inasmuch as it reflects the shift in her budget line when legal rules change. Preferences also may shift because of the *ex ante* incentive effects of legal rules on behavior and preferences. When matrimonial fault is not penalized, there

<sup>16</sup>*Towles v. Towles*, 256 S.C. 307, 182 S.E.2d 53 (1971).

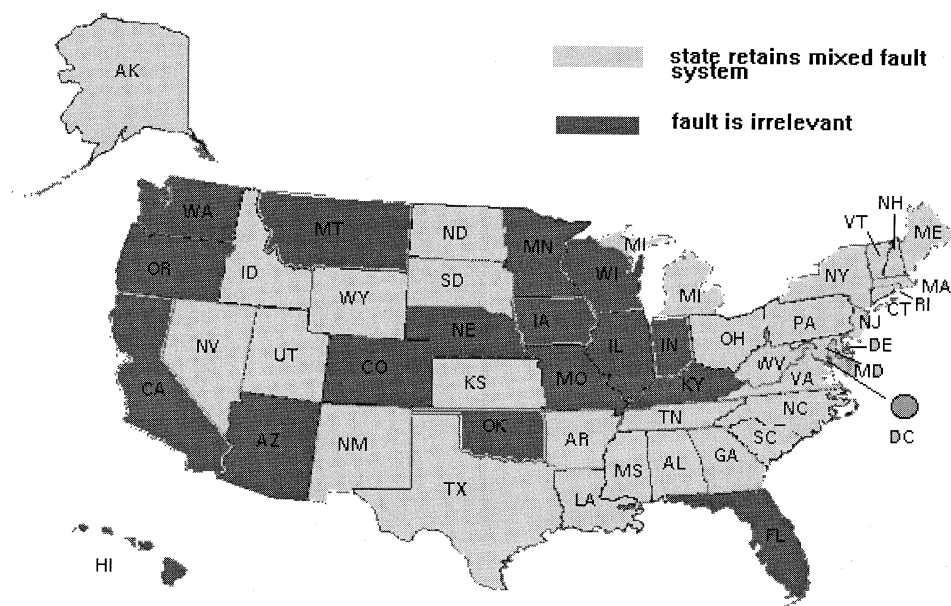


FIG. 2. Fault and no-fault states.

will be more of it, and more straying or outraged spouses who seek a divorce.<sup>17</sup> There will be more grievous faults, and trivial breaches will be forgiven less readily. The slight offense that is quickly forgotten in a fault regime, where divorce is not seen as an option, might be felt to oppress in a no-fault one.<sup>18</sup> With a greater probability of divorce, the parties also will invest less in marriage-specific assets such as children, and this will further increase divorce levels.<sup>19</sup> As well, the social stigma of divorce might weaken when no-fault laws are passed and divorce levels increase. When relaxed social norms are internalized, the transgressor will no longer be policed by a sense of guilt.

*Ex ante* incentive effects might in theory be addressed through private fault barriers in prenuptial agreements in no-fault regimes. For example, a wife might bargain for one-quarter of her husband's future earnings on divorce if neither are at fault, but for three-quarters if he is guilty of a matrimonial offense and she is not. However, we are unaware of any case in which the spouses have actually bargained for a private fault regime in a no-fault state. We can think of at least two reasons for this. First, such a bargain might be held illegal, insofar as it conflicts with the no-fault statute. Would it be upheld in Montana, for example, where the statute explicitly provides that the maintenance order shall be made "without regard to marital misconduct"? Even where the

<sup>17</sup>Richard A. Posner, (1992). *Sex and Reason*, Cambridge, MA: Harvard University Press, p. 249; see also Margaret F. Brinig, and Steven M. Crafton, (1994). "Marriage and Opportunism." *Journal Legal Studies* 23:869, 873.

<sup>18</sup>Scott J. South, (1985). "Economic Conditions and the Divorce Rate: A Time-Series Analysis of the Postwar United States." *Journal of Marriage and Family* 47:31. Writing much earlier, this is the sentiment of David Hume, (1987). Of polygamy and divorces. In *Essays: Moral, Political and Literary*, Eugene Miller, ed. 181-190. Indianapolis, IN: Liberty Classics. The fact that law does have an impact on behavior, particularly moral behavior, is the focus of Carl E. Schneider, (1992). "The Channelling Function in Family Law." *Hofstra Law Review* 20:495.

<sup>19</sup>Brinig and Crafton, *supra* note 17.

TABLE 2. Definition of variables

Divorce rate	Divorces divided by 1000 population
No-fault divorce	1 = Fault irrelevant in divorce and property settlements; 0 otherwise
Peters unilateral divorce	1 = Statute allows unilateral divorce; 0 = statute allows mutual consent divorce only
Unemployment	Average of monthly unemployment figures
Employment growth	Percentage of yearly change in non-farm employment
Metropolitan	Percent of population living in metropolitan areas
Insurance	Total dollar amount of life insurance in the state, divided by state income
Entry	Year of admittance of state into the Union less 1788 (original states as 1)
Marriage rate	Marriages divided by 1000 population

conflict with the statute is not so clear, the ability of the parties to stipulate for a financial penalty on divorce is clouded with uncertainty.<sup>20</sup> Second, a party might not seek to bargain for stiff fault penalties because this might send a signal that she is mercenary and might cost her the marriage.<sup>21</sup>

### III. Our Model

This section discusses the results of a regression analysis of the determinants of state divorce levels. Our principal finding is that divorce levels are positively and significantly correlated with state laws that do not penalize marital misbehavior at the time of divorce.

Our dependent variable *DIVORCE* is the *per capita* state divorce rate. To examine the effect of state divorce laws on *DIVORCE* levels in *State<sub>i</sub>*, we estimated the following equation:

$$\begin{aligned}
 DIVORCE_{it} = & \alpha_0 + \beta_1 LAW_{it-1} + \beta_2 UNEMPLOYMENT_{it-1} \\
 & + \beta_3 EMPLOYMENT\ GROWTH_{it-1} + \beta_4 YEAR + \beta_5 ENTRY_i \\
 & + \beta_6 METRO_{it-1} + \beta_7 INSURE_{it-1} + \beta_8 CATHOLIC_{it-1} + \epsilon_i
 \end{aligned}$$

where  $\epsilon_i$  is an error term, and where the variables are as defined in Table 2. Summary statistics are given in Table 3. Divorce levels from 1980 to 1991 were regressed on 1979 to 1990 independent variables. Unless otherwise mentioned, the source for our data was the Statistical Abstract of the United States.

All non-dummy variables were transformed into their natural logarithmic form, after

<sup>20</sup>*Sanders v. Sanders*, 288 S.W.2d 473 (Tenn. 1955) (suggesting that a financial penalty for divorce in antenuptial agreement would be contrary to public policy if the divorce suit was prosecuted in good faith and on reasonable grounds); *Norris v. Norris*, 174 N.W.2d 368 (Iowa 1970) (impeaching an antenuptial fault clause). See further Theodore F. Haas, (1988). "Rationality and Enforceability of Contractual Restrictions on Divorce." *North Carolina Law Review* 66:879 (arguing for the enforceability of financial fetters on divorce in antenuptial agreements); Elizabeth Scott, (1994). "Rehabilitating Liberalism in Modern Divorce." *Utah Law Review* 687:722.

<sup>21</sup>The signaling problem would persist if the parties were asked to elect between a fault and a no-fault regime, as Jeffrey Stake has suggested. Jeffrey E. Stake, (1992). "Mandatory Planning for Divorce." *Vanderbilt Law Review* 45:397. In the past, the signaling problem was addressed through the appointment of parents to bargain on behalf of their engaged children.

Apart from illegality and signaling problems, the myopic might fail to provide for the consequences of divorce in an antenuptial agreement because they ascribe too low a probability to divorce. See Scott, *supra* note 20, at 722.

TABLE 3. Summary statistics

Variable	Mean	Standard Deviation	Minimum	Maximum
<i>DIVORCE</i>	5.0259	1.7156	2.2000	9.1000
<i>UNEMPLOYMENT</i> <sub>-1</sub>	6.7985	5.4724	1.7000	18.000
<i>EMPLOYMENT GROWTH</i> <sub>-1</sub>	101.71	3.0070	92.946	113.68
<i>METRO</i> <sub>-1</sub>	62.451	22.276	15.000	100.00
<i>CATHOLIC</i> <sub>-1</sub>	19.370	13.494	1.6000	65.800
<i>INSURE</i> <sub>-1</sub>	2.6185	0.20269	1.3966	4.7620
<i>MARRIED COUPLES</i> <sub>-1</sub>	10.213	2.0790	6.8113	17.353
<i>WORKING WIVES</i> <sub>-1</sub>	53.910	38.901	36.600	64.900
<i>INCOME</i> <sub>-1</sub>	1237.2	238.65	823.97	2252.3

we determined that this was appropriate through a Box-Cox test on untransformed variables.<sup>22</sup>

*The Dependent Variable*

Our dependent variable, *DIVORCE*, represents total state divorces per year divided by state population. This is not the only way to measure divorce levels. Divorces also might be computed per married couple. *Per capita* divorce rates may be low because marriage rates are low, and not because married people are more faithful or happier in that state.<sup>23</sup> The divorce rate will be zero in a state where no one marries. Because of this, we re-estimated divorce levels on a per couple basis. Because the results were so similar to the *per capita* figures,<sup>24</sup> however, we omit them. We also employed marriage levels as an endogenous variable in the two-stage least square estimations that we describe below.

Divorce rates are far higher in Nevada than in other states.<sup>25</sup> Unlike Peters and Allen, we therefore excluded Nevada observations from our study. We were left with 49 states, over a 12-year period, for a total of 588 observations.

*Independent Variables*

We employed two different legal predictors of divorce. In the first two columns of Table 4, the *NO-FAULT* estimator is a dummy variable that takes the value of 1 if the state has a no-fault divorce law, as we have defined it, and takes 0 otherwise. In the third and fourth columns, the *PETERS* estimator is a dummy variable that takes the value of 1 if the state has a no-fault divorce law, as Peters has defined it, and takes 0 otherwise.<sup>26</sup>

<sup>22</sup>Our Box-Cox  $\lambda$ s on our fixed-state effects models ranged from 0.38 to 0.43, and on our non-fixed-state effects models ranged from 0.24 to 0.36. Box-Cox transformations are discussed in George C. Judge, R. Carter Hill, William E. Griffiths, Helmut Lütkepohl, and Tsoung-Chao Lee, (1987). *Introduction to the Theory and Practice of Econometrics*. 2nd ed. New York: Wiley, pp. 555–556.

<sup>23</sup>We obtained the number of married couples in each state for 1980 and 1990 from the decennial censuses. For intervening years, we multiplied the state population by the married couple ratio, which we constructed by assuming an equal change each year.

<sup>24</sup>Table available from authors.

<sup>25</sup>From 1973 to 1991, Nevada’s average annual divorce rate was 15.47 per 1000, about three times higher than the mean of 5.08 when Nevada was excluded. The next highest rate was approximately 8.

<sup>26</sup>See *supra* text in notes 14 and 15.

TABLE 4. The determinants of *per capita* divorce rates

Variable	1	2	3	4
<i>NO-FAULT</i> <sub>-1</sub>	0.13694 (4.313)*	0.15812 (5.209)*		
<i>PETERS</i> <sub>-1</sub>			0.045626 (1.379)	0.066747 (2.067)*
<i>UNEMPLOYMENT</i> <sub>-1</sub>	-0.028642 (-4.182)		-0.027235 (-3.984)*	
<i>EMPLOYMENT GROWTH</i> <sub>-1</sub>	0.19347 (4.681)*		0.21097 (5.120)*	
<i>YEAR</i>	-0.013892 (-2.656)*	-0.020128 (-3.747)*	-0.012452 (-2.372)*	-0.018924 (-3.480)*
<i>ENTRY</i>	0.17172 (3.674)*	0.21891 (5.547)*	0.17354 (3.709)*	0.23417 (5.821)*
<i>METRO</i> <sub>-1</sub>	0.037456 (1.444)	0.15786 (4.397)*	0.035274 (1.372)	0.16097 (4.372)*
<i>CATHOLIC</i> <sub>-1</sub>	0.061140 (2.398)*	0.10640 (4.320)*	0.066332 (2.589)*	0.11348 (4.594)*
<i>INSURE</i> <sub>-1</sub>	-0.23086 (-7.952)*	-0.21812 (-7.207)*	-0.23694 (-8.099)*	-0.22427 (-7.292)*
Sum of squared errors	581.42	585.43	580.98	584.79
Standard error	1.0464	1.0480	1.0460	1.0475
Buse R <sup>2</sup> (1979)	0.4675	0.4526	.4585	0.4388
Log likelihood	940.121	932.555	936.305	928.414

Note: Estimated regression coefficients and Kmenta pooling with fixed state effects.

\*significant at .05 level

Because we expected higher divorce levels in no-fault states, our model predicted that both coefficients would be positive, particularly *NO-FAULT*.

The two legal variables should be seen as proxies for the financial sanctions that courts actually impose. Ultimately, what counts is the value of the expected sanction for marital fault, and not the statutory regime. Moreover, the statutory regime is not always a perfect proxy for the financial sanctions. In a no-fault regime, a conservative judge might impose a financial penalty on a misbehaving spouse,<sup>27</sup> whereas a liberal judge in a fault state might offer an easy absolution. The statutory variable might thus be prone to type I and type II errors. Local legal cultures might affect financial awards in other ways. For example, awards generally might be higher in one state for in all civil and marital actions. Because of this, we would have relied on the actual financial payouts had they been available.<sup>28</sup> Nevertheless, our assumption that the financial penalty will

<sup>27</sup>In egregious cases, issues of fault may surface in tort actions. See Brinig and Crafton, *supra* note 17, at 893 and note 108. Fault might also result in an annulment. See Brinig, Margaret F., and Michael V. Alexeev, (1994). "Fraud in Courtship." *European Journal of Law and Economics* 2:45.

<sup>28</sup>The evidence from panel studies indicates that payouts are higher in fault states (as we have defined that term). See Margaret F. Brinig, and Michael V. Alexeev, (1993). "Trading at Divorce: Preferences, Legal Rules and Transaction Costs." *Ohio State Journal of Dispute Resolution* 8:279; Marsha Garrison, (1991). "Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes." *Brooklyn Law Review* 57:621; Michael Kelly and Greer Litton Fox, (1993). "Determinants of Alimony Awards." *Syracuse Law Review* 44:641; Elisabeth Landes, (1978). "The

be higher in fault states is not unreasonable. If conservative and liberal (and high- and low-payout) judges are normally distributed among fault and no-fault states, we would still expect a higher mean payout in fault states, so long as some judges pay attention to statutory standards. And if judges are not normally distributed, we would expect to find more conservative ones in fault states, if the political sentiment on the bench mirrors popular political sentiment in the state.

The social capital theorist expects social variables to be highly correlated with economic and legal variables. Social norms affect the level of material wealth, which in turn affects social norms. Perverse laws also may subvert social norms, and perverse social norms may subvert the enforcement and enactment of legal norms. For example, a society with liberal social norms is more likely to enact no-fault laws, and such a society also is more likely to have high divorce rates. Our legal variables thus might be partly social in nature, whereas our social variables might partly be legal constructs.<sup>29</sup> We address the multicollinearity problem by employing specifically social variables, in addition to our legal variables.

As a proxy for economic growth, we employed two predictors. *UNEMPLOYMENT* is the yearly average of monthly unemployment rates<sup>30</sup>; and *EMPLOYMENT GROWTH* is the percentage of increase in nonfarm total employment from year to year. We might expect to find higher divorce rates after economic downturns. Economic hardship imposes strains on many marriages. A spouse might have to work harder, spending more time away from his family, possibly even migrating to another state. In addition, where the parties have seen their wealth disappear in a severe economic downturn, the financial costs of a divorce might seem less troubling.<sup>31</sup> If one has lost nearly everything, there comes a point when there is less need to preserve what one has by staying married. The effect of economic predictors is ambiguous, however, because couples divorce in both good times and bad, and social variables seem to matter more than the economic ones. For example, divorce rates are far higher today than in the Great Depression. To the extent that economic variables matter, volatility seems to be more important than mean values.<sup>32</sup> If spouses are either much wealthier or much poorer than they expected at marriage, divorce is more likely.<sup>33</sup>

Divorce rates are sensitive to social norms, because social stigma may greatly increase the cost of deviant behavior. The decline in the stigma of divorce in this century likely explains much of the increase in divorce levels. We would also expect social sanctions to vary from one region to another. Therefore, we employed four social predictors of

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Economics of Alimony." *Journal of Legal Studies* 7:35. For example, Yoram Weiss, and Robert Willis, (1993). "Transfers Among Couples in Divorce Settlements." *Journal of Labor Economics* 11:629, 656 at Table 4, show that divorced wives with children received a mean of \$9313 in no-fault states, compared to \$5220 in fault states (as we define them). In most of these studies, however, the difference in payouts is not significant.

<sup>29</sup>The reductionist and unverifiable claim that all variables are social in nature is as unreasonable as the claim that at the bottom all variables are proxies for more fundamental economic conditions or legal variables. For a political explanation of when no-fault laws were introduced, employing a logit estimation technique, see Brinig and Crafton, *supra* note 17.

<sup>30</sup>This is the percentage of members of the labor force who are actively looking for employment.

<sup>31</sup>Bumpass, Larry, Teresa Castro Martin and James Sweet, (1990). "Background and Early Marital Factors in Marital Disruption." Madison, WI: Center for Demography and Ecology, unpublished manuscript, pp. 10 and 16 (reporting a two-thirds greater probability of divorce if the husband was unemployed at any time during the first year of marriage).

<sup>32</sup>Becker, Gary S., (1991). *A Treatise on the Family*. Cambridge, MA: Harvard University Press, p. 339.

<sup>33</sup>Becker, Gary, Elisabeth M. Landes, and Robert Michael, (1977). "An Economic Analysis of Marital Instability." *Journal of Political Economy* 85:1141; South, *supra* note 18, at 37.

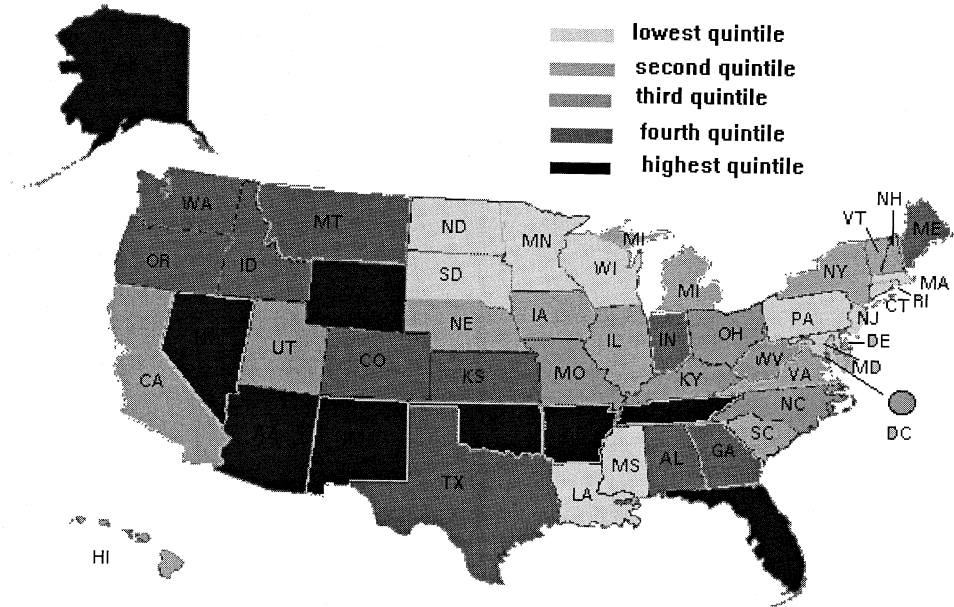


FIG. 3. Divorce rates from 1979 to 1991.

divorce rates: *ENTRY*, *METRO*, *INSURE*, and *CATHOLIC*. We omitted racial variables, which were insignificant in both the Peters and Allen studies.

As may be seen in Figure 3, divorce rates are higher in western states.<sup>34</sup> Regional differences are long-standing,<sup>35</sup> because the frontier offered spouses a relatively easy exit option from marriage.<sup>36</sup> In 1838, Alexis de Toqueville noted the "restless disposition and an excessive love of independence" of Americans, whose westward migration kept "ties broken or unformed."<sup>37</sup> Even today, higher divorce rates in western states plausibly reflect a more mobile society, with a greater proportion of migrants and weaker ties to the social and family institutions that prop up ailing marriages. Regional differences in divorce rates also might reflect different social sanctions for divorce.

One might seek to capture the frontier effect through regional dummy variables. However, dummy variables do not weigh the frontier effect, as the *ENTRY* variable does. *ENTRY* represents the number of years between 1788 and the year that the state was admitted to the Union,<sup>38</sup> with increasing values as one moves westward.

<sup>34</sup>Norval D. Glenn, and Beth Ann Shelton, (1985). "Regional Differences in Divorce in the United States." *Journal of Marriage and Family* 47:641; Norval D. Glenn, and Michael Supanic, (1984). "The Social and Demographic Correlates of Divorce and Separation in the United States: An Update and Reconsideration." *Journal of Marriage and Family* 47:563.

<sup>35</sup>In 1908, the Labor Department reported that "the divorce rate increases as one goes westward." United States Department of Labor and Commerce, (1908). *Marriage and Divorce 1867-1906*, I, 14-15, (Reprinted Westport, CT, 1978).

<sup>36</sup>Roderick Phillips, (1988). *Putting Asunder*. Cambridge: Cambridge University Press, p. 452.

<sup>37</sup>De Toqueville, Alexis, (1838). *Democracy in America*. New York, NY: Random House, pp. 276 and 285.

<sup>38</sup>The *ENTRY* variable took the value of 1 for each of the original thirteen states. An *ENTRY* variable was used to predict state economic growth in Olson, Mancur. (1982). *The Rise and Decline of Nations*. New Haven, CT: Yale University Press.

Urbanization always has been linked with increased divorce rates.<sup>39</sup> Cities offer greater opportunities to stray and greater anonymity for transgressors. In cities, moreover, the safety net of community and religion might be weaker than in smaller towns. No doubt, that has always been part of the appeal of cities. Our proxy for urbanization was the *METRO* variable, representing the percentage of the population living in a metropolitan statistical area.

The link between marriage and insurance was noted by Gary Becker,<sup>40</sup> who argued that marriage reduces the financial and emotional risks that singles bear.<sup>41</sup> In marriage, spouses pool their fortunes by promising "to love and honor . . . in sickness and in health, for better and for worse."<sup>42</sup> The emotional security of marriage also will have a higher appeal for the risk averse. No doubt, marriage "is a lottery in which there are wondrous many blanks," as Voltaire noted. But even in such cases, the known quantity of one's spouse may be preferred to the uncertainty of the next (blind) date or the unhappiness of remaining alone.<sup>43</sup>

Our *INSURE* variable, representing total life insurance in force divided by total income for each state, serves as a proxy for differential risk aversion. We suggest that those who are risk averse in one set of decisions will be reluctant to gamble in other sets of choices, even where the decisions are ostensibly dissimilar. As a measure of general risk aversion, there are few better sources of data than life insurance rates, which vary substantially from one region to another.<sup>44</sup>

The *CATHOLIC* variable represents the percentage of Catholics in the state.<sup>45</sup> More than any other major religion, Catholicism refuses to recognize remarriage after divorce. Divorce rates also might be lower for Catholics if they are more risk averse than Protestants, as Max Weber famously argued.<sup>46</sup> However, the differences in divorce rates are smaller than one might have thought. In America, 26% of Protestants and 23% of Catholics have been divorced at least once.<sup>47</sup>

<sup>39</sup>Phillips, *supra* note 36.

<sup>40</sup>Gary S. Becker, (1993). "The Economic Way of Looking at Behavior." *Journal of Political Economy* 101:385. See also, Christopher J. Bruce, (1994). "An Economic Model of Spousal Support," Part III. Working paper, University of Calgary Department of Economics.

<sup>41</sup>A point noted well before Becker. See, e.g., Karl Llewellyn, (1932). "Behind the Law of Divorce," Part 1. *Columbia Law Review* 32:1281, 1290.

<sup>42</sup>See, e.g., West Virginia Code §48-1-12b (1994), and the traditional marriage ceremony in the Book of Common Prayer.

<sup>43</sup>Becker, et al. *supra* note 33, pp. 1147-1148; Paula England and Gary Farkas, (1988). *Households, Employment and Gender*. New York: Aldine Press; William Bishop, (1984). "Is He Married?: Marriage as Information." *University of Toronto Law Journal* 23:245, 249; Becker, *supra* note 32, at 337.

<sup>44</sup>We re-estimated divorce levels in regressions that omitted the *INSURE* variable and found that little changed, particularly with respect to our legal coefficients. Data available from authors.

<sup>45</sup>Source: Official Catholic Directory, years 1970 to 1991, published by P.J. Kennedy & Sons in association with R.R. Bowker, A. Reed Reference Publishing Company, New Providence, NJ.

<sup>46</sup>Max Weber, (1930). *The Protestant Ethic and the Spirit of Capitalism*.

<sup>47</sup>George Gallup Jr. and Jim Castelli, "Attitudes On Marriage Surveyed; Catholic, Protestant Divorce Rates Similar," *Washington Post*, Saturday, April 8, 1989, at C13. These figures understate the difference in divorce rates, because Protestants are more likely to remarry and have a second divorce. Although 54% of divorced Protestants remarry, only 39% of divorced Catholics do so.

Once again, we re-estimated divorce levels in regressions that omitted the *CATHOLIC* variable and found that little changed, particularly for our legal coefficients. Data available from authors.

TABLE 5. The determinants of divorce

<i>Variable Name</i>	<i>No-Fault Definition Marriage, Insurance, and Working Women Endogenous</i>	<i>Peters Definition Marriage, Insurance, and Working Women Endogenous</i>
MARRIAGE		0.35010 (7.012)*
PETERS		0.11163 (6.782)*
NO-FAULT	0.098402 (5.925)*	
YEAR	0.097344 (4.893)*	0.10388 (5.253)*
EMPLOYMENT GROWTH	0.54357 (5.991)*	0.62611 (6.811)*
UNEMPLOYMENT	0.047327 (2.244)*	0.052766 (2.524)*
METRO	-0.037627 (-2.051)*	-0.028605 (-1.620)
INSURANCE	-0.61070 (-9.844)*	-0.57582 (-9.434)*
ENTRY	0.037169 (8.306)*	0.037381 (8.666)*
WOMEN IN LABOR FORCE	-0.29121 (-2.752)*	-0.39732 (-3.705)*
CATHOLIC	-0.11084 (-11.19)*	-0.12299 (-12.41)*
STANDARD ERROR	0.16752	0.16568
R <sup>2</sup> adjusted	0.5935	0.6023

Note: Two-state least squares estimations with fixed state effects. Without economic variables, Peters'  $t$ -statistic is 4.43; No-fault is 2.78.

\*significant at .05 level

### Methodology

Elizabeth Peters' study was based on panel data taken from a sample of individuals. By contrast, our study estimates average filing rates at the state level through state-level time series cross-sectional data (TSCS). This difference reflects a methodological difference. Peters' paper rests on a model in which the crucial building block is the individual. On social capital theories, however, societies also have their own character, for better or for worse. We assume that these differences may be observed between states, and we employ state-wide legal and socioeconomic variables to estimate state divorce filing rates.

The use of TSCS data heightens concerns about idiosyncratic state factors not captured by the other variables. Because of this, we employed a fixed-effects model throughout, with a separate intercept for each state.<sup>48</sup> We first estimated divorce levels

<sup>48</sup>Judge 1988: § 11.4. On the need to employ a fixed-state effect model for TSCS data, see Gary Becker, (1993). "Comments on Danzon, Maki, Murray, and Allen." *Journal of Labor Economics* New York, NY: MacMillan, 11:S326.

through an ordinary least squares (OLS) regression that employed a lagged dependent variable. However, a Lagrange multiplier test revealed a substantial serial correlation problem.<sup>49</sup> In theory, one might address this through instrumental variables, but in practice it is difficult to find instruments that are well correlated with the dependent variable and are uncorrelated with the errors. Because of this, we employed the Kmenta cross-sectionally heteroskedastic and timewise autocorrelated (CHTA) model with fixed-state effects.<sup>50</sup>

The CHTA model assumes cross-sectional independence and  $\beta$  coefficients that do not vary between cross-sections. However, we adjusted for cross-sectional differences in two ways. First, we employed a fixed-state effects model, with a separate intercept  $v_i$  for each State $_i$ . In addition, the CHTA model corrects for serial correlation through a state-specific generalized least squares technique. First, the equation is estimated by OLS. Next, the OLS residuals are used to estimate a separate coefficients of autocorrelation  $\rho_i$  (bounded by  $-1$  and  $+1$ ) for each State $_i$ . The  $\rho_i$ 's then are used to transform the observations to produce a serially independent and homoskedastic error term.

$$y_{it} = \rho_i X_{it} \beta + v_i + \epsilon_{it}$$

Finally, the equation is estimated by the OLS method.

Because several of our variables are substantially endogenous, we also estimated divorce rates through a two-stage least squares (2SLS) procedure. The decision to purchase insurance is made often by married couples (particularly if they have children) as a form of estate planning, and we would, therefore, expect smaller *INSURE* values in states with high divorce rates. We already have noted that marriage rates are endogenous, insofar as the nonmarried do not divorce. In addition, high divorce rates may correlate with high marriage rates because of remarriages after divorce.<sup>51</sup> Our *MARRIAGE* variable represents married couples *per capita*. We also employ an endogenous *WORKING WOMEN* variable, representing the percentage of working age women with regular outside employment.<sup>52</sup> In a recent paper,<sup>53</sup> Allen Parkman argues that wives are more likely to be employed in no-fault states (1) to make themselves more valuable to their husbands to decrease the likelihood of divorce, and (2) to insure themselves against the financial loss that follows divorce.

Our 2SLS equation, therefore, took the following form:

$$\begin{aligned} DIVORCE_{it} = & \alpha_0 + \beta_1 LAW_{it-1} + \beta_2 UNEMPLOYMENT_{it-1} \\ & + \beta_3 EMPLOYMENT\ GROWTH_{it-1} + \beta_4 YEAR + \beta_5 MARRIAGE_{it-1} \\ & + \beta_6 ENTRY_i + \beta_7 METRO_{it-1} + \beta_8 INSURE_{it-1} + \beta_9 CATHOLIC_{it-1} \\ & + \beta_{10} WORKING\ WOMEN_{it-1} + \epsilon_p \end{aligned}$$

<sup>49</sup>The Lagrange multiplier  $\chi^2$  for the *NO-FAULT* Koyck equation was 47.383, and for the *PETERS* Koyck equation was 47.080 (both with 23 degrees of freedom). In the non-Koyck equations, the Lagrange multiplier  $\chi^2$  were 173.857 and 162.311, respectively (again, with 23 degrees of freedom).

<sup>50</sup>On CHTA estimation, see Jan Kmenta, (1986). *Elements of Econometrics*. New York, NY: MacMillan, 618–622.

<sup>51</sup>About 75% remarry within 5 years after the divorce. Andrew J. Cherlin, (1981). *Marriage, Divorce, Remarriage: Social Trends in the United State*. Cambridge, MA: Harvard University Press, p. 29.

<sup>52</sup>Source: Department of Labor, Bureau of Labor Statistics, printouts for various years.

<sup>53</sup>Parkman, Allen M. (1998). "Why Are Working Women Working So Hard?" *International Review of Law and Economics* 18:41–49.

with *INSURE*, *MARRIAGE* and *WORKING WOMEN* taken to be endogenous. As an exogenous variable, we also employed an inflation-adjusted AFDC variable, representing the average state payout to a family of four. Because Aid for Families with Dependent Children (AFDC) subsidizes illegitimacy,<sup>54</sup> we expected lower marriage rates in high AFDC states.

#### IV. Results

Our results are reported in Tables 4 and 5. Our principal result is that divorce levels are positively and significantly correlated throughout with no-fault laws, as we have defined them. Divorce levels also were positively and significantly correlated with the *PETERS* no-fault variable in the 2SLS estimations in Table 5 but not in Table 4's CHTA pooled regression.

Table 4 reports on a regression of *DIVORCE* rates on legal, economic, and social state-level variables. Specifications 1 and 2 employ our *NO-FAULT* legal variable, whereas specifications 3 and 4 substitute the *PETERS* no-fault variable. Because the signs of our economic coefficients were countercyclical, the economic variables were not employed in specifications 2 and 4.

Table 5 reports on a 2SLS estimation in which endogenous variables (*MARRIAGE*, *INSURE*, and *WORKING WOMEN*) are estimated in a simultaneous equation model. The *NO-FAULT* variable is employed in specification 1, and the *PETERS* no-fault variable is employed in specification 2.

Our *NO-FAULT* variable is positive and significant throughout. The *PETERS* variable also was positive throughout and was significant in the 2SLS equation.<sup>55</sup> This suggests that the failure of prior studies to detect a significant legal variable might be attributed to a faulty definition of fault. Alternatively, such studies may have failed to account for endogenous variables or may have omitted relevant variables.

The economic coefficients are significant throughout. However, the *EMPLOYMENT GROWTH* coefficient always has a positive sign, inasmuch as there are more divorces in expanding economies. The *UNEMPLOYMENT* coefficient is positive in Table 4, suggesting more divorces in economic downturns, but it is negative in Table 4. These results suggest that divorce levels might be influenced more closely by social than by economic variables. Therefore, we dropped both economic variables in specifications 2 and 4 of Table 4.

There were fewer surprises in the social coefficients. The *INSURANCE* coefficient was significant and negative throughout, as predicted. A risk-averse society would seem to be characterized by higher insurance coverage and lower divorce rates, because marriage serves an insurance function. The *METROPOLITAN* coefficient was positive in Table 4 but negative in Table 5. A frontier effect continues to be evident in the *ENTRY* coefficient, which was positive and significant throughout.

Because divorce rates crested around 1980, at the beginning of our study, we expected the *YEAR* coefficient to be negative, as it was in Table 4. However, in the 2SLS estimation in Table 5, the *YEAR* and *MARRIAGE* coefficients were positive. At least part

<sup>54</sup>See Margaret F. Brinig and F.H. Buckley, (1998). "The Price of Virtue." *Public Choice* (in press).

<sup>55</sup>In an OLS model employing a lagged dependent variable, the *NO-FAULT* coefficient was positive and significant, whereas the *PETERS* coefficient was positive and insignificant. In an OLS non-fixed-state effects model, both coefficients were positive and insignificant when a lagged dependent variable was employed, and they were positive and significant when it was not. Tables available from authors on request.

of the decline in divorce rates is attributable to the decline in marriage rates. This also might explain why the *CATHOLIC* coefficient was unexpectedly positive and significant in Table 4, whereas it was negative and significant in Table 5. As expected, *WORKING WOMEN* levels seem higher in states with high divorce rates.

## V. Conclusion

Our study of divorce rates from 1988 to 1991 provides the strongest evidence to date that no-fault divorce laws are associated with higher divorce levels. Prior studies failed to detect a significant no-fault predictor of long-term divorce rates because they defined “no fault” solely in terms of the dissolution of the marriage and ignored the financial penalty that a court might impose on an at-fault party. Because of this, they labeled as no-fault some states that imposed a financial penalty on fault. This is a mistake, because there will be less fault when it is penalized, and fewer divorces. This explains why our *NO-FAULT* coefficient was positively and significantly correlated with higher divorce rates in Table 4, but why a less precise no-fault predictor was not always significant.

These results are consistent with the theory that the change to no-fault divorce laws resulted in increased divorce levels. However, our results are suggestive only. In particular, the assumption that a watertight compartment separates legal and social variables may be questioned. Divorce levels likely will be lower in societies that stigmatize divorce. Such societies also are less likely to enact no-fault divorce laws. The legal predictor thus might serve as a proxy for more fundamental social norms. Although we sought to address this problem by employing explicit social variables, and by estimating divorce levels through a 2SLS procedure, we cannot discount the possibility that our *NO-FAULT* predictor is, in part, a social variable itself. It is excessive, however, to regard legal variables, including *NO-FAULT* as exclusively social. If that were so, then legal rules, and the economic costs that they impose on rule breakers, would not in themselves affect behavior. It is as unreasonable to suggest that all causes are social as it is to insist that social stigma counts for nothing.

This article suggests a solution to the divorce law controversy that might appeal to all sides in the debate. The consequences of divorce are troubling. Children are harmed by it, and no-fault laws have impoverished many women. More broadly, the move to no-fault may have contributed to a coarsening of American society. Nevertheless, many Americans will resist any attempt to condition the divorce decree on proof of fault. Yet, if no-fault laws are to be retained at the divorce stage, matrimonial fault still might be penalized at the stage when assets are divided and spousal support is awarded. Many states, such as Virginia, have in fact adopted such a regime. Our findings suggest that divorce rates would be lowered if more states penalized matrimonial fault in this way.