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Recommended Citation
Michael J. Whaling, No Fault Concept: Is This the Final Stage in the Evolution of Divorce, 47 Notre Dame L. Rev. 959 (1972).
Available at: http://scholarship.law.nd.edu/ndlr/vol47/iss4/8

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THE NO FAULT CONCEPT: IS THIS THE FINAL STAGE IN THE EVOLUTION OF DIVORCE?

I. Introduction

In the past twenty years society has been screaming for more realistic divorce grounds. Since the 1969 removal of fault-based grounds for divorce in California,¹ state after state has started reform. As more and more states begin to reform their divorce law, it becomes evident that state legislatures do pay attention to the practicing bar and the social scientists. The legislators have responded to the pleas with a variety of different approaches based upon the "no fault" or marital breakdown concept. An analysis of the different types of statutes indicates that, with the possible exception of Iowa, the legislators are probably off the target.

This article will summarily trace a history of the law of divorce and its development from "no fault" to marital fault and back, attempting to look at the interrelated social developments. It will then examine three current types of "no fault" divorce statutes and indicate some inherent problems within these statutes. Finally, the article will propose an alternative to the present forms of divorce, based upon marital breakdown principles.

II. The Evolutionary History of Divorce

The law of divorce, like other laws, runs in an historical circle. In the early days of the Roman Republic, divorce was a matter of civil contract and freely terminable at will, but within the family traditional mores exercised strict controls making divorce relatively rare.² In the few divorces that occurred, the courts were resorted to only in matters of property settlement for couples who had privately decided upon divorce.³ It was in the later Roman Republic that the law began its circle of development. As the traditional family mores broke down, divorce became more commonplace. Family life broke down completely. Some marriages would last only a matter of days. It was during this period that Rome became known for the riotously free life style that is traditionally depicted in books and movies.

The reaction to the widespread abuses in the Roman way of life brought about the development of the fault-oriented doctrine. The Stoic philosophers and early Christians who disapprovingly witnessed the sexual freedom of the time eventually caused the pendulum to begin its swing to the other extreme.⁴ Surprisingly, when the empire became Christian, it did little to affect private Roman law. The only exception was divorce.⁵ As the Catholic Church became stronger, the doctrine of indissoluble marriage began to develop.

¹ CAL. CIV. CODE §§ 4506-4507 (West 1970).
⁴ Bodenheimer, supra note 2, at 186.
Constantine, the emperor responsible for the conversion of the Empire, enacted that if one spouse divorced the other (except for certain specified causes), then in addition to the existing penalties affecting the dowry, an offending wife could be deported and an offending husband could not marry again. If he did remarry, the divorced wife could seize the second wife's dowry.\footnote{Id. at 36.}

Again, the law went through a series of developments. Christianity had so little effect upon the law of Rome that even after these penalties were imposed, the divorce was still valid.\footnote{Id. at 36.} Roman law was never to exercise jurisdiction over the marital termination \textit{per se}.\footnote{Walker, \textit{Beyond Fault: An Examination of Patterns of Behavior in Response to Present Divorce Laws}, 10 J. Fam. L. 267, 271 (1971).} Considering these developments, Max Rheinstein has said:

\begin{quote}
No court decree or other act of government was ever required in Rome as a constituent element of a divorce and never was there engendered the idea that a divorce would not be possible except upon 'cause'.\footnote{Rheinstein, \textit{Trends in Marriage and Divorce Law of Western Countries}, 18 Law \& Contemp. Prob. 3, 7 (1953).}
\end{quote}

It was not until the Middle Ages that divorce based upon marital fault became the only divorce available. The absence of any formal regulation of marriage and divorce which was characteristic for Rome, as well as for the Germanic peoples, was changed by the element which entered into the making of the Middle Ages, i.e., Christianity.\footnote{Id. at 8.} Because of Charlemagne, one of the most powerful lords of the Middle Ages, who baptized thousands by the sword and granted vast power to the Church,\footnote{See H. Davis, \textit{Charlemagne: The Hero of Two Nations} (1899); H. Lamb, \textit{Charlemagne: The Legend and the Man} (1954). Charlemagne was known as the ruler and lawgiver. Although he was a devout Christian attending Mass daily and known as a Defender of the Church, he tended to uxoriousness, and divorced and married several times. He never permitted his daughters to marry, although he generally tolerated illicit unions on their part so long as they stayed at home. The Church kept silent during his lifetime; so faithful a defender could not be refused some trifling indulgence.} the Ecclesiastical Courts of the Church were entrusted to deal with marital problems throughout all of Christendom.\footnote{Mark 10:9.} It was in this period that the Ecclesiastical Courts raised marriage to the dignity of a sacrament.\footnote{Rheinstein, supra note 9, at 8.} A spouse could only dream of divorce during those days of knightly honor and chivalry. The Ecclesiastical Courts had a strong grip upon society. The Church had succeeded in making its courts and its matrimonial law effective everywhere from Scandinavia to Sicily and from Portugal to the Territory of the Teutonic Knights on the shores of the Baltic.\footnote{Id. at 10.} Based upon Church doctrine, the Ecclesiastical Courts made marriage a bond that “no man” may “put asunder.”\footnote{Mark 10:9.} It became the law of the land. The Church was not able to do this without certain concessions. These concessions manifested themselves in annulment\footnote{Rheinstein, supra note 9, at 10.} and separation, or divorce from bed and
board. Annulment is based upon the ground that no marriage has taken place, and thus doesn't concern itself with fault or a termination of marriage. The parties simply discontinue a marriage, which was never really a marriage in the first place. Divorce from bed and board was really only separation. It was allowed only for matrimonial offence, usually adultery or cruelty, and did not include the right to remarry. Divorce from bed and board was in fact no divorce at all. This remedy only allowed the aggrieved spouse to live apart from the offending spouse. Perhaps it should be pointed out that in the Middle Ages, as well as today, in countries still influenced by the Catholic Church, the mistress system was openly accepted and tolerated as a part of normal social life. The doctrine of indissolubility of marriage came to final solidification at the Council of Trent in 1563, where it was declared to be a part of Church doctrine, though not dogma, of the Catholic faith.

During the latter stage of this pronounced swing in the law of divorce, the Protestant Reformation began. As a later development of the Reformation itself, the law of marriage and divorce again became a matter of civil contract. The Reformation exerted its influence in two ways, it repudiated the sacramental nature of marriage, and returned the matter of adjudication of family law to the courts of the state. As characterized by Luther, marriage was a wholly external thing, subject to secular jurisdiction. The reformers all agreed that marriage dissolution should be allowed and the reformers had different opinions only on the matter of grounds. In the words of John Knox, divorce should be permitted for adultery.

Marriage once it is lauchfullie contracted may not be dissolved at manis pleasour, as oure Maister, Jesus Christ, doth witness, onles adulterie be commited; which being sufficientlie proven in the presence of the civil magistrate, the innocent (yf thei so requyre) ought to be pronounced frie, and the offender ought to suffer the death as God hath commanded.

Although the courts would now grant a divorce absolute with the privilege to remarry, the old rules of the Ecclesiastical Courts had left their mark. The old grounds for separation in the Ecclesiastical Courts were transferred to the civil courts as the basis for an absolute divorce with the privilege to remarry. At the same time during this development, the Ecclesiastical Courts continued to prosper, proclaiming marriage indissoluble, granting only annulments.

It was during the Middle Ages, sometimes called the Dark Ages (correctly so where divorce law is concerned), that the fault-oriented approach became

17 Mace, supra note 3, at 180.
19 Mace, supra note 3, at 180.
20 Walker, supra note 8, at 274.
21 Pospishil, supra note 18, at 600. Msgr. Pospishil points out that because this doctrine is not dogma the Catholic Church could actually change the doctrine without a great deal of difficulty.
22 Rheinstein, supra note 9, at 10.
24 Id.
25 Mace, supra note 3, at 181.
entrenched in the law. It is interesting to note that the influence of the Church is only in the development of Western divorce. In the Western countries where the Church played such a major role, the divorce law went through these confusing stages of development. In the Eastern Orthodox church, which parted from the Western church during the early phases of development, dissolution of marriage was permitted. All Eastern Christian churches still permit divorce and remarriage. In Muslim countries where religion also exerts a great influence, but in different moral and ethical backgrounds, divorce is obtained by the husband saying three times “I divorce thee.” In another religiously based society, the Jewish setting, there was surprisingly little authorized regulation of marriage. Divorce was freely permissible to the husband, subject only to informal censure by the community.

The present day movement in the United States for more realistic divorce grounds is a development of the last forty years. For the most part, the criticism came from the social sciences; only very recently has it been from the law schools and the practising bar. However, divorce based upon grounds other than fault is not a new idea. The Soviet Union was probably one of the first countries of modern times to adopt the marital-breakdown approach. Marriage and divorce were among the first institutions to be affected by the earliest Soviet decrees. In December, 1917, the Soviet regime introduced divorce in which no statement of fault was required. For a time divorce was permitted by registration of only one of the parties. Today divorce with no statement of fault is the sole basis upon which divorce can be granted in the Soviet Union and most communist countries.

Although the law has been modernized since its first introduction, as early as 1959, Australia had a so-called “no fault” divorce statute in the form of a living separately statute. The statute only required that the parties live separately for five years. By 1966 the marital-breakdown approach to divorce was already in effect in some form in Greece, Switzerland, Yugoslavia, Norway, Sweden, Denmark and Japan. Further, in Japan about 90% of all divorces are supposedly granted upon mutual consent of the couple.

In the United States the progress has been at a much slower rate. Several states had made attempts at improving the law by adopting “incompatibility of temperament” statutes. Such statutes were adopted by Alaska, New Mexico and Oklahoma. These statutes were not the beginning of the marital-breakdown approach in the United States because the judges in these jurisdictions, through judicial gloss, included all of the old time-honored prin-

26 Pospishil, supra note 18, at 596.
27 Walker, supra note 8, at 274.
28 Rheinstein, supra note 9, at 8.
30 Walker, supra note 8, at 274.
31 Mace, supra note 3, at 182.
33 Mace, supra note 3, at 182.
34 ALASKA STAT. § 09.55.110(5)(c) (1962).
35 N. M. STAT. ANN. § 22-7-1(8) (1955).
Dilemmas of fault in determining "incompatibility." At the same time, the courts in other states were making significant contributions to family law. The Supreme Court of California had done away with the doctrine of recrimination. Other courts were simply tolerating uncontested divorces and divorces based upon the dubious ground of extreme cruelty.

It has been reported that the average uncontested divorce proceeding in California occupies less than 10 to 15 minutes of the court's time. It is hard, therefore, for even the most naive observer to believe that fifteen minutes of "justice" can ever reveal the truth of the couple's marital difficulties that may have been fermenting for months, or even years.

In 1966 the state of New York, which had allowed divorce for adultery only, attempted legislative reform. The new law amounted to nothing more than the addition of some more fault grounds for divorce, plus the adoption of a restrictive living apart statute. The statute was a so-called "no fault" statute, but the consent of both parties was needed. During this period of development, many people began to recognize the need for a complete examination and reform of the entire system. Finally, in 1969, the California legislature became the first state to take the dramatic step of completely revamping its divorce law. Since the passage of the California law, the states of Iowa, Michigan, and New Jersey have also enacted legislation which has substantially reformed their respective divorce laws.

III. The View of the Social Sciences

While divorce law continued in its circle of development, it had its effect on the community. Since the divorce law on the books did not reflect the demands of society, the courts began to administer a law that was different from the law on the books. Collusion between the parties was considered to be a bar to a cause of action of divorce, yet many couples agreed to get a divorce. The procedure was quite simple, one spouse would agree not to contest. The courts tolerated the situation because of a lack of desire to prove collusion—a manifest disagreement with the law.

In many states more than 90% of all the divorces granted were uncontested. In New York, where adultery was the only grounds for divorce, a distraught husband would contemplate agreeing to be found in a hotel room with someone he had never met, thereby establishing a legal ground. Mrs. Bodenheimer suggests a case where two husbands in collusion could use wife-swapping.

37 Kleinfeld & Moss, A Divorce Reform Act, 5 HARY. J. LEGIS. 563, 565 (1968).
39 Walker, supra note 8, at 284.
41 Id.
42 CAL. CIV. CODE § 4506-4507 (West 1970).
43 IOWA CODE § 598 (Supp. 1971).
44 MICH. COMP. LAWS ANN. § 552.6 (Supp. 1971).
46 Kleinfeld & Moss, supra note 37, at 569.
as a means to obtain divorce on grounds of adultery. These situations reflect what was actually taking place in society. They indicate that a law, which presumes a happy marriage until there is evidence of fault, can be based upon a faulty assumption.

Timothy Walker, a sociologist/lawyer, describes the conduct in terms of "law-avoidance" and "law-accommodation." Law-avoidance is conduct which achieves a similar goal to that provided by the law by a means totally outside the legal system. In divorce law it manifests itself in different forms. In the lower classes of England, a spouse could easily rid himself of an unwanted mate, although divorce was generally prohibited. The spouse simply left, since most were never legally married in the first place. By keeping the marriage outside the legal system, divorce was made easy. In America "common law divorce" has always been popular among the lower economic classes. Why should a fellow spend time and money attempting to get a divorce that was unobtainable? It was much easier to obtain the so-called "poor man's divorce" of desertion.

Law-accommodation is conduct which operates within the system in order to obtain a result provided by that legal system. The idea is to stay within the grounds of the law for social acceptability. The letter of the law is stretched to its very limits, but it is never broken. Two of the most common examples of this kind of conduct are divorce grounded upon cruelty and the uncontested divorce. It is worth noting that the two go hand in hand. Over 90% of all uncontested American divorces are based upon cruelty. According to Walker:

The behavior pattern of judges in such situations is one of law-accommodation — of administering the procedures of the adversary system in form only by requiring the presentation of corroborated evidence of fault by the spouse in the court room. And too many times the presentation of this evidence assumes the character of a well-rehearsed and too-often-repeated one-act play.

One of the most interesting examples of law-accommodation in the area of divorce was the "shoebox divorce." It was a curious blend of unconscious law-avoidance on the part of the couple, and law-accommodation upon the part of a court clerk. In the South, when a Negro couple got married, the court clerk would put the license in a shoebox, never recording it. If the marriage failed, the couple would go to him for a divorce whereupon he would destroy the unrecorded marriage license. The most popular combination of law-avoidance and law-accommodation in recent times has been the migratory divorce. Since there is relative strictness or laxity in various state divorce laws, one can easily go to another state with a lax law, declaring an intent of domicile. The spouse obtains his divorce and immediately returns home. This represents law-

47 Bodenheimer, supra note 2, at 181.
48 Walker, supra note 8, at 269.
49 Id. at 277.
50 Id. at 278.
51 Id. at 270.
52 Id. at 283.
53 Id. at 285.
54 Id. at 280.
avoidance on the part of the spouse who flees the strict divorce law of his true domicile, and law-accommodation on the part of the states.\textsuperscript{55}

The social scientists were the first to point out the major problems with divorce law. They recognized early that the effect the law was having was diametrically opposed to its intent. Divorce is an adjustment of relationship that does not erase the past or create a totally unrelated future.\textsuperscript{56} Divorce law should foster viable family relationships, but when this is not possible, it should resolve the differences through divorce with a minimum amount of conflict.\textsuperscript{57} If a divorce is the result, it should help the parties learn from the experience. Under the fault-oriented approach, it was not possible. The parties were shoved into an adversary process and forced to point fault at the other party to obtain divorce. This was not done without effects. The finger pointing exacerbated the aggressive forces already destroying the family. The resentment that grew made it almost impossible for an attempt at reconciliation. It also created an emotionally charged atmosphere, causing a great deal of difficulty in issues of finance and child custody.\textsuperscript{58}

Another important factor is that the outmoded fault system attempted to require people, whose marriage had obviously broken down, to live together. This happened in either one of two ways. First, if there had been no incidence of fault, the courts presumed that a happy marriage existed. Although there had been no technical fault, this was not always a valid presumption. The second problem arose when both spouses were at fault. Until DeBurgh v. DeBurgh, recrimination or the "clean hands theory" of equity would bar an award of divorce in almost every state.\textsuperscript{59} A husband who beat his wife, and a wife who committed adultery, could not get a divorce. The resulting effects of such a situation can be disastrous. In many cases, it may lead to harm far greater to society and the individual than divorce. It can lead a spouse to set up housekeeping with a partner of his choice, and ultimately establishing an illegitimate family.\textsuperscript{60} It leaves many children in an unhappy, stress-filled environment to be raised. It is widely recognized that the initial proceeding of divorce itself can be traumatic to children in certain age groups.\textsuperscript{61} The disorganized family is generally considered to be a major factor in juvenile delinquency and child neglect. It is not so much the broken home, but the contentious, quarreling, unstable home that is most often the cause of maladjusted children.\textsuperscript{62}

In the words of Max Weber, rules are usually observed because of their apparent utility,\textsuperscript{63} but the divorce rules were not responsive to what had occurred in society. Technology had brought about remarkable changes in society. Wom-

\textsuperscript{55} Id. at 233.
\textsuperscript{56} Westman & Cline, Divorce is a Family Affair, 5 Fam. L.Q. 1 (1971).
\textsuperscript{58} Id. at 81.
\textsuperscript{59} Until the DeBurgh case, when both parties were at fault, no divorce could be granted. The state denied the divorce because neither spouse was free from fault.
\textsuperscript{60} New Jersey, Final Report of Divorce Law Study Commission 7-10 (1970) [hereinafter cited as New Jersey Report].
\textsuperscript{61} Bodenheimer, supra note 2, at 191.
\textsuperscript{62} Chute, Divorce and the Family Court, 18 Law & Contemp. Prob. 49, 51 (1953).
en were no longer dependent upon men for their well-being. As women became more independent, it was no longer necessary for courts to judiciously protect the marriage relationship. The courts had begun to accommodate the law to the needs of society, while the legislatures continually refused to change the law. People, realizing the futility of the law, had begun to take maximum advantage of the methods of law-avoidance. Gradually, disrespect for the divorce court and the divorce lawyer had grown. The situation led Roger Traynor, former Chief Justice of the California Supreme Court, to comment:

Perhaps in no other area has the discrepancy between law in dogmatic theory and law in action, evading dogma by fiction and subterfuge, become so marked as in divorce law. The withered dogma that divorce can be granted only for marital fault, variously and eccentrically defined from state to state, is rendered still more irrational by the widespread rule that recrimination is an absolute defense. The result has been triumph, not for dogma, but for hypocrisy. Rules insensitive to reality have been cynically circumvented by litigants and attorneys, with the tacit sanction of the courts.\(^6\)

The condition finally lead to a self-examination and an appeal to the legislatures for help. Although slow at first, the legislatures have responded with a variety of statutory forms.

IV. Current "No Fault Divorce" Statutes

The earliest attempts at liberalization of divorce laws were the "incompatibility of temperament" or "incompatibility" statutes.\(^6\) Although on their face they were a noble attempt at a lessening of the strictness of the fault grounds, as already observed, they have been interpreted strictly on fault grounds, thereby frustrating their purpose.

The refusal of the judges to allow more liberal divorce through the "incompatibility" statutes leads to the formulation of a whole new basis for divorce by legislative commissions:

The objective to strive for is to make it legally possible to end dead marriages. . . .

. . . .

In the Commission's judgment, a dead marriage is no less dead because only one of the parties is demonstrably at fault. It must be observed, at this point, that the demonstrable fault is frequently the result of, rather than the cause of, marital breakdown. . . .

It is the public interest in private morality, in marriage as an institution, that is best served by terminating marriages that have failed. The outmoded policy of suspending in limbo the offending spouse is the wrong remedy insofar as public morality is concerned. At the same time, there is no vested right to immunity from divorce . . . blocking the offender from

\(^{65}\) OKLA. STAT. ANN. tit. 12, § 1271(7) (1961); N.M. STAT. ANN. § 22-7-1(8) (1953); ALASKA STAT. § 09.55.110(5)(C) (1962).
terminating a meaningless relationship and perhaps creating a socially desirable one.66

At the same time the judges themselves were formulating a new rationale for divorce:

The family is the basic unit of our society, the center of the personal affections that ennoble and enrich human life. It channels biological drives that might otherwise become socially destructive; it ensures the care and education of children in a stable environment; it establishes continuity from one generation to another; it nurtures and develops the individual initiative that distinguishes a free people. Since the family is the core of our society, the law seeks to foster and preserve marriage. But when a marriage has failed and the family has ceased to be a unit, the purposes of family life are no longer served and divorce will be permitted. "[P]ublic policy does not discourage divorce where the relations between the husband and wife are such that the legitimate objects of matrimony have been utterly destroyed."67

With such purposes in mind, the legislatures set forth to reform the law.

The living apart statute represents the first truly "no fault" divorce statute.68 The second type is the modern "no fault" divorce statute or the marital-breakdown approach.69 Such statutes make the breakdown of the marriage the sole basis for divorce. These statutes may be further classified by separating the living apart statute or clause within a statute70 from the complete revision of the fault system based upon marital breakdown,71 and putting the marital breakdown principle into the existing adversary system.72 All three of these groups have problems, some of which are in common with others.

The New York statute has a living apart clause that implies that a couple need only live apart for a period of one year. However, the actual living apart must be pursuant to a court decree or an agreement of separation. This effectively precludes the spouse who has no grounds for separation, and who can't get his spouse to agree to separate.73 The long waiting period encourages the parties to use the quicker fault-ground approach, even though it may mandate perjury. This will happen particularly where the fault grounds are laxly enforced. The economic and emotional costs of fulfilling the terms of the separation agreement over long periods of time may be prohibitive. Finally, not many attorneys would recommend separation if a speedier method is available.74

The California statute best exemplifies the marital-breakdown approach, but it too has its problems. The statute grants a great deal of discretion to the trial judge. The judge may grant or deny divorce for "irreconcilable differences

66 New Jersey Report, supra note 60, at 6-8.
69 Mich. Comp. Laws Ann. § 552.6 (Supp. 1971); Iowa Code § 598 (Supp. 1971);
74 Bodenheimer, supra note 2, at 208.
which have caused the irremediable breakdown of the marriage".\textsuperscript{75} Irreconcilable differences are defined as "substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved".\textsuperscript{76}

The initial problem with California law is confusion. Each judge is free to decide for himself what constitutes substantial reasons for discontinuation of the marriage. It is a rather subjective standard giving the trial judge a tremendous amount of control. It opens the door for interpretations based upon a particular judge's attitude toward divorce. One judge may believe that a heated, though single, argument is substantial. A second judge, believing in the sanctity of marriage, could refuse divorce upon any grounds. This situation lends itself to a possible unequal application of the new divorce law. Additionally, the law allows the taking of fault evidence in order to determine irreconcilable differences.\textsuperscript{77} This could entirely defeat the new divorce law, but many judges reading the legislative history of the law will say irreconcilable differences are an untriable issue, making the way for a divorce by consent.\textsuperscript{78} Neither situation was the intent of the legislators.

A statute similar to the one adopted by the state of California could be improved by more adequate definitions of terms, the absolute elimination of fault evidence, and protective measures to prevent unwarranted, unnecessary hasty divorce. The new California law would work best if it included the family court process with mandatory conciliation recommended by the Governor's Commission.\textsuperscript{79}

The proposed mandatory procedures for the parties to obtain a dissolution were heavily weighted to encourage them to make use of the court's conciliation and counselling services. If, however, a dissolution was definitely desired, the proposal aimed at minimizing the conflict and bitterness between the parties by providing that the proceedings be carried out in as neutral an environment as possible.\textsuperscript{80}

Rather than fostering this purpose, the legislature just made divorce easier to obtain.

The Michigan statute puts the marital-breakdown approach into the existing adversary system.\textsuperscript{81} Although Michigan courts do provide reconciliation service, the system is still adversary in nature. The court favoring reconciliation may find it difficult to encourage when the attorneys are operating in an adversary nature. A Michigan judge cannot compel anyone to submit to marriage counselling.\textsuperscript{82} The problem is further complicated by the fact that evidence must be presented in open court, showing "there has been a breakdown in the marriage relationship to the extent that the objects of matrimony have been destroyed

\textsuperscript{75} CAL. CIV. CODE § 4506(1) (West 1970).
\textsuperscript{76} Id. § 4507.
\textsuperscript{77} Id. § 4509.
\textsuperscript{79} Krom, California's Divorce Law Reform: An Historical Analysis, 1 PAC. L.J. 156, 164 (1970).
\textsuperscript{80} Id. at 165.
\textsuperscript{81} MICH. COMP. LAWS ANN. § 552.6(1) (Supp. 1971).
\textsuperscript{82} MICH. COMP. LAWS ANN. § 551.344 (1967).
and there remains no reasonable likelihood that the marriage can be preserved.\textsuperscript{83} Like the California statute, this allows the trial judge a vast amount of discretion. Michigan provides that admission of the breakdown by a spouse may be considered by the court but is not binding upon it, thereby demonstrating that the court has the power to refuse divorce.\textsuperscript{84} Fortunately, the statute provides the judge with some guidance in that it doesn't allow for the introduction of fault claims in a complaint for divorce.\textsuperscript{85} However, it does not genuinely preclude the use of fault evidence in open court to show the marriage breakdown. It is difficult to imagine what type of evidence, if any, without resort to fault, can be used to prove marital breakdown. While it was probably not the intent of the Michigan legislature, as it was not the intent in California, perhaps all that has been accomplished is to make divorce extremely easy. It remains to be seen how the Michigan judges will apply the new law.\textsuperscript{86}

Michigan based the format of its law on the new divorce law of Iowa passed earlier the same year.\textsuperscript{87} Iowa has taken a slightly different approach. It has adopted the marital-breakdown approach and mandatory conciliation before divorce is allowed. Originally, the Divorce Laws Study Committee of Iowa, in its \textit{Report}, said that all evidence should be permitted in determining marital breakdown.\textsuperscript{88} The legislature, however, declined to follow its recommendation, electing, instead, to eliminate fault grounds.\textsuperscript{89} This can be interpreted as an attempt to truly effectuate the purpose of the modern approach to divorce. It is the elimination of the finger pointing that reduces the bitterness and conflict. However, the statute does not prohibit the use of fault evidence. It will be interesting to see if Iowa judges, in accordance with the legislative history in the report of the Divorce Laws Study Committee, allow the introduction of fault evidence. Iowa has not gone far enough to prevent the judges from returning to the standards of fault. The new statute should specifically prohibit fault evidence.

Iowa was concerned with the problem of hasty divorce and set aside a period of 90 days during which reconciliation counselling is mandatory. No divorce may be granted until that conciliation is completed.\textsuperscript{90} Conciliation can be waived if it can be shown in good faith that it would be to no avail. By the use of this procedure, Iowa has mitigated the problem of consensual divorce. The methods Iowa has chosen attempt to remove the proceedings from the adversary context and further the goal of fostering viable marriage relationships.

The Michigan, California and Iowa statutes do not encourage the parties to proceed on fault grounds in the interest of speed. Marital breakdown, or "no fault", are the only grounds for divorce in these states. Iowa has gone even

\textsuperscript{83} MICH. COMP. LAWS ANN. § 552.6(3) (Supp. 1971).
\textsuperscript{84} Id. § 552.6(2) (Supp. 1971).
\textsuperscript{85} Id. § 552.6(1) (Supp. 1971).
\textsuperscript{86} Discussion with several members of the bar of St. Clair County, Michigan showed that the local circuit court judges were intending to continue to require showing of fault to determine that the marriage has in fact broken down.
\textsuperscript{87} IOWA CODE § 598 (Supp. 1971).
\textsuperscript{88} IOWA, FINAL REPORT OF THE DIVORCE LAWS STUDY COMMITTEE 18 (1968) [hereinafter cited as IOWA REPORT].
\textsuperscript{89} IOWA CODE § 598.17 (Supp. 1971).
\textsuperscript{90} Id. § 598.16 (Supp. 1971).
farther in an effort to foster viable marriage relationships by the use of compulsory conciliation. This minimizes the danger of hasty divorce with which both California and Michigan could be faced.

In addition to the difficulty over the application of "no fault" principles, the new laws have done little in the area of child custody. In California, there is a presumption in favor of the mother, but the child may be awarded to either the father or the mother in the best interests of the child.\(^9\) To determine the best interests of the child, the court may take into consideration evidence of marital fault,\(^9\) but that evidence is not conclusive.\(^9\) Michigan also allows the introduction of fault evidence for the purpose of determining child custody.\(^9\) Iowa has attempted to provide additional help in this area. Iowa now provides for the appointment of an attorney to represent the minor child's best interests. Even here it is difficult to perceive what help he can provide in cases where the parents are bitterly battling for custody. The attorney will be unable to prevent emotional stress or bitterness. His greatest contribution will be in his private investigation and possible participation in the conciliation process.\(^9\) Iowa has made the greatest strides in the area of implementation of "no fault" divorce, but like its sister states, the new law is not without problems. All three states have not provided sufficient definitions or adequate guidelines of what constitutes marital breakdown.

V. Additional Development Is Necessary

There are alternatives which can be used with "no fault" divorce to properly foster the stated purposes of divorce law. This discussion posits that a marital-breakdown approach represents a better divorce law. It does away with the hypocrisy of the fault approach, and, more importantly, it can be used to limit the bitterness and emotional stress associated with the fault system. Since marital breakdown is not properly a triable issue, this approach opens the door to divorce by agreement. The use of the alternatives in such cases helps to foster the purpose of preserving viable marriages.

The first method is the use of trial marriage. Marriage would be contracted for a trial period which the parties could terminate by consent. There is no formal divorce, just an election not to renew the contract. During the trial period the couple would agree not to have children. Should the couple have children during the trial period, they automatically ratify the permanent contract. If the couple did elect to renew the contract, it would be of permanent duration and carry with it the implicit right to have children. The state probably has a smaller interest in a marriage without children. Trial marriage could provide a speedy remedy where there is little at stake, allowing the couple to

\(^9\) Peters, Iowa Reform of Marriage Termination, 20 Drake L. Rev. 211, 221 (1971). Here Mr. Peters points out that the attorney who represents the child will have the power to force the conciliation hearing because it cannot be waived without his consent, although he hesitates about how much conciliation will really take place.
freely rebuild their lives after a mistake. However, such a system may on the whole do very little to promote viable, long lasting marriages.

The second proposal would include tougher requirements to marry within the legal system. Currently it is more difficult in many states to get a license to drive an automobile than it is to get a license to marry, yet the marriage license carries with it an assumption by the state the couple is qualified to raise children. Since the maturity and age of the partners are often important factors in divorce, there should be strongly enforced age requirements before marriage is permitted. Secondly, there should be a waiting period during which people should be required to take a school class (like a driver education course) about the state in life they are about to enter. People spend years training for professions and yet when they approach one of the most important states in life, they do so with no preparation at all. Society has an interest in protecting the future children of such a marriage, similar to society's right to attempt to protect us all from bad drivers.

The trouble with these procedures is that society is probably not yet ready to accept the first one and the second one is too restrictive for today's society. This is further complicated by today's lower voting age requirements. Their biggest difficulty is probably that they are pre-marriage requirements. They provide no help to an existing marriage already in trouble.

VI. Evolutionary Gap Filling

Any proposed modification of the existing "no fault" divorce statutes should include four basic principles in order to eliminate the problems inherent in the existing laws. First, marital breakdown should be the only basis for divorce. The purpose of the law would be to end dead marriages and foster and preserve viable marriage relationships. The court should never look at marital fault because it is only evidence of a previous breakdown of the marriage relationship. Second, voluntary conciliation service should be available. A spouse, with the consent of the other spouse, could give the court jurisdiction over a conciliation procedure. This would require the establishment of a court-operated conciliation procedure or a family court. It would help the couple work out the problem before a critical stage. Third, conciliation should be required before the granting of any divorce. This would provide for qualified

96 Clark, Divorce Policy and Divorce Reform, 42 Colo. L. Rev. 403, 404 (1971).
98 Id. § 551.103.
99 Clark, supra note 96, at 404.
100 Id. at 404.
102 Goldstein & Gitter, supra note 57, at 78.
103 New Jersey Report, supra note 60, at 7.
105 Chute, Divorce and the Family Court, 18 Law & Contemp. Prob. 49 (1953). In the entire article Mr. Chute points out the purpose of a family court and includes a complete discussion of its operation.
106 Iowa Code § 598.16 (Supp. 1971).
people to decide whether or not a marriage could be saved.\footnote{Chute, \textit{supra} note 105, at 50.} It would insure that a couple truly desire a divorce before they could be granted one. Fourth, at the end of a one year waiting period, divorce should be granted regardless of whether the parties have participated in reconciliation. This allows the parties to get a divorce even though they have a strong objection to the conciliation process, yet it would encourage people to use the conciliation process. Divorce is generally a last ditch effort and in many cases the parties really desire an alternative. If a party refuses to enter conciliation for the entire statutory period, it is probably a good indication of marital breakdown. A divorce in less time than the statutory waiting period could be obtained only by submitting to the conciliation process.

These principles would insure the orderly dissolution of marriage without the pitfalls of the old fault method, or the inadequate provisions of the new laws. Together they insure that the decision to end this marriage is really the couple's, but the state provides an additional adequate safeguard against hastiness in the interests of saving viable marriages.

This system should not overlook the problem of alimony. In many states alimony is subject to the prejudices of the trial judge because it may be awarded for fault. The new divorce laws are eliminating this problem, but need adequate guidelines to replace fault.\footnote{Clark, \textit{supra} note 96, at 410.} Alimony would be based upon need and the ability to pay, as determined by the economic status of the spouses at the time of marital termination.\footnote{Id. at 411.} In conjunction with the ability to pay, the social status of the spouses would also be important, and perhaps even the social and economic status of the spouses prior to marriage should be considered. Evaluation of the length of time of the marriage would also be important. This is important in determining the relative need of the spouses as well as their ability to become self-supporting.\footnote{Hofstadter & Levittan, \textit{Alimony—A Reformulation}, 7 J. Fam. L. 51, 55 (1967).}

Finally, antenuptial agreements should have effect in regard to alimony.\footnote{Clark, \textit{supra} note 96, at 411.} Should the marriage fail, alimony would already be determined. Perhaps alimony insurance could even be developed to cover this problem. With the use of our now extensive divorce statistics, computation of premiums is feasible and a system could be developed. As to the argument that it would foster divorce, Professor Clark has pointed out:

Presumably one reason why insurance has never before been proposed has been the familiar attitude that it would be "conducive to divorce", the same argument which has limited the use of separation agreements. But if non-fault grounds are established, and if divorce is recognized to be one of the risks of contemporary social existence, similar in effect to death or automobile accidents, there is no convincing reason why insurance should not at least be considered, and adopted if economically feasible.\footnote{Id. at 412.}

Matters of child custody should be handled similar to Iowa's law. An at-
torney should be appointed to represent the interests of the minor children. The attorney should also have the power to make his own investigation of the best interests of the children.\textsuperscript{113} The principal provision for the protection of the children's interests, however, should be the attorney's participation in the conciliation hearing itself. It would thereby allow him to better evaluate the situation and to make recommendations in the best interests of the children.\textsuperscript{114}

The implementation of this approach requires further investigation. The law must be changed to reflect modern thinking. In most cases it requires the passage of an entirely new divorce law. For states with laws such as those already examined, only minor amendments are required. The other necessary prerequisite is the assemblage of qualified people to aid the courts in the administration of the law. This has always been a stumbling block, but not a necessarily insurmountable one.

\textbf{VII. The Final Application}

The most important part of this proposed method of marriage dissolution, like Iowa's new law, is compulsory conciliation. Conciliation effectuates the purposes of the new approach to divorce.

In the past, two major problems have caused legislatures to turn away from conciliation. The primary problem has been the financial expense the program entails.\textsuperscript{114} The second problem has been the fear of the psychiatrist probing deeply into the minds of people.\textsuperscript{115} Some people do not want this type of help, considering it an invasion of their privacy.\textsuperscript{116} Significant developments in the field of psychiatry have made these concerns somewhat less important. New approaches have both reduced cost and done away with the necessity of long term treatment.

In recent years a tremendous development has taken place in the area of family counselling techniques.\textsuperscript{117} Family therapy is a method in which the whole family participates in the same room at the same time with the same therapist.\textsuperscript{118} It is ideally suited for divorce counselling because its purpose is to promote family equilibrium through the development of family rules. In the development of family rules the whole family is involved in the decision making process. If successful, most of the disagreements causing family problems are eliminated.\textsuperscript{119} It has several other advantages. It does not take an extended period of time.\textsuperscript{120} This has the added effect of cutting cost, thereby eliminating the prime concern of the legislatures. Additionally, it doesn't allow for a great deal of time to establish a dependency upon the analyst. The analyst concerns himself with the current problems. He does not, nor does he have to, search

\textsuperscript{113} \textit{Iowa Code} § 598.12 (Supp. 1971).
\textsuperscript{114} Krom, \textit{supra} note 79, at 171.
\textsuperscript{116} Some questions have been raised upon the constitutionality of compulsory conciliation in light of \textit{Griswold v. Connecticut}, 381 U.S. 479 (1965).
\textsuperscript{117} Bodenheimer, \textit{supra} note 115, at 191.
\textsuperscript{118} Id. at 192.
\textsuperscript{119} Id.
\textsuperscript{120} Id.
out the deep seated causes of people’s behavior. The purpose is to allow the parties to work out the solutions for themselves. Perhaps one of the biggest advantages of the use of this approach in compulsory conciliation is that it works upon individuals who don’t want to participate almost as well as on people who desire to participate.\textsuperscript{121}

Another new form of psychiatry which works well in divorce counselling is Reality-Therapy. Like Family Therapy, it has the advantages of requiring little time for treatment, and no need to probe the past mind for deep seated causes. The principal approach of Reality Therapy is to confront the person with reality and thereby help him to accept responsibility and plan his future actions. It encourages people to see things as they are. The analyst encourages the patient to do things which will help him change his attitude about others. This is often just what is needed in a divorce counselling situation. It is not a deep mind-searching probe; rather, it takes the form of advice. It could be called nothing more than an intense form of advice and counselling.\textsuperscript{122}

Psychiatry now has the means to effectively work within the legal framework in support of the new approach to divorce.

Practically speaking, it is evident that the “new psychiatry” offers us radically shortened treatment time; availability of services when needed in a crisis; increasing emphasis on communication and interrelation, especially within the family; a declining interest in unconscious motivation; de-emphasis on labels of mental illness; and a great deal of practical, down-to-earth advice. This kind of therapy is not a luxury for the privileged few, but a service within the financial reach of the private or public purse.\textsuperscript{123}

Research shows that compulsory conciliation is probably the better method in divorce law. Evidence indicates that individual psychotherapy with only one party to a weak marriage often leads to divorce, while joint therapy has the tendency to strengthen the family.\textsuperscript{124} Compulsory conciliation provides leverage which is necessary to get both parties together to try the “new psychiatry.” Once tried, it is possible for it to work, because it has been proved to be effective with people who do not want to participate.

Most people, when presented with an alternative to divorce, are relieved and eager to try it.\textsuperscript{125} This requires that we do the utmost to preserve the marriage. If the result is divorce, the system has not failed. There is still much good to be gained from the conciliation conferences. Matters of property settlement, alimony and child custody can be settled amicably in the conference, rather than in the courtroom. In the non-hostile atmosphere, these matters can be settled in the best interests of the parties, their children and the law.

VIII. Conclusion

In the divorce area the states of California, Michigan and Iowa have taken

\begin{itemize}
  \item \textsuperscript{121} Id. at 194-5.
  \item \textsuperscript{122} Id. at 196.
  \item \textsuperscript{123} Id. at 207.
  \item \textsuperscript{124} Id. at 205.
  \item \textsuperscript{125} Id. at 198.
\end{itemize}
a dramatic step to leave the past behind. They have made a noble attempt at
revamping the law of divorce. To a large degree, they have been successful and
all three are on the right path. However, they have all failed in providing the
guidance necessary for the administration of the system. In order to completely
achieve the purpose of fostering viable marriage relationships, some additions
are needed. All three states need more adequate guidelines defining and limiting
the type of evidence which can be introduced. It is necessary to provide clear
cut standards so that a judge can determine that a marriage has broken down
within the meaning of the law. Without such standards, the future of divorce
law depends upon the particular attitudes of those on the bench.

Continued attention must be given to the areas of alimony and child
custody. As we enter the no fault era, new alimony laws must be formulated.
Methods must be established for the ease in determination of more equitable
alimony awards. Use of the antenuptial agreement is only one suggested ap-
proach.

Child custody is one of the most vital awards made in a divorce proceeding.
Care must be taken to see that the best interests of the children are really taken
into consideration. Iowa’s use of the outside attorney for the children must
represent only the beginning. New procedures must continue to be developed.

In an effort to effectively promote viable marriage relationships, Michigan
and California should adopt a mandatory conciliation procedure like that in the
Iowa law. Further, all three states should take full advantage of the new services
which can be provided by the “new psychiatry.”

If a truly equitable and socially helpful divorce law is to be developed, the
reformers must not stop now. The state commissions which have made the
proposal for the current reforms must continue to evaluate the law. It is neces-
sary that new reforms be proposed and adopted as needed. Only in this way
can the law of divorce become a living law in tune with the needs of the people.

Michael J. Whaling