

THE MIXED BLESSINGS OF NO-FAULT DIVORCE

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I. DIVORCE: THEN AND NOW

Between the mid-1960s and 1979 the crude divorce rate in the United States more than doubled.¹ Although divorce had increased at a steady rate for more than the previous 100 years, the mid-1960s marked the beginning of an unprecedented boom.² Despite modest declines over the last twenty years,³ the divorce rate remains high: about one out of two new marriages will fail.⁴

The 1970s also witnessed the proliferation of easy divorce laws. California passed the landmark no-fault divorce law in 1970,⁵ with

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1. Andrew J. Cherlin, *Marriage, Divorce, Remarriage* 21 (rev. and enlarged ed., Harvard U. Press 1992).

2. *Id.*

3. Joshua R. Goldstein, *The Leveling of Divorce in the United States*, 36 *Demography* 409, 414 (1999).

4. R. Kelly Raley & Larry Bumpass, *The Topography of the Divorce Plateau: Levels and Trends in Union Stability in the United States after 1980*, 8 *Demographic Research* 245, 249 (2003).

5. Herma Hill Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 *Cal. L. Rev.* 291, 291 (1987).

every other state following suit by 1987.⁶ Aspiring divorcées no longer had to establish fault in a court of law. Instead, a couple had merely to acknowledge "irreconcilable differences" or the "irretrievable breakdown" of their marriage.⁷ The timing could not have been better; by 1970 the divorce boom was in full swing and divorce cases were clogging the courts.⁸

In almost every state prior to 1970, one spouse had to sue the other to establish "fault" and thereby obtain a divorce decree.⁹ Grounds for divorce varied widely across the states, with adultery and abandonment almost universally recognized.¹⁰ Ending a marriage could be a complicated, embarrassing, and expensive undertaking in the era of fault-based divorce.¹¹ Consider the charade people went through to sue for divorce on grounds of adultery, often when there had been no adultery. The usual practice was to hire a professional "co-respondent," nominally an adulterer, along with a photographer.¹² Compromising photographs coupled with false testimony would then be presented in court to obtain a divorce decree.¹³ Everyone present was aware that the adultery may never have occurred.¹⁴

This system had numerous liabilities. The tolerance of perjury is

6. Norval D. Glenn, *A Reconsideration of the Effect of No-Fault Divorce on Divorce Rates*, 59 J. of Marriage & Fam. 1023, 1023 (1997). Although California is hailed as having the first no-fault divorce law, this is not technically correct. Alaska, Maryland, and Oklahoma had no-fault laws on the books as early as 1953, but in an era of low divorce rates they attracted little attention. *Id.* The same cannot be said, however, for Reno's notoriety as a divorce mill, which extended back at least to the turn of the century. See generally Robert Wernick, *Where You Went if You Really Had to Get Unhitched: In the Days When Divorced Still Were a Sin and a Shame, the City of Reno Grew Rich and Infamous, Catering to Domestic Disharmony*, 27 Smithsonian 64 (1996) (discussing Reno as a mecca for the maritally troubled).

7. Mary Ann Glendon, *Abortion and Divorce in Western Law* 81 (Harvard U. Press 1987). The details of divorce law continue to vary in the no-fault era. For instance, some countries require separation prior to divorce. See generally *id.* at 80-81.

8. See Glenn, *supra* n. 6, at 1023.

9. *Id.* at 1024.

10. See generally Elaine Tyler May, *Great Expectations: Marriage and Divorce in Post-Victorian America* 122-123 (U. of Chi. Press 1980); Roderick Phillips, *Untying the Knot: A Short History of Divorce* 102-107 (Cambridge U. Press 1991).

11. See e.g. Nelson Manfred Blake, *The Road to Reno: A History of Divorce in the United States* 5-6 (The Macmillan Co. 1962).

12. *Id.* at 6.

13. *Id.*

14. *Id.*

deplorable, but doubtless many perjurers felt their transgressions were outweighed by intolerable marital problems. Furthermore, the cost of photographers, co-respondents, and trial lawyers made divorce more expensive than it had to be.

The human costs were equally great. Suing for adultery in the absence of any actual infidelity was doubtless embarrassing, especially for the party alleged to have taken part in the extramarital affair. Actual court proceedings could be even more humiliating, as evidenced by the 1920 case of a Los Angeles man who charged his wife with wearing a bathing suit "designed especially for the purpose of exhibiting to the public the shape and form of her body," an "appetite for beer and whisky," and a "desire to sing and dance at cafes and restaurants for the entertainment of the public."¹⁵ If such allegations were hard on the aspiring divorcées, consider their effect on any children involved: one parent, however innocent, had to be at fault, besmirched by tawdry legal proceedings. Perhaps advice columnist Ann Landers best summed up the moral failings of fault-based divorce when she complained about the humiliation at having to sue her former husband for cruel and unusual punishment when he had been, in her opinion, neither cruel nor unusual.¹⁶ In more recent years fault-based legal proceedings often became *pro forma*, but a contested divorce could still engender considerable shame, acrimony, and expense.

Given that no-fault laws and the boom arrived at about the same time, questions of cause and consequence were inevitable. Most researchers have concluded that no-fault laws had little overall impact on divorce rates.¹⁷ Nevertheless, no-fault laws have been reviled as a primary cause of modern family breakdown. This understanding has motivated the modern divorce reform movement, characterized by attempts to repeal or weaken no-fault laws. I now turn to the divorce

15. May, *supra* n. 10, at 1.

16. Ann Landers, *The Ann Landers Encyclopedia, A to Z: Improve Your Life Emotionally, Medically, Sexually, Socially, Spiritually*, ___ (Random House Publishing 1997).

17. See e.g. Glenn, *supra* n. 6, at 1023; H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 *The Am. Econ. Rev.* 437, 446-448 (1986); Robert Schoen, Harry N. Greenblatt & Robert B. Mielke, *California's Experience with No-Fault Divorce*, 12 *Demography* 223 (1975); Justin Wolfers, *Did Unilateral Divorce Laws Raise Divorce Rates? A Reconciliation and New Results* 1, 13, <http://bpp.wharton.upenn.edu/jwolfers/Papers/Divorce.pdf> (last accessed Mar. 1, 2005).

reform movement in detail, with particular attention to the covenant marriage laws of Louisiana, Arizona, and Arkansas, the divorce reform movement's landmark triumphs to date.

II. THE DIVORCE REFORM MOVEMENT

In recent years, many people have identified high divorce rates as a social problem that threatens America. It is well-known that divorce can have negative consequences for both parents and children. No-fault divorce laws have been frequently blamed for the divorce boom taking place between 1965 and 1979 despite considerable evidence to the contrary.¹⁸ The most commonly proposed solution to America's "divorce problem" is to repeal or weaken these laws, thereby preserving more intact families and reducing the societal ills attributed to high divorce rates.

Concern with high divorce rates and "family breakdown" is by no means a modern phenomenon. By the 1860s divorce law had become more liberal than ever before, although the acceptable grounds for marital dissolution varied widely across states.¹⁹ Divorce has increased steadily since the Civil War,²⁰ the first time rates could be reliably tracked.²¹ The *casus belli* for opponents of divorce – more divorce coupled with easier divorce laws – were therefore in place, with predictable results. In 1867, for example, Yale University President Theodore Woolsey denounced "corruption in the family, as manifested by connubial unfaithfulness and divorce"; Americans' destiny, he continued, "depends on our ability to keep family life pure and simple."²² The beginning of the twentieth century witnessed a spate of anti-divorce activism, with more than 100 pieces of restrictive legislation passed by state governments.²³

With the 1965-1979 divorce boom exceeding any other in American history, it is little surprise that attention has turned once again to the question of divorce reform. One difference from previous efforts concerns the invocation of social science research. Whereas turn-of-the-century condemnation of high divorce rates resorted to

18. Glenn, *supra* n. 6, at 1024.

19. See generally Blake, *supra* n. 11; Phillips, *supra* n. 10.

20. May, *supra* n. 10, at 4.

21. Wernick, *supra* n. 6, at [¶ 4].

22. Blake, *supra* n. 11, at 131.

23. See generally May, *supra* n. 10, at 4.

moral arguments,²⁴ modern divorce reformers base their proposals on hard data: marital disruption can have devastating effects on women's incomes and, more notably, offspring's well-being.²⁵ This provided the ammunition activists and politicians could use to push divorce reform forward. Representative Tony Perkins, sponsor of the Louisiana Covenant Marriage law, made this point in a 1997 interview:

Well, legislatures around the country are continually dealing with issues trying to create new laws to address teenage pregnancy, juvenile delinquency . . . a number of these issues. And now what the social sciences are telling us [is] that these issues trace right back to broken homes.²⁶

24. See generally William L. O'Neill, *Divorce in the Progressive Era* (Yale U. Press 1967).

25. This is certainly true, but many of the works cited in defense of these points have overstated their claims due to sampling issues. For years an assertion that divorced women's standard of living declined seventy-three percent was the estimate most often cited by policy makers and others. Lenore J. Weitzman, *The Divorce Revolution* 323 (The Free Press 1985). It was not shown to be in error for more than ten years. See Richard R. Peterson, *A Re-evaluation of the Economic Consequences of Divorce*, 61 *Am. Sociological Rev.* 528, 528 (1996). Similarly, Judith Wallerstein's often-criticized research has frequently been cited to demonstrate that divorce has adverse effects on children. Compare Judith S. Wallerstein & Sandra Blakeslee, *Second Chances: Women, Men, and Children a Decade after Divorce* (Ticknor & Fields 1989) (discussing children's lives after divorce, focusing on their relationships with parents and peers and what happened to the parents after divorce); Judith S. Wallerstein, & Joan B. Kelly, *Surviving the Breakup: How Children and Parents Cope with Divorce*, (Basic Books 1980) (discussing the importance of what happens after divorce, the importance of father-child relationships regardless of the frequency of contacts, and examines children's reaction to these changes in their lives); Judith S. Wallerstein, Julia M. Lewis & Sandra Blakeslee, *The Unexpected Legacy of Divorce: A 25 Year Landmark Study* (Hyperion 2000) (based on a twenty-five year study about the lives of children, now adults, whose parents divorced: describing the feelings, expectations, and memories of divorce that these children carried into adulthood, especially in their own relationships – love, marriage, cohabitation, divorce, and becoming parents themselves) with Andrew J. Cherlin, *Going to Extremes: Family Structure, Children's Well-Being, and Social Science* 36 *Demography* 421, 422 (1999); Andrew J. Cherlin, *Generation Ex-* 271 *The Nation* 62, 63 (2000); Katha Pollitt, *Social Pseudoscience* 271, *The Nation* 10, 10 (2000) (critiquing Wallerstein). Divorce certainly can have adverse consequences for women and children, but nowhere near as severe as that depicted by Weitzman and Wallerstein.

26. *PBS NewsHour*, "Bound by Love?" [¶ 8] (PBS Aug. 20, 1997) (online newshour, transcr. available at http://www.pbs.org/newshour/bb/law/july-dec97/marriage_8-20.html).

The timing was right for a resurgence in public condemnation of divorce. No-fault laws had been in place for some time when the divorce reform movement reappeared in the 1990s, providing policy makers with ample opportunity to capitalize on the putative consequences of divorce depicted in the work of Judith Wallerstein, Lenore Weitzman, and others. Their research spurred on conservative activists;²⁷ divorce reform legislation was introduced in over thirty states in the 1990s.²⁸ Language urging the reconsideration of no-fault divorce appeared in the 2000 Republican Platform.²⁹

Most of the state-level efforts at divorce reform have failed. The first success did not come until 1997, with passage of the Louisiana Covenant Marriage law.³⁰ Similar legislation was enacted in Arizona the following year,³¹ followed by Arkansas in 2001.³² All three measures created two-tiered marriage systems: couples could opt for either traditional unions, dissolvable under no-fault statutes, or covenant marriage.³³ The latter effectively reintroduced fault-based divorce law; petitioners had to prove adultery, abuse, or similar egregious conduct.³⁴ In the absence of such transgressions, couples have to separate for one or more years before a divorce decree will be granted.³⁵ Furthermore, counseling must be obtained prior to obtaining

27. See e.g. Katherine Shaw Spaht, *Why Covenant Marriage? A Change in Culture for the Sake of the Children*, 46 La. B.J. 116, 118 (1998).

28. The Lewin Group et al., *State Policies to Promote Marriage: Preliminary Report*, "Different Laws for Couples with Children, Such as Requiring Parents to Attend Education on the Effects of Divorce" (2002) (available at <http://aspe.hhs.gov/hsp/marriage02/marr-rpt.htm>) (last accessed Mar. 18, 2005).

29. *The Republicans: Excerpts from Platform Approved by Republican National Convention*, N.Y. Times A16 (Aug. 1, 2000) (available at 2000 WLNR 3282479).

30. 1997 La. Sess. L. Serv. 1380.

31. Ariz. Sess. L. ch. 135 (1998).

32. 2001 Ark. Acts 1486. See Steven L. Nock, James D. Wright & Laura Sanchez, *America's Divorce Problem*, 36 Socy. 43, 43-44 (1999); Ross A. Thompson & Jennifer M. Wyatt, *Values, Policy, and Research on Divorce: Seeking Fairness for Children*, in R.A. Thompson & P.R. Amato, *The Postdivorce Family: Children, Parenting, and Society* 191 (Sage 1999) (discussing the passage of the Louisiana bill and the divorce reform movement in general); see also The Lewin Group et al., *supra* n. 28 (reviewing recent state-level legislation affecting divorce law).

33. Ariz. Sess. L. ch. 135, at § 1; 2001 Ark. Acts 1486, at § 25-901; 1997 La. Sess. L. Serv. 1380, at § 1.

34. 2001 Ark. Acts 1486, at § 5.

35. *Id.*

a divorce.³⁶ Of the three states, Arizona's covenant marriage law is the most liberal. Fault-based statutes or prolonged separation only applies if one spouse contests the divorce.

Covenant marriage has not caught on so far. In 1998, less than two percent of Louisiana newlyweds opted for covenant marriages.³⁷ These unions do appear to have lower divorce rates, although the difference is largely due to the fact that only couples less prone to ending their relationships are likely to choose the covenant option in the first place.³⁸ Even if divorce rates are lower, covenant marriage laws may not have reduced the suffering attributed to divorce. One potentially adverse consequence is to trap children in damaging, high-conflict marriages. This Article will return to this topic later.

Despite its apparent lack of appeal in Louisiana, divorce reformers have not given up on covenant marriage. It appeared in the plank offered in 2000 by the Marriage Movement, an eclectic group of clergy, scholars, and state politicians.³⁹ Attracting national attention, the Movement offers numerous ideas for strengthening marriage.⁴⁰ One of these is covenant marriage; another is proposed legislation to uniformly weaken no-fault laws:

Reconsider no-fault divorce laws and find innovative new ways to give legal weight to the marriage vow. For example, a longer

36. *Id.* at § 3.

37. Laura Sanchez et al., *The Implementation of Covenant Marriage in Louisiana*, 9 Va. J. Soc. Pol. & L. 192, 198 (2001). The minuscule numbers of covenant marriages is partially attributable to low levels of awareness among Louisiana citizens, not to mention lack of understanding and enthusiasm by civil servants processing marriage applications. *Id.* at 197 tbl. 5 (indicating civil service workers do not ask couples applying for marriage licenses to choose the covenant marriage option because of workers' own lack of knowledge, training, and moral beliefs on covenant marriage); see also Pam Belluck, *States Declare War on Divorce Rate Before Any "I Dos."*, N.Y. Times A1 (Apr. 21, 2000).

38. Laura Sanchez et al., *Can Covenant Marriage Foster Marital Stability among Low-Income, Fragile Newlyweds?* 22 (Nat'l. Poverty Conf. on Marriage & Fam. Formation Among Low Income Couples: What Do We Know from Research? Washington, D.C., Sept. 2003) (available at <http://www.npc.umich.edu/news/events/past/SanchezNock.pdf>).

39. Karen S. Peterson, *The Matrimony Manifesto Coalition Takes up Arms against USA's 'Culture of Divorce'* USA Today 9D (June 29, 2000) (available in LEXIS, News Library).

40. *Id.*

waiting period (at least eighteen months for contested no-fault divorces), slows down the divorce process . . . ⁴¹

Given the thousands of academics, theologians, public officials, and concerned citizens listed as signatories to its mission statement, the Marriage Movement exemplifies American concern with divorce. Inspired by such broad-based support, some of the divorce reform legislation now under consideration may well become law.

III. WHAT RECENT RESEARCH SAYS ABOUT DIVORCE REFORM

This Article contends that it is in the best interest of America's families to keep no-fault divorce laws on the books. This argument is premised on the abatement of three negative consequences of divorce, which has occurred in large part because divorce has become less stigmatized. The weakening of no-fault divorce laws could recreate many of the conditions that once exacerbated divorce's negative consequences.

III.A. THE CHANGING CONSEQUENCES OF PARENTAL DIVORCE

Many researchers have argued that the normalization of divorce in contemporary America has weakened its negative impact on children. Goldscheider and Waite foresaw this development but did not attempt to verify it.⁴² Amato and Keith, through an exhaustive meta-analysis of almost 100 studies, found that the average negative effect of growing up in a divorced family has declined over time.⁴³ Parental divorce had far more adverse consequences for offspring self-concept and mother-child relations in the 1950s and 1960s than in more recent decades. Another study found that parental divorce had fewer negative effects on survey respondents interviewed in 1976 than it did for a comparable sample from 1957.⁴⁴ Taken together, these results

41. Marriage Movement, *The Marriage Movement: A Statement of Principles* 23 (2000) (available at <http://www.marriagemovement.org/pdfs/The%20Marriage%20Movement-A%20Statement%20of%20Principles.pdf>).

42. Frances K. Goldscheider & Linda J. Waite, *New Families, No Families? The Transformation of the American Home* 99 (U. of Cal. Press 1991).

43. Paul R. Amato & Bruce Keith, *Parental Divorce and the Well-Being of Children: A "Meta-Analysis,"* 110 *Psychol. Bull.* 26, 40 (1991).

44. Richard A. Kulka & Helen Weingarten, *The Long-Term Effects of Parental*

provide evidence that the effects of parental divorce have diminished over time. These findings have been corroborated in two recent studies.⁴⁵

III.A.1. Parental Divorce and Offspring Marriage Timing

The relationship between parental divorce and marriage timing has changed over time.⁴⁶ Numerous studies have demonstrated that parental divorce affects offspring marital behavior, although little consensus existed as to whether the children marry earlier or later than people from intact families.⁴⁷ My research, summarized in Figure 1, analyzes the 1973-1994 General Social Survey to show how the effects of parental divorce have changed over time.⁴⁸ Compared to people from intact families, teenagers from divorced families have extremely high marriage rates across the study, but they are much lower in 1994 than in 1973.⁴⁹

Divorce in Childhood in Adult Adjustment, 35 *The J. of Soc. Issues* 50, 73 (1979).

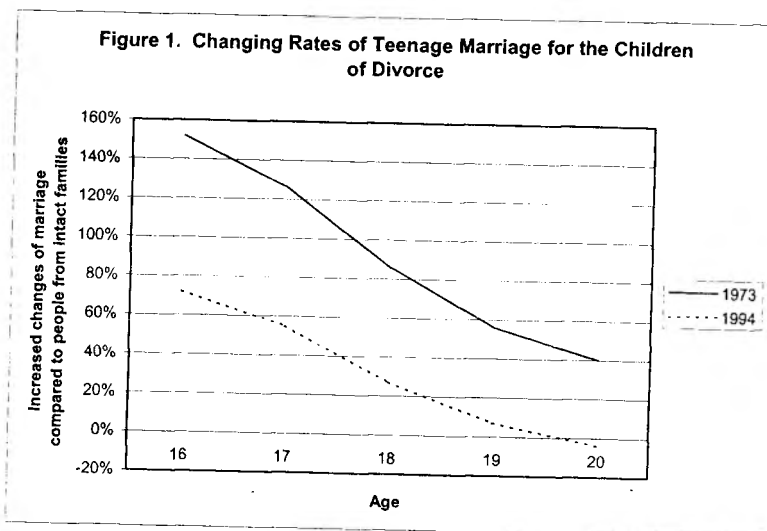
45. Nicholas H. Wolfinger, "Family Homogamy": *The Effects of Parental Divorce on Partner Selection and Marital Stability*, 32 *Soc. Sci. Research* 80-97 (2003).

46. See generally Nicholas H. Wolfinger, *Understanding the Divorce Cycle: How Parental Divorce Affects Offspring Marital Behavior* (Cambridge U. Press forthcoming 2005).

47. Jiang H. Li & Roger A. Wojtkiewicz, *Childhood Family Structure and Entry into First Marriage*, 35 *The Sociological Q.* 247, 247-248 (1994).

48. *Infra* Fig. 1 (comparing the rates of teen marriage among teenagers of divorced families).

49. *Id.*



Source: Wolfinger (2003, 2005); 1973-1994 General Social Survey.

The most likely explanations for the declining rate of teenage marriage for the offspring of divorce stems from the likelihood that the typical modern divorce involves less conflict and upheaval than it once did.⁵⁰ When divorce was less common, couples needed greater justification to dissolve their marriages. In the absence of no-fault divorce laws, a couple desiring a divorce often needed to demonstrate total and absolute marital failure.⁵¹ Normative expectations persuaded quarreling couples to “stick it out” under circumstances, such as domestic violence, that would today be readily recognized as reasonable grounds for divorce.⁵² When couples finally ended their marriages, the situation may have deteriorated far more than is typical in most modern divorces.

The majority of modern divorces do not involve extensive

50. Nolo, *No Fault Divorce vs. Fault Divorce FAQ*, <http://www.nolo.com/article.cfm/ObjectID/6191B9DC-00BF-42CA-A5ADA95C2AEC5196/catID/995EE405-21AA-4B4A-97CBABD905A37E1B/118/246/222/FAQ/> (last accessed Mar. 18, 2005).

51. *Id.* at “Do All States Allow a ‘Fault’ Divorce?”

52. *Id.* at “What Is a ‘Fault’ Divorce?”

conflict.⁵³ Conversely, it is impossible to know for certain whether only the very worst marriages were dissolved in years gone by. But if we accept this proposition, it follows that children used to be exposed to far more conflict than is typical in most modern divorces. In days gone by, the conflict associated with parental divorce may have pushed teenagers into premature marriage as a means of escaping an acrimonious home life. If parental divorce is now less unpleasant than it used to be, teenagers will feel less pressure to leave. Consequently their marriage rates have been lower in recent years.⁵⁴ Many of the negative consequences of growing up in a divorced family can be linked to parental conflict,⁵⁵ so declining conflict should have other beneficial effects on the rate of teenage marriage. Compared to people from intact families, the children of divorce are disproportionately likely to become sexually active at a young age⁵⁶ and to become pregnant out of wedlock.⁵⁷ Parental divorce even accelerates the onset of menstruation in young women.⁵⁸ Without a doubt, early sexual activity increases, if unintentionally, the chances of early wedlock. Thus a decline in parental conflict may have benefited the children of divorce by reducing the incidence of behaviors that may ultimately lead to high teenage marriage rates.

53. Paul R. Amato & Alan Booth, *A Generation at Risk: Growing Up in an Era of Family Upheaval* 220 (Harvard U. Press 1997).

54. Douglas J. Besharov & Karen N. Gardiner, *Trends in Teen Sexual Behavior* 1-2 (1998) (available at <http://www.welfareacademy.org/conf/papers/dougmay.pdf>).

55. Paul R. Amato & Alan Booth, *Consequences of Parental Divorce and Marital Unhappiness for Adult Well-Being*, 69 Soc. Forces 885, 905-914 (1991); Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 Psychol. Bull. 310, 310-330 (1982); Robert E. Emery, *Marriage, Divorce, and Children's Adjustment* xii (Sage Publications 1988).

56. Chris Albrecht & Jay D. Teachman, *Childhood Living Arrangements and the Risk of Premarital Intercourse*, 24 J. of Fam. Issues 867, 867 (2003); see Mignon R. Moore & P. Lindsay Chase-Lansdale, *Sexual Intercourse and Pregnancy among African American Girls in High-Poverty Neighborhoods: The Role of Family and Perceived Community Environment*, 63 J. of Marriage & Fam. 1146, 1146 (2001).

57. Moore & Chase-Lansdale, *supra* n. 56, at 1154; Lawrence L. Wu, *Effects of Family Instability, Income, and Income Instability on the Risk of a Premarital Birth*, 61 Am. Sociological Rev. 386, 386 (1996); Lawrence L. Wu & Brian C. Martinson, *Family Structure and the Risk of a Premarital Birth*, 58 Am. Sociological Rev. 210, 210 (1993).

58. See generally E. Mavis Hetherington, *An Overview of the Virginia Longitudinal Study of Divorce and Remarriage with a Focus on Early Adolescence*, 7 J. of Fam. Psychol. 39, 44 (1993).

Very few people would argue with the idea that teenage marriage is undesirable. Perhaps the most important reason is the strong relationship between youthful marriage and divorce.⁵⁹ Other things being equal, a couple with a mean marriage age of twenty is a third less likely to divorce than one with a mean marriage age of eighteen.⁶⁰ Furthermore, people who marry young are less likely to remain in school.⁶¹

III.A.2. Trends in the Intergenerational Transmission of Divorce

A second consequence of parental divorce to weaken over time is its transmission between generations (in other words, the increased likelihood of ending one's own marriage as the result of growing up in a divorced family).⁶² Figure 2 shows a dramatic weakening in the rate of divorce transmission. General Social Survey respondents from divorced families interviewed in 1973 were 126 percent more likely to have dissolved their own marriages than were people from intact families.⁶³ By 1994, the disparity had declined to forty-five percent.⁶⁴ Part of this decline can be attributed to the reduction in youthful marriage for the children of divorce described in the previous section of this Article. After controlling for age at marriage, the figures for 1973 and 1994 shrink to ninety-four percent and thirty-three percent

59. See Tim B. Heaton, *Factors Contributing to Increasing Marital Stability in the United States*, 23 J. of Fam. Issues 392, 395, 405, 406 (2002); Matthew D. Bramlett & William D. Mosher, *Cohabitation, Marriage, Divorce, and Remarriage in the United States* 37 (Natl. Ctr. for Health Statistics Ser. 23, No. 22, July 2002) (available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf).

60. Estimate produced by the author using data from the National Survey of Families and Households. James A. Sweet & Larry L. Bumpass, *The National Survey of Families and Households - Waves 1 and 2: Data Description and Documentation* (1996) (available at <http://www.sscwisc.edu/nsfh/home.htm>) [hereinafter Sweet & Bumpass, *National Survey*]; James A. Sweet, Larry L. Bumpass, & Vaughn R. A. Call, *The Design and Content of the National Survey of Families and Households* (Ctr. for Demography & Ecology 1988) [hereinafter Sweet, Bumpass & Call, *Design and Content*].

61. Jay D. Teachman & Karen A. Polonko, *Marriage, Parenthood, and the College Enrollment of Men and Women*, 67 Soc. Forces 512, 512, 520, 521 (1988).

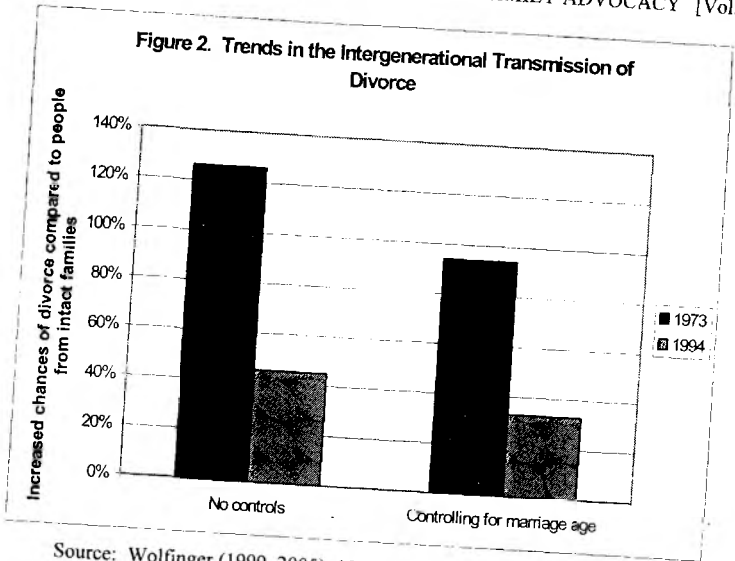
62. Nicholas H. Wolfinger, *Trends in the Intergenerational Transmission of Divorce*, 36 Demography 415, 415 (1999).

63. *Infra* Fig. 2 (illustrating trends in the intergenerational transmission of divorce).

64. *Id.*

respectively.⁶⁵ Still, a strong trend remains.

65. *Id.*



Source: Wolfinger (1999, 2005); 1973-1994 General Social Survey.

The intergenerational transmission of divorce can largely be attributed to a weakening in marital commitment.⁶⁶ Compared to people from intact families, the children of divorce more often use divorce as a solution to difficulties in their own marriages than do people from intact families.

The message children receive about commitment has almost certainly changed over time. If your parents were the only ones in the neighborhood to end their marriage, it conveyed a far more poignant lesson about the permanence of marital bonds than it does in today's society. Children learned that marriage could be forsaken when it went sour, that the best solution to marital difficulties was to cut one's losses. In contrast, no matter how painful it is at the time, a modern divorce does not stand out against the experiences of one's peers and therefore does not send nearly as strong a message to children. As a result, people are now less likely to get divorced just because they grew up in a divorced family. The normalization of divorce, in short, means

66. Paul R. Amato & Danelle DeBoer, *The Transmission of Divorce across Generations: Relationship Skills or Commitment to Marriage?*, 63 *J. of Marriage & Fam.* 1038, 1038, 1040 (2001); Norval D. Glenn & Kathryn B. Kramer, *The Marriages and Divorces of the Children of Divorce*, 49 *J. of Marriage & Fam.* 811, 813 (1987).

that parental divorce conveys a weaker message about marital commitment than it once did. This is similar to an argument made to account for demographic differences in the divorce cycle. Divorce transmission is weaker in populations with high divorce rates, as speculated, because marriage itself is seen as less inviolable.⁶⁷ If this logic is applied historically, it portends a weakening in the divorce cycle.

Another argument to explain trends in the intergenerational transmission of divorce concerns the declining stigma of growing up in a single-parent family. Throughout the twentieth century people became increasingly accepting of divorce,⁶⁸ a trend that increased especially quickly between the early 1960s and the late 1970s.⁶⁹ As divorce became more common and acceptable, perhaps children in divorced families suffered less stigma, either real or imagined.⁷⁰ In the past, when divorces were few and far between, single mothers and their children were frequently harassed or ostracized.⁷¹ Under these conditions children were less likely to develop normal relationships, with their mothers, grandparents, or their peers. The children of divorce could hardly avoid seeing themselves as deviant. In modern times one's post-divorce relationships sometimes cushion the blow of parental divorce. In days gone by, the children of divorce usually faced only stigma. Without a doubt this added to the psychological trauma of experiencing parental divorce, given the powerful relationship between stigma and personal identity, and thereby increased the chances of

67. See Ann Laquer Estin, *Economics and the Problem of Divorce* 2 U. Chi. L. Sch. Roundtable 517, 526 (1995).

68. See Phillips, *supra* n. 10, at 246.

69. Arland Thornton, *Changing Attitudes toward Family Issues in the United States*, 51 J. of Marriage & Fam. 873, 873 (1989); Arland Thornton & Linda Young-DeMarco, *Four Decades of Trends in Attitudes Toward Family Issues in the United States: The 1960s through the 1990s*, 63 J. of Marriage & Fam. 1009, 1010 (2001).

70. Just how much have the social norms surrounding divorce changed in the last fifty years? Adlai Stevenson's divorce probably contributed to the failure of his presidential campaigns, with voters in 1952 more concerned with his marital problems than the threat of domestic communism. Wernick, *supra* n. 6, at [¶ 4]; see Angus Campbell et al., *The American Voter* 51 (John Wiley & Sons, Inc. 1968). One voter told a reporter in 1953: "Young man, the American people proved once and for all last November that we will never tolerate a divorced man in the White House." Wernick, *supra* n. 6, at [¶ 3]. Twenty-seven years later, Ronald Reagan's divorce was the non-event of his presidential campaign. In 1996, previously divorced Bob Dole ran for president on a family values platform.

71. See generally Phillips, *supra* n. 10.

having difficulty in one's own marriage.⁷²

III.B. THE ECONOMIC CONSEQUENCES OF DIVORCE FOR WOMEN

Opponents of easy divorce laws often cite the grim economic condition of single mothers to justify stringent divorce laws. The Louisiana covenant marriage legislation was motivated in part by the economic consequences of divorce.⁷³ poverty rates for single-mother families have traditionally been five times those of two-parent families.⁷⁴ Moreover, Pamela Smock showed almost no change in the economic costs of marital disruption for women from the late 1960s through the mid 1980s.⁷⁵ The lack of progress has been largely attributed to the unequal distribution of assets following divorce, low female participation in the labor force, and limited job skills among those who did work.⁷⁶

But much of this has changed. Table 1 displays various social and demographic characteristics for divorced women in 1980 and 2001 that are related to earning potential.⁷⁷ The data comes from the March Demographic Supplement of the Current Population Survey; all changes are significantly different except for coresidence with parents.⁷⁸ Between 1980 and 2001, divorced women's labor force qualifications increased considerably.⁷⁹ Twenty-nine percent of respondents from 1980 did not have high school diplomas.⁸⁰ By 2001,

72. See generally Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (Prentice-Hall, Inc. 1963).

73. Spaht, *supra* n. 27, at 117.

74. Irwin Garfinkel & Sarah S. McLanahan, *Single Mothers and Their Children: A New American Dilemma* 14 fig. 1 (The Urban Inst. Press 1986).

75. Pamela J. Smock, *The Economic Costs of Marital Disruption for Young Women Over the Past Two Decades*, 30 *Demography* 353, 353 (1993).

76. Matthew McKeever & Nicholas Wolfinger, *Reexamining the Economic Costs of Marital Disruption for Women*, 82 *Soc. Sci. Q.* 202, 202-203 (2001) (citing Greg J. Duncan & Saul D. Hoffman, *Economic Consequences of Marital Instability, in Horizontal Equity, Uncertainty, and Well-Being* 427 (U. of Chi. Press 1985)) [hereinafter McKeever & Wolfinger, *Reexamining*]; Richard R. Peterson, *Women, Work, and Divorce* (St. U. of N.Y. Press 1989); Smock, *supra* n. 75.

77. *Infra* Tbl. 1 (illustrating the changing sociodemographic characteristics of divorcées).

78. United States Bureau of the Census, *Current Population Survey: Annual Demographic File*, Bureau of Labor Statistics, Washington, D.C. (2001).

79. *Infra* Tbl. 1.

80. *Id.*

only fifteen percent failed to finish high school.⁸¹ The number of women with four-year college degrees grew seven percent during these years, while the number with some college increased fourteen percent.⁸² Average occupational status also increased, from thirty-four to thirty-seven percent.⁸³ Employment fell one percent, from twenty-four to twenty-three; however, the percentage of divorced women in full-time work increased one percent, from fifty-eight to fifty-nine percent.⁸⁴ Furthermore, the average age for divorcées rose from forty-three in 1980 to fifty in 2001.⁸⁵ All else being equal, older women have more work experience.⁸⁶

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

Table 1. The Changing Sociodemographic Characteristics of Divorcées

	1980	2001
<i>VOCATIONAL CHARACTERISTICS</i>		
Education		
Less than H.S.	29%	15%
H.S. graduate	41	32
Some college	18	32
College graduate (4 year degree)	7	14
Advanced degree	5	7
Hours worked		
None	23%	24%
Part-Time	19	17
Full-Time	58	59
SEI ^a	34.0	37.0
Age	43	50
<i>ADDITIONAL INCOME SOURCES</i>		
Alimony/child support received	32%	19%
Amount alimony/child support ^b	5,224 (2,430)	6944
Public aid received	15%	3%
Amount of public aid ^b	5,934 (2,760)	3,835
<i>FAMILY CHARACTERISTICS</i>		
Number of children		
Zero	52%	71%
One	23	16

Two	17	10
Three or more	9	4
Children younger than six	14%	6%

Notes: Percentages may not sum to 100 due to rounding error. Figures are weighted. Ns are 4,142 for 1980 and 4,541 for 2001. Source: McKeever and Wolfinger (forthcoming).

^aMeans reported for those who are currently working

^bMeans reported for those who received given type of aid; amounts expressed in 2001 dollars, with 1980 dollar amounts in parentheses

^cNo statistically significant change between 1980 and 2001

These and other developments have finally begun to affect divorced women's economic prospects. Although divorced women still suffer economically, their median income losses after divorce have declined significantly in recent years. This undercuts another rationale for restricting divorce. A recent analysis based on the National Survey of Families and Households (NSFH)⁸⁷ indicates that divorce now has smaller effects on women's incomes than it did in the past.⁸⁸ Table 2 contrasts the NSFH estimates of the costs of divorce, measured in per capita income, with those obtained by earlier studies. Divorce now costs the median woman fourteen percent of her per capita income, a much lower figure than had been reported previously.⁸⁹ By way of contrast, studies based on data from 1970 to 1983 suggested income losses averaging thirty percent.⁹⁰ A fourteen percent loss of per capita

87. Sweet & Bumpass, *National Survey*, *supra* n. 60; Bumpass & Call, *Design and Content*, *supra* n. 60.

88. McKeever & Wolfinger, *Reexamining*, *supra* n. 76, at 203; see also Matthew McKeever & Nicholas H. Wolfinger, *Shifting Fortunes in a Changing Economy: Trends in the Economic Well-Being of Divorced Women in Fragile Families and the Marriage Agenda* ___ (Kluwer forthcoming 2005) [hereinafter McKeever & Wolfinger, *Shifting*].

89. *Infra* Tbl. 2 (changes in the economic well-being of divorced women).

90. See generally Annette Sorensen, *Estimating the Economic Consequences of Separation and Divorce: A Cautionary Tale from the United States*, in *Economic*

income still represents a marked decrease in quality of life, but the fact that there has been improvement suggests that things will continue to get better. Divorced women's economic gains can be attributed chiefly to greater and more lucrative labor force participation among divorced women, and secondarily to lower rates of marital fertility.⁹¹

Table 2. Changes in the Economic Well-Being of Divorced Women

Study	Time period	Median per capita Income Loss
McKeever and Wolfinger (2001)	1987-1994	-14%
Smock (1993)	1979-1987	-25%
Sorensen (1992)	1970-1984	-23%

IV. SUMMARIZING THE EVIDENCE AGAINST FAULT-BASED DIVORCE

Much of the impetus for divorce reform has been premised on the notion that divorce is disastrous for children. Although parental divorce still hurts children, they are now collectively better off than they used to be. The main reason for this, broadly speaking, has been the normalization of divorce in American society. Reintroducing tough divorce laws would recreate many of the conditions that used to make

Consequences of Divorce: The International Perspective, 251, 263, 269 (Clarendon Press 1992).

91. McKeever & Wolfinger, *Shifting*, *supra* n. 88, at ___ (forthcoming 2005).

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

As the consequences of growing up in a divorced family abate, divorce reformers may focus renewed attention on the often dire economic straits of single mothers. Their concern has merit, given that poverty rates for single mother families are traditionally far higher than for two-parent families. In the last twenty years, however, divorcées have made substantial economic gains, largely on account of their labor force participation. Divorce still takes a toll on women's incomes, but not nearly as severe as it did in the past. This undercuts a key rationale for limiting access to divorce.

There is wisdom in viewing any new body of findings with caution, particularly if they are to be the basis of policy decisions. For this reason we should consider some of the negative implications of the developments this Article describes. The first concerns the changing marital behavior of people from divorced families. Although lower rates of teenage marriage are certainly a welcomed development, the other side of the coin has been lower marriage rates across the board for the children of divorce. In 1973, people from divorced families had much higher overall marriage rates than did people from intact families,⁹² owing largely to extraordinarily high levels of teenage wedlock. By 1994, the children of divorce were thirteen percent less likely to marry than were their peers from intact families.⁹³ Although teenagers from divorced families still had high marriage rates in 1994, their chances of matrimony plummeted if they remained single past age twenty.⁹⁴ This is probably because teenagers from divorced families increasingly opted for cohabitation in lieu of marriage.⁹⁵

Certainly, many people who remain single throughout their lives are happy in doing so, but marriage remains the normative experience

92. *Supra* Fig. 2 (illustrating marriage rates among children who were raised in divorced or intact families)..

93. *Id.*

94. *Id.*

95. *Id.*

for almost everybody – about ninety percent of Americans will wed at some point in their lives.⁹⁶ Moreover, married people typically report greater emotional well-being than do those who remain single.⁹⁷ Although it is still good news that the children of divorce have lower teenage marriage rates than they used to, their declining overall marriage rate is noteworthy.

Another development that might be a mixed blessing for the children of divorce concerns the circumstances under which people choose to end their marriages. While it is certainly good news that people are less likely to stay in high conflict marriages than they used to, it is also cause for concern if the majority of divorces nowadays come after virtually no conflict.⁹⁸ Ending a low-conflict marriage may hurt children as much as staying in a high-conflict family.⁹⁹ Nevertheless, there is certainly a break-even point at which children's well-being is best served if their parent's marriage is dissolved.¹⁰⁰

The final reasons for keeping no-fault laws on the books are moralistic, and go beyond the ethical dilemmas presented by perjury in divorce trials. The traditional alternative to divorce, especially in the absence of adequate means to buy a "trip to Reno," was permanent separation.¹⁰¹ Numerous unhappy couples effectively ended their marriages in this way.¹⁰² In the absence of a paper trail, it is impossible to know how many. Because most of those who opted for permanent separation did not want to spend the rest of their lives alone, adultery or even bigamy ensued.¹⁰³ South Carolina stands out as an extreme example of the folly of prohibiting divorce.¹⁰⁴ Having no

96. Joshua R. Goldstein & Catherine T. Kenney, *Marriage Delayed or Marriage Foregone? New Cohort Forecasts of First Marriage for U.S. Women*, 66 *Am. Sociological Rev.* 506, 507 (2001).

97. Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better off Financially*, 67-68 (Doubleday 2000).

98. See Amato & Booth, *supra* n. 53, at 220.

99. Amato & DeBoer, *supra* n. 66, at 1049; Paul R. Amato, Laura Spencer Loomis & Alan Booth, *Parental Divorce, Marital Conflict, and Offspring Well-Being during Early Adulthood*, 73 *Sociological Forces* 895, 909 (1995).

100. Amato, Loomis & Booth, *supra* n. 99, at 913.

101. Laurie Nichol, *Your California Legal Separation Advisor*, http://legaladvice.articleinsider.com/56387_california_legal_separation.html [¶ 2] (last accessed Mar. 18, 2005); see Blake, *supra* n. 11, at 155-159.

102. Blake, *supra* n. 11, at 143-144.

103. *Id.* at 234.

104. *Id.*

divorce laws until fairly recently, it fostered peculiar conditions for marriage.¹⁰⁵ In the mid-nineteenth century, laws had to be passed limiting the amount of money a man could bequeath to his mistress, given the popularity of engaging in extramarital relations in lieu of divorce.¹⁰⁶ Moreover, such arrangements offered no solution for the female half in such loveless marriages. By demonstrating one limit of legislating morality, these nineteenth century laws are instructive to those who object to divorce on moral grounds.¹⁰⁷

V. OTHER WAYS OF REDUCING DIVORCE

Although many people feel the divorce rate in contemporary America is too high, not all agree that tougher divorce laws are a good way to preserve marriage. Some contend that families can best be kept together through governmental programs that make life easier for married couples.¹⁰⁸ The scope of ideas is extensive, ranging from increased financial assistance to poor married couples to government-sponsored training in relationship skills.¹⁰⁹ Some programs have already been implemented. Recently the federal tax burden incurred by poor married couples was reduced, while certain states have begun marriage education programs.¹¹⁰

Do these programs help keep marriages together? For the most part it is too soon to tell.¹¹¹ One mark in favor of these programs is that they can't hurt. People may object to government-subsidized marital education as a waste of taxpayers' money or an unwarranted intrusion into people's private lives, but it is hard to imagine that the newlyweds learning about happy marriages might actually be harmed in the process so long as the government does not use marriage programs as an excuse to curtail more vital services.¹¹² On the other

105. *Id.*

106. *See generally id.* at 219.

107. *See generally id.*

108. *See e.g.* Theodora Ooms, *Marriage Plus*, "Help Those Who Want to Stay Married," <http://www.prospect.org/print/V13/7/ooms-t.html> (Apr. 8, 2002).

109. Besharov & Gardiner, *supra* n. 54, at Ex. 2.

110. *Id.*

111. Scott M Stanley, *Making a Case for Premarital Education*, 50 *Fam. Rel.* 272, 278 (2001).

112. Dawne Moon & Jaycee Whitehead, *Marrying for America: A Feminist Discursive Approach to National Intimacy*, in *Fragile Families and the Marriage Agenda* ____ (Kluwer forthcoming 2005).

hand, the discouraging legacy of tough divorce laws is hardly in question.

Though not formally associated with the marriage movement, one auspicious development in all fifty states has been the elevation of the minimum marriage age to eighteen.¹¹³ Until recently, for instance, women could wed at fifteen in Mississippi.¹¹⁴ Given the high divorce rates for teenagers chronicled earlier in this Article, the prohibition of youthful marriage may eventually contribute to lower divorce rates.

In many states the legal minimum marriage age of eighteen can be waived by parental or judicial consent, or premarital pregnancy.¹¹⁵ Marriage between teenagers may be desirable when babies are involved, but the merits of youthful marriage via parental or judicial approval seem suspect. This is a potential area for legal reform on the part of the marriage movement. In addition, we might do more to discourage matrimony among eighteen- and nineteen-year-olds. As of 2000, about five percent of American teenagers were married.¹¹⁶ Perhaps marriage education programs might seek to persuade teenagers to delay marriage until their twenties, given the high divorce risk youthful couples face.¹¹⁷

113. Marriage Laws, *Teen Marriage Laws*, *Laws*, http://usmarriagelaws.com/search/united_states/teen_marriage_laws/index.shtml (last accessed Mar. 18, 2005).

114. PopPolitics, *Attitudes Toward Marriage*, "Statistics," <http://www.poppolitics.com/articles/2000-06-19-stats.html> (last accessed Mar. 23, 2005) (noting that minimum age for women to marry in Mississippi without parental consent was fifteen in 2000).

115. Marriage Laws, *supra* n. 113.

116. Daniel T. Licher & Zhenchao Qianh, *Marriage and Family in a Multiracial Society* tbl., <http://www.prb.org/Template.cfm?Section=PRB&template=/ContentManagement/ContentDisplay.cfm&ContentID=12035> (last accessed Mar. 18, 2005).

117. Naomi Seller, *Is Teen Marriage a Solution?* 1 (Ctr. for L. & Soc. Policy Apr. 2002) (available at <http://www.clasp.org/publications/teenmarriage02-20.pdf>).