Louisiana Law Review

Volume 50 | Number 5
Family Law Symposium
May 1990

Louisiana Divorce Reform: For Better or For Worse?

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I. INTRODUCTION

Eight years ago, the Louisiana State Law Institute began to draft a revision of Louisiana's marriage and divorce laws. As a result of this effort, the Law Institute submitted proposed legislation[1] to the State Legislature in 1987.[2] Although the Legislature adopted the revisions to the marriage section, it defeated the divorce provisions. Those provisions were reintroduced and again defeated in 1988.[3] Despite subsequent amendments designed to make the revision more politically acceptable, the Legislature again refused to adopt the changes in 1989.[4] The Marriage-Persons Committee of the State Law Institute, in cooperation with the Joint Legislative Committee on Divorce and the Legislature's Civil Law and Procedure Committee, has further revised the working draft, and a significantly transformed bill will be introduced in 1990.

The primary thrust of the divorce reforms has been to remove the issue of fault from the proceedings necessary to obtain a divorce. In the proposed version, fault is an issue only as it relates to one's eligibility to receive alimony. Consequently, the issue of fault will not have to be litigated if the parties agree that one of them will pay alimony to the other, or that neither will receive alimony.

The procedure itself has also been significantly simplified in the revision. In lieu of the current approach requiring that the spouses live separate and apart in all but the most egregious of circumstances,[5] under the new proposal one party could immediately file a petition for divorce. After a six-month period of living separate and apart, that party could file a motion for final divorce.[6] Absent a reconciliation between the parties, there would be no "defense" to this action.

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1. The revision involves Book I, Of Persons; Titles IV, Husband and Wife; and V, Of Separation From Bed and Board and of Divorce, of the Louisiana Civil Code.

2. H.R. 1139, 13th La. Leg., Reg. Sess. (1987).

3. H.R. 847, 14th La. Leg., Reg. Sess. (1988).

4. H.R. 336, 15th La. Leg., Reg. Sess. (1989).

5. La. Civ. Code art. 139, infra note 25.

6. Only the plaintiff may move for such a judgement. Proposed La. Civ. Code art. 102, infra note 48. However, the defendant spouse may protect his right to do so by filing his own divorce action. The declinatory exception of lis pendens is not available to the plaintiff to have the defendant's suit dismissed, under Proposed La. Code Civ. P. art. 3957, which expressly permits the filing of such a suit.

This article will discuss Louisiana's current divorce law and how divorcing couples, family law practitioners, and the courts apply it. It will then summarize the Law Institute's purposes and processes in drafting the revision and analyze the proposed revision. This analysis will focus on the elimination of fault as an issue in divorce proceedings and provide a general overview of the changes it makes in current law. Next, examples are given of the abuses that have resulted from the application of fault in Louisiana divorce proceedings. Some of the problems resulting from the elimination of fault in "pure" no-fault divorce states[7] follows. In conclusion, the two approaches are considered to determine which provision seems to be the better alternative.

II. Current Louisiana Divorce Law and Practices

Louisiana's law of divorce, like that of most of its sister states, is grounded in ecclesiastical or canon law.[8] Historically, this foundation resulted in a virtual ban on divorces, based on the religious concept of "'til death us do part." Where divorces were allowed, they could be based only on religiously-sanctioned grounds and then were only obtainable by the "innocent" party.[9] As the bulk of divorce law evolved away from these religious tenets, the concept of fault-based divorce remained.

Originally, in the United States, divorces could only be granted by individual statute. Such a statute was applicable to only one couple at a time, much like early corporation statutes.[10] As divorce became more common, however, "legislatures recognized the need for an efficient way to dissolve a marriage."[11] There were no easy solutions, because the legislatures had to balance conflicting societal demands. "One was a demand that the law lend moral and physical force to the sanctity and stability of marriage. The other was a demand that the law permit people to choose and change their legal relations."[12]

During the 1970's, state lawmaking bodies nationwide began to recognize that the concept of fault as it relates to divorce did not accurately reflect typical marital breakdowns. Divorce practitioners and social scholars have found, on the contrary, that isolated, cataclysmic

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7. For a definition of a "pure no-fault" divorce law, see infra note 44.

8. L. Wardle, C. Blakesley and J. Parker, Contemporary Family Law: Principles, Policy and Practice § 1:01-03 (1988); Note, Ecclesiastical Law: How Far Adopted in the United States, 30 Harv. L. Rev. 283 (1917).

9. Wadlington, Divorce Without Fault Without Perjury, 52 Va. L. Rev. 32, 35-37, 40 (1966); L. Wardle, C. Blakesley and J. Parker, supra note 8, at §§ 17.02, 19.01.

10. Friedman, Rights of Passage: Divorce Law in Historical Perspective, 63 Or. L. Rev. 649, 651-53 (1984).

11. Id. at 653.

12. Id.

events seldom end marriages.[13] Most marriages deteriorate over long periods of time.[14] The decision to divorce is usually made incrementally, and the parties seldom fit into the simple categories of totally innocent or exclusively "at-fault."[15] As this pattern became clear, states began to adopt laws allowing for divorce based on living "separate and apart" for an established period of time, or other "no-fault" grounds.[16] Today, all states have adopted some form of "no-fault" divorce.[17]

There are important public policies supporting the requirement of proof of fault for a party to obtain a divorce in less than one year. Mandating a one-year "cooling off" period in the absence of egregious fault prevents hasty or ill-considered terminations of marriages, provides for more stable family relationships, extends economic support of the continuing family unit, and protects the sanctity of marriage. Lawmakers are justifiably concerned with the protection, encouragement, and stabilization of marriage. In accord with these important public policies, states have resisted the total elimination of fault as a consideration during divorce proceedings.

This objection, however, appears to be based on a false premise. Few people contemplating divorce know the particular requirements of their state's divorce laws. They make their decisions for countless indefinable reasons that have little or nothing to do with the ease or difficulty of obtaining a divorce. At least two social statistics bring this to bear: divorce rates remained stable in eighty-seven per cent of the states adopting simplified procedures or removing fault as a requirement;[18] and the duration of marriages remained unchanged before and after adoption of the no-fault provisions.[19]

Because legal barriers appear to provide little deterrence to the incidence of divorce, the legal termination of the marriage should be made as civil as possible. Fault-based divorces force the parties to take unnecessarily adversarial positions toward one another, thereby lessening the likelihood of reconciliation and creating unnecessary hostility and acrimony between parties who are already likely to be emotionally vul-

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13. Freed and Foster, Divorce in the Fifty States: An Overview as of 1978, 13 Fam. L.Q. 105, 107 (1979).

14. Wadlington, supra note 9, at 82.

15. Id. at 40; Carbonneau, Analytical and Comparative Variations on Selected Provisions of Book One of the Louisiana Civil Code With Special Consideration of the Role of Fault in the Determination of Marital Disputes, 27 Loy. L. Rev. 999, 1018-19 (1981).

16. Freed and Foster, supra note 13.

17. Freed and Walker, Family Law in the Fifty States: An Overview, 21 Fam. L.Q. 417, 440-43 (1988); 20 Fam. L.Q. 439, 460 (1987); 19 Fam. L.Q. 331, 341 (1986).

18. Sepler, Measuring the Effects of No-Fault Divorce Laws Across Fifty States: Quantifying a Zeitgeist, 15 Fam. L.Q. 65, 88-89 (1981).

19. McGraw, Sterin and Davis, A Case Study in Divorce Law Reform and its Aftermath, 20 J. Fam. L. 443, 465 (1982).

nerable.[20] This is true even when the parties opt to wait a year and obtain a divorce on no-fault grounds, because of the relevance of fault to the determinations of alimony[21] and child custody.[22] In addition, the inherent tension encompassed in the present system discourages voluntary settlements.[23] Given the possibility that removing the fault requirement may improve relations between divorcing spouses, and the resulting positive impact on the affected children, Legislatures ought to encourage civility and cooperation in the divorce process. Removing fault as an issue would help achieve this goal.[24]

In Louisiana, fault-based separations from bed and board and divorces are governed by Civil Code articles 138 and 139. To secure an immediate divorce requires either proof of adultery on the part of the other spouse or his conviction of a felony and sentencing to death or imprisonment at hard labor.[25] Alternatively, spouses may obtain a divorce if they have been living separate and apart for six months without a reconciliation after having obtained a judgment of separation from bed and board on grounds specifically listed in Civil Code article 138[26] and

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20. Id. at 453.

21. La. Civ. Code art. 160 provides that a judicial finding of fault will act as an absolute bar to that spouse's eligibility for alimony.

22. La. Civ. Code art. 146 C. provides that the presumption that joint custody is in the best interest of a minor child may be rebutted by a showing of, among other factors: "(f) The moral fitness of the parties involved. (g) The mental and physical health of the parties involved. (l) Any other factor considered by the court to be relevant. . . ."

23. McGraw, Sterin and Davis, supra note 19, at 471; Schiller, Dueling Over the Issue of Fault: Fault Undercuts Equity, 10 Fam. Advoc. 10(2), 14 (1987).

24. Wadlington, supra note 9; Schiller, supra note 23, at 14-15; Gitlitz, The Case for a No Fault Divorce Law in New York, 58 N.Y. St. B.J. 2d 28, 31 (1986); L. Weitzman, The Divorce Revolution 23 (1985).

25. Immediate divorce may be claimed receprocably [reciprocally] for one of the following causes:

1. Adultery on the part of the other spouse.

2. Conviction of the other spouse of a felony and his sentence to death or imprisonment at hard labor.

Divorce may be granted to either spouse after a separation from bed and board in accordance with the provisions of Section 302 of Title 9 of the Louisiana Revised Statutes of 1950.

La. Civ. Code art. 139.

26. Separation from bed and board may be claimed reciprocally for the following causes:

1. In case of adultery on the part of the other spouse;

2. When the other spouse has been convicted of a felony and sentenced to death or imprisonment at hard labor in the state or federal penitentiary;

3. On account of habitual intemperance of one of the married persons, or excesses, cruel treatment, or outrages of one of them toward the other, if such habitual intemperance, or such ill-treatment is of such a nature as to render their living together insupportable;

in Louisiana Revised Statutes 9:302.[27] Lastly, spouses may obtain a divorce when they have been living separate and apart continuously for at least one year.[28]

Obtaining a divorce in Louisiana in less than one year requires proof of acts sufficient to constitute the required "fault."[29] Even if a couple

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4. Of a public defamation on the part of one of the married persons towards the other;

5. Of the abandonment of the husband by his wife or the wife by her husband;

6. Of an attempt of one of the married persons against the life of the other;

7. When the husband or wife has been charged with a felony, and shall actually have fled from justice, the wife or husband of such a fugitive may claim a separation from bed and board, on producing proofs to the judge before whom the action of separation is brought, that such husband or wife has actually been guilty of such felony, and has fled from justice;

8. On account of the intentional non-support by the husband of his wife who is in destitute or necessitous circumstances, or by the wife of her husband who is in destitute or necessitous circumstances.

9. When the husband and wife have voluntarily lived separate and apart continuously for six months and no reconciliation has taken place during that time.

10. When the spouses have lived six months separate and apart, voluntarily and without reconciliation; provided that both spouses shall execute an affidavit attesting to and testifying that they have so lived separate and apart and that there exists irreconcilable differences between the spouses to such a degree and nature as to render their living together insupportable and impossible. In all such cases, the proceedings shall be entitled "In the matter of _____ (petitioner) and his (or her) spouse _____."

La. Civ. Code art. 138.

27. A. When there has been no reconciliation between the spouses for a period of six months or more from the date the judgement of separation from bed and board was signed, either spouse may obtain a judgment of divorce.

B. If an appeal is taken from a judgment of separation from bed and board, a suit for divorce may not be commenced until the day after the date upon which the judgment becomes definitive as provided by Article 1842 of the Louisiana Code of Civil Procedure or until the expiration of the time stated in Subsection A of this Section, whichever is later.

C. The right of a spouse to alimony shall not be affected because the other spouse obtains the judgment of divorce under the provisions of this Section.

D. The provisions of this Section do not affect in any way the right of the spouse who had obtained the care and custody of the children, as provided by law, to retain such care and custody.

La. R. S. 9:302 (Supp. 1990).

28. "When the spouses have been living separate and apart continuously for a period of one year or more, either spouse may sue for and obtain a judgement of absolute divorce." La. R.S. 9:301 (Supp. 1990).

29. La. Civ. Code arts. 138-139, supra notes 25-26.

is willing to wait more than a year to obtain a divorce based upon the "no-fault" grounds contained in Louisiana Revised Statutes 9:301,[30] the spouses may have to prove the lack of a reconciliation during the physical separation.[31] Some spouses engage in deceptive behavior such as simulating a heartfelt reconciliation in order to prolong eligibility for alimony pendente lite or to eliminate the admissability of evidence of prior fault.[32] Spouses may also engage in such behavior simply to frustrate the wishes of the party who wants to expedite the divorce.[33] Because Louisiana's no-fault divorce provision requires that the parties live separate and apart for one year without reconciliation before filing,[34] the state arguably encourages such behavior by requiring proof of fault as an essential element of the cause of action for one to obtain a divorce in less than one year.

Current law also encourages collusive divorces between those parties who have mutually agreed to end their marriages, but who want to do so in less than one year.[35] Particularly if one party agrees to pay alimony, he may agree to take the assignment of fault either to facilitate the process or in exchange for some concession from the other party. Although the courts do not expressly condone such divorces, they are often tacitly endorsed as long as the agreement does not violate equity.[36]

III. THE EVOLUTION OF THE REVISION

As directed by the Louisiana Legislature, the Louisiana State Law Institute[37] is pursuing an ongoing revision of the Louisiana Civil Code.[38]

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30. La. R.S. 9:301 (Supp. 1990), supra note 28.

31. See, e.g., Millon v. Millon, 352 So. 2d 325 (La. App. 4th Cir. 1977); Stewart v. Stewart, 175 So. 2d 692 (La. App. 1st Cir. 1965).

32. See, e.g., Hickman v. Hickman, 218 So. 2d 48 (La. App. 3d Cir.), writ denied, 253 La. 879, 220 So. 2d 460, reh'g denied, 227 So. 2d 14 (La. App. 3d Cir. 1969); Jordan v. Jordan, 394 So. 2d 1291 (La. App. 1st Cir. 1981).

33. See, e.g., Humes v. McIntosh, 225 La. 930, 74 So. 2d 167 (1954).

34. La. R.S. 9:301 (Supp. 1990), supra note 28.

35. See, e.g., Collins v. Collins, 485 So. 2d 956 (La. App. 5th Cir.), writ denied, 488 So. 2d 203 (1986). See also Clark, Marital Privacy: New Remedies for Old Wrongs, 16 Cumb. L. Rev. 229, 232 (1986).

36. Friedman, supra note 10, at 659-61; Brinig and Carbone, The Reliance Interest in Marriage and Divorce, 62 Tul. L. Rev. 855, 896-97 (1988).

37. The Louisiana State Law Institute was created in April of 1938 at the Louisiana State University Law School. Later that year, the Louisiana Legislature officially recognized and funded the Institute as "an official advisory law revision commission, law reform agency and legal research agency of the State of Louisiana." La. Acts 1938, No. 166 § 1, subsequently codified at La. R.S. 24:201-208 (1989) (enacted in 1938).

38. The fundamental purpose of the Institute, as stated by the Legislature in the act that created it, is "to promote and encourage the clarification and simplification of the law of Louisiana and its better adaptation to present social needs; to secure the better administration of justice and to carry on scholarly legal research and scientific legal work." La. R.S. 24:204 (1989).

The revision of this state's marriage and divorce laws is only a part of this larger endeavor.

The Institute's Marriage-Persons Committee began the revision of the provisions relating to marriage in October of 1981, and began consideration of the divorce provisions in 1984. This Committee is comprised of a retired supreme court justice,[39] two family law judges,[40] six law professors[41] and three family law practitioners.[42] The combined breadth of their knowledge of this subject makes their recommendations highly persuasive authority for the positions espoused.

The Committee has met approximately four times annually during this eight-year period and has integrated the recommendations not only of its members, but also of the Joint Legislative Study Committee on Divorce and the Legislature's Civil Law and Procedure Committee. The Reporter has stated the Institute's goals in this project as follows, in their order of priority:

> 1. The law should recognize that, because marriage is a personal relationship entered into for complex personal and social reasons,

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39. Honorable Fred A. Blanche, Jr., Justice, Louisiana Supreme Court (1979 to 1986); Judge, Louisiana First Circuit Court of Appeal (1969 to 1979); Judge, Louisiana Nineteenth Judicial District Court (1960 to 1969).

40. Honorable E. Donald Moseley, Chief Judge, East Baton Rouge Parish Family Court (1972 to present) and Honorable Anthony J. Graphia, Judge, East Baton Rouge Parish Family Court (1978 to present), who is no longer a member of the Committee.

41. Katherine Shaw Spaht, Jules and Frances Landry Professor of Law, Paul M. Hebert Law Center, Louisiana State University, who serves as the Reporter for the revision of this section of the Civil Code; J.D., Paul M. Hebert Law Center, Louisiana State University (1971).

Christopher L. Blakesley, Professor of Law, Paul M. Hebert Law Center, Louisiana State University; J.S.D., Columbia University School of Law (1985); LL.M., Columbia University School of Law (1976); J.D., University of Utah College of Law (1973); M.A., the Fletcher School of Law and Diplomacy (1970).

Thomas E. Carbonneau, Professor of Law, Tulane University School of Law; Deputy Director of the Eason-Weinmann Center for Comparative Law; J.S.D., Columbia University School of Law (1984); LL.M., Columbia University School of Law (1979); M.A., University of Virginia (1979); M.A., Oxford University (1979); J.D., University of Virginia (1978); A.B., Bowdoin College (1972); Diplôme Supérieur d'Etudes Françaises, Université de Poitiers (1971).

Jeanne Carriere, Associate Professor of Law, Tulane University School of Law; J.D., Tulane University School of Law (1986); Ph.D., University of California at Los Angeles (1975); M.A., University of California at Los Angeles (1972).

Kathryn V. Lorio, Professor of Law, Loyola University School of Law; J.D., Loyola University School of Law (1973).

Cynthia Samuel, Professor of Law, Tulane University School of Law; J.D., Tulane University School of Law (1972).

42. Eavelyn T. Brooks, Attorney at Law, Bastian and Wynne; Philip R. Riegel, Jr., Attorney at Law, Parlongue and Riegel; and Kenneth Rigby, Attorney at Law, Love, Rigby, Dehan, McDaniel and Goode.

> the parties to a marriage are in the best position to know when it has ceased to serve its intended purposes.
> 2. Dissolution of marriage should be as amicable as possible, and the law should encourage civility in dissolution actions by making them non-adversarial in nature.
> 3. The law should promote reconciliation between spouses by imposing a reasonable waiting period in all divorce actions.
> 4. The law should seek to avoid the adverse effects on the judicial system occasioned by fault-based and complex no-fault schemes.
> 5. The law should encourage spouses to resolve the incidents of dissolution of marriage between themselves whenever possible.
> 6. Simple divorce procedures should be available in simple cases in order to insure that everyone has access to the courts in this area.[43]

These policies are too important to be easily dismissed. Countervailing concerns are often justified in the name of "pro-marriage." However, these positions are not necessarily mutually exclusive, or even incompatible. This proposed revision is considered by many to be a step toward a more civilized social structure.[44] In addition, progress in this direction is probably inevitable as divorce laws nationwide are developing similarly.[45]

IV. Proposed Law: Major Provisions[46]

The proposed revision of Louisiana's divorce law is more similar to than it is different from current law. Most of the changes make Louisiana law conform more closely to comparable provisions in those states whose divorce laws seem to protect the interests of the parties and their children better than under current Louisiana law. The revision

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43. K. Spaht, From the Reporter: Policy Considerations Governing the Divorce Revision, 4-5 (May 10, 1985) (document prepared for the meeting of the council).

44. Seventeen years after the passage of the first "pure" no-fault divorce law in the United States, one analysis concludes that California law has continued to be an improvement over its earlier fault-based system. (A "pure" no-fault divorce law is one that removes considerations of marital fault from the grounds for divorce, the award of spousal support and the division of property.) Kay, An Appraisal of California's No-Fault Divorce Law, 75 Calif. L. Rev. 291 (1987).

45. Freed and Walker, supra note 17.

46. For purposes of this section, this article will refer to provisions of 1989 House Bill No. 336, supra note 4. This bill has been significantly amended by the Marriage-Persons Committee of the Law Institute, and will be changed further before it is resubmitted to the Legislature in 1990, but this is the last publicly-available version of the proposed revision.

attempts to eliminate unnecessary obstacles to divorce while allowing the courts sufficient authority to do justice between the parties.

The most striking difference from current law in the Institute's proposal is the elimination of fault as a ground for divorce, except for a continuation of the provision allowing an immediate divorce upon proof of adultery or a felony conviction and sentencing of the other spouse. In every other circumstance, divorce would become available to either party after a spouse files a petition for divorce[47] and a six-month waiting period has elapsed,[48] or after having lived separate and apart for one year.[49] The final decree would be obtainable by rule rather than by trial.[50] The proposed procedures should make the proceedings simpler and reduce acrimony by eliminating fault as a consideration for the divorce itself and lessening the adversarial and often prurient nature of the proceedings.

Regrettably, however, the revision has not completely eliminated the issue of fault. Fault of one spouse would no longer be an absolute bar to eligibility to receive permanent alimony (called "support" in the revision).[51] Rather, the court would consider the relative fault of both parties to determine "comparative marital misconduct"[52] in awarding support. Under this analysis, the party more at fault, or the one who has committed the more egregious fault, or the extent of the provocation one party endured before engaging in behavior technically characterized as "fault," would all be relevant in the ultimate determination of the

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47. See supra note 6.

48. A divorce shall be granted upon motion of a spouse when that spouse has filed a petition for divorce and one hundred eighty days have elapsed from the service of the petition.

The motion shall be a rule to show cause filed after the one hundred eighty days have elapsed.

Proposed La. Civ. Code art. 102.

49. "A divorce shall be granted on the petition of either spouse upon proof that the spouses have been living separate and apart continuously for a period of one year or more." Proposed La. Civ. Code art. 103.

50. Proposed La. Civ. Code art. 102, supra note 48, and:

The rule to show cause provided under Civil Code Article 102 shall allege proper personal service of the initial petition for divorce and shall state that one hundred eighty days or more have elapsed since that service. The rule to show cause shall be verified by the mover, and shall be accompanied by an affidavit, executed more than one hundred eighty days after the service of the original petition, stating that the affiant still desires to be divorced.

Proposed La. Code Civ. P. art. 3953.

51. Proposed La. Civ. Code arts. 104-111.

52. "The term 'marital misconduct' as used in this Article means any substantial act or omission that violates a spouse's marital duties or responsibilities." Proposed La. Civ. Code art. 106. This language is based on the Louisiana Supreme Court's definition of fault in Felger v. Doty, 217 La. 365, 46 So. 2d 300 (1950), as cited in Smith v. Smith, 216 So. 2d 391, 394 (La. App. 3d Cir. 1968).

party at fault. Even then, there are a host of other factors to be considered. This analytical process should prevent the inequity that often occurs under current law when a spouse guilty of only minor fault is barred from receiving any alimony, while the spouse primarily responsible for the demise of the marriage escapes an otherwise legally-imposed obligation to provide support to his ex-spouse.[53]

The revision also eliminates the provisions for legal separation from bed and board. Originally, legal separation was a concession allowed by the Legislature to terminate the community regime and most of the other obligations of marriage when the parties were unable to obtain a divorce. Legal separation is now viewed by many family law practitioners and judges as an unnecessary step in the divorce process that serves little purpose other than creating a backlog of cases for family courts.[54] Because of these objections, the necessity of obtaining a legal separation has been replaced by the filing of a petition for divorce, requiring only a six-month waiting period and no reconciliation. For those persons who prefer less hasty actions, the revision contains a provision that allows divorce upon proof that the parties have lived separate and apart for more than one year.[55]

The revision also bases the prescriptive periods for claiming spousal support on the length of the marriage.[56] Present law provides no prescriptive period for initial claims for alimony.[57] This change is another indication of the changing nature of divorce, from a punitive, morality-based, retributive process to one based on the civil and economic effects of the dissolution of a marriage. This expression of intent to allow greater rights of recovery for longer marriages recognizes the economic aspects of this special partnership and should influence the determination

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53. Butler and Russell, Casting Stones: The Role of Fault in Virginia Divorce Proceedings, 20 U. Rich. L. Rev. 295, 312 (1986).

54. See, e.g., Memorandum from the Staff Attorney to the Reporter of this project, at 2, § (3) (February 3, 1989) (regarding the Meeting of the Joint Legislative Study Committee on Divorce, held on February 1, 1989). But see H. F. Sockrider, Jr.'s comments, id. at 4, and in his letter to the Staff Attorney (February 9, 1989).

55. Proposed La. Civ. Code art. 103, supra note 49.

56. The action for support under this Section prescribes in:

> Ten years, if the parties were married for twenty or more consecutive years.
>
> Five years, if the parties were married for at least ten but less than twenty consecutive years.
>
> Three years, if the parties were married for less than ten consecutive years.
>
> This prescription commences to run from the date the judgement of divorce is signed.

Proposed La. Civ. Code art. 111.

57. La. Civ. Code art. 160.

of awards, lessening some of the economic inequities experienced in other states.

> The history of divorce graphically illustrates the interplay of factors—cultural, religious, economic—at work in the law over time. It was necessary to emphasize the economic factor in discussing divorce law in the early nineteenth century—the relevance of divorce to property, inheritance, legal status. The later shape of divorce law, however, had to be explained in terms of a power struggle that was not so crudely economic. The no-fault revolution in turn represented a major shift in legal culture, a change in popular attitudes toward law.[58]

The proposed revision also changes the provisions relative to spousal support, child custody, visitation and support, null marriages, and termination of the marital property regime.[59] The Louisiana State Law Institute has proposed the introduction of this legislation as four separate bills in 1990.[60]

V. New Solutions for Old Problems

There are deeply-rooted and persuasive policy arguments that support retention of the proof of fault as a requirement for obtaining a divorce in less than one year. Historically, "[m]arriage was considered a stabilizing social, economic, religious, and moral force for good."[61] Given the frequency with which married couples terminate their marriages, however, and the fact that stringent divorce requirements have had little or no effect on the rates of divorce,[62] there seems to be little justification in retaining proof of fault as a prerequisite to divorce.

> In continuing the traditional concepts and procedures we are wasting the time and talents of our already overburdened ju-

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58. See Friedman, supra note 10, at 669.

59. Under current law, the legal regime of community property terminates by a judgment of divorce, separation from bed and board, or separation of property, and is retroactive to the date of filing suit. La. Civ. Code art. 2356, comment (C). Under the proposed law, the community property regime terminates by the judgment of divorce, retroactively to the date of filing the petition. Proposed La. Civ. Code art. 126. This corresponds to current law, with the incorporation of the proposed elimination of judgments of separation from bed and board.

60. The proposed topics to be covered by the new bills are: divorce, spousal support and claims for reimbursement of contributions made to education and training; child custody and support; and nullity of marriage.

61. Golden and Taylor, Dueling Over the Issue of Fault: Fault Enforces Accountability, 10 Fam. Advoc. 11(2) (1987).

62. See Frank, Berman, and Mazur-Hart, No Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary, 58 Neb. L. Rev. 1 (1978); McGraw, Sterin and Davis, supra note 19; Sepler, supra note 18.

> diciary by compelling courts to continue with rituals that everyone knows are fixed in advance. We are interfering in what really should be a matter protected under the right of privacy provisions of the Ninth Amendment. . . . But in the final analysis, the most compelling reason of all for a no-fault divorce law would seem to be that the traditional divorce doctrines are not in harmony with the real nature of things, and the only realistic and compassionate solution is the adoption of a concept that is.[63]

Some of these problems would remain under the proposed revision due to the continued relevance of fault in determining the incidents of divorce, primarily alimony. The proposed changes, however, are a welcome and important step in the right direction.

The purposes of divorce are "to escape the marriage, which has grown intolerable for at least one person,"[64] and "to build a new life."[65] Unfortunately, the latter is often lost in the process, despite the fact that "this second-life-building aspect of divorce turns out to be far more important than the crisis. It is the long haul of divorce that matters."[66] A recent study of families ten years after divorce found that the debilitating effects of an uncivilized divorce linger for years.[67]

The movement toward "no-fault" was intended to ameliorate many of these problems. Some commentators, however, have criticized the unintended effects of no-fault divorce provisions, particularly the subsequent decline of the economic conditions of affected women and children.[68] Dr. Lenore Weitzman studied the economic effects of no-fault divorce on women and children ten years after California adopted such a scheme, and found that the standard of living for men increased forty-two per cent after divorce, while decreasing for women by seventy-three per cent.[69]

> California's divorce reforms, which were supposed to eliminate the trauma—and the gender discrimination consequences—of divorce, have instead in effect drastically reduced the financial security previously available to women and children under older

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63. Gaylor, Something is Loose in the Marital Woods, 59 A.B.A. J. 1306, 1309 (1973).

64. J. Wallerstein and S. Blakeslee, Second Chances: Men, Women, and Children a Decade After Divorce, at xi (1989).

65. Id.

66. Id.

67. Id.

68. See L. Weitzman, supra note 24. See also Minow, Consider the Consequences, 84 Mich. L. Rev. 900 (1986).

69. L. Weitzman, supra note 24, at 338-39. See also Baker, Contracting for Security: Paying Married Women What They've Earned, 55 U. Chi. L. Rev. 1193 (1988).

divorce rules.[70]

A similar study in Vermont found that men's per capita income rose one hundred and twenty per cent after divorce, while women's decreased by thirty-three per cent.[71]

Some social scientists have commended Dr. Weitzman's methodology for keeping the human element visible in a sea of statistics, and for "avoid[ing] the common social science error of favoring statistics over people's reflections on their own experiences."[72] However, this particular commentator explicitly did "not attempt to evaluate Weitzman's methodology."[73]

Others, however, have frequently criticized Weitzman's approach for similar reasons, as well as for failing to demonstrate a true cause and effect relationship between no-fault divorce and the economic plight of divorced women. They argue that many other factors have led to this social problem. "The bottom line is that Weitzman's data do not show any substantial changes in the economic situation of women and children under the no-fault divorce."[74] Dr. Weitzman's use of the data in the book has also been called "statistically unsophisticated."[75] One critic found that "Weitzman's evidence falls far short of conclusively demonstrating that changes in no-fault, property, and custody law are responsible for the economic plight of divorced women."[76]

An analysis of these commentaries points to the probability that the declining economic status of women after divorce results not solely from the provisions of no-fault divorce itself: "it was bad before no fault, and it continues to be bad now."[77] Rather, this unintended result seems to be the product of an uneven application of the law by practitioners and judges who do not yet fully understand the underlying policies and equities of the theory, and a combination of economic factors unrelated to divorce law. If such is the case, this problem should partially resolve itself as family law judges and practitioners learn to apply no-fault more fairly, taking into account the practical realities and economic inequities of the workplace. Alternatively, Congress or state lawmakers may at-

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70. Minow, supra note 68, at 903.

71. Wishik, Economics of Divorce: An Exploratory Study, 20 Fam. L.Q. 79, 97 (1986); Baker, supra note 69.

72. Minow, supra note 68, at 901 n.5.

73. Id.

74. Melli, Constructing a Social Problem: The Post-Divorce Plight of Women and Children, 1986 Am. B. Found. Res. J. 759, 770.

75. Jacob, Faulting No-Fault, 1986 Am. B. Found. Res. J. 773, 774.

76. Id. at 778.

77. Melli, supra note 74, at 770.

tempt to standardize alimony awards, as they have done relative to child support awards,[78] if there continues to be such a wide disparity.

On the other hand, continuing to make proof of fault relevant in a divorce proceeding has failed to ameliorate the impact of these economic conditions, and has caused equally serious problems. A recent fifth circuit case[79] amply demonstrates this undesirable situation. Although the parties began their separation voluntarily and by mutual agreement, the husband later alleged that the wife's departure from the matrimonial domicile constituted constructive abandonment. The wife introduced evidence that the husband had demonstrated little, if any, affection towards her and that he had forced her to be in the presence of the woman with whom she knew he was having an affair. In return, the husband introduced evidence that the wife berated him in public using obscene speech on at least two occasions, which the court quoted verbatim in its opinion.[80] In her defense, the wife tried but failed to prove that her behavior was caused by mental illness. Trial on the issue of fault in this case took three days, with testimony from lay and expert witnesses on both sides.[81] At the time of the trial, the couple had been physically separated for over two years. Would not our system of justice have been better served by having the scope of inquiry limited to proof that they had lived separate and apart for more than one year? The three days spent by the court, the parties, their attorneys and the witnesses could have been spent in productive enterprises instead of in a cruel violation of marital privacy, protection, and confidence. This process tends to mock marriage in public, actually denigrating the purported purpose of promoting marriage.

Another fifth circuit case[82] held that, despite testimony of the parties that their marriage was fraught with tension and unpleasantness, "mere dissatisfaction with the marriage and incompatibility do not constitute grounds for separation."[83] What plausible explanation exists for requiring couples who have proved incompatibility to continue to be married for at least another year or be forced to fabricate proof of sufficient sins to allow the divorce under Louisiana law? One commentator has noted that the reasons for this position have historically been that:

> by making divorces difficult to obtain, states reinforced the virtues of self-sacrifice and tolerance while keeping families to-

78. Pursuant to Congressional mandate, child support award tables were codified in Louisiana at La. R.S. 9:315-315.14 (Supp. 1990) (effective October 1, 1989).

79. Eppling v. Eppling, 537 So. 2d 814 (La. App. 5th Cir.), writ denied, 538 So. 2d 619 (1989).

80. Id. at 817.

81. Id. at 815.

82. Vincent v. Vincent, 544 So. 2d 544 (La. App. 5th Cir. 1989).

83. Id. at 547.

> gether. This also allowed children to grow up in a two-parent, complete environment.
> The intent was to encourage married persons to make the best of their situations and find solutions to their problems, within the framework of marriage.[84]

Fault-based divorce law has not accomplished its desired result. Couples did not get fewer divorces in states with stringent requirements;[85] the divorces themselves were simply made more traumatic than was necessary.

In a recent first circuit case,[86] the court held that:

> A party is not justified in leaving the matrimonial domicile unless that party has reasons for leaving which would amount to grounds for separation listed under C. C. art. 138. . . . Mutual incompatibility and general unhappiness with the marital relationship are not lawful causes for leaving the family home. . . . Mr. Asher was therefore guilty of abandonment and at fault in causing the separation.[87]

Despite the husband's introduction of evidence that his wife was threatening to kill the parties' six-year-old daughter and to commit suicide, being verbally abusive, and being fiscally irresponsible, the court held that:

> In light of the circumstances of Mrs. Asher's mental problem and Mr. Asher's willingness to overlook her housekeeping deficiencies for an extended period of time while children were being conceived of their relationship, Mrs. Asher should not be cast with fault on the basis of cruel treatment toward her husband.[88]

Because he did not ask her to dust more frequently, the wife was held not to be at fault, and the husband was found to be at fault for "abandoning" the matrimonial domicile. It is difficult, if not impossible, to allocate fault fairly in such circumstances. Is justice being served by such a determination?

Another first circuit case[89] actually lists the acts, followed by more detailed descriptions, alleged to be cruelty. First the wife, Kathleen, filed

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84. J. Wallerstein and S. Blakeslee, supra note 64, at 12.
85. McGraw, Sterin and Davis, supra note 19; Sepler, supra note 18.
86. Asher v. Asher, 521 So. 2d 645 (La. App. 1st Cir. 1988).
87. Id. at 647.
88. Id.
89. Jarman v. Jarman, 540 So. 2d 444 (La. App. 1st Cir. 1989).

for a separation based on cruelty. She alleged that her husband, Bill, had:

> changed work habits, that the marital relationship changed, that Bill had failed to help her with a birthday party, began a health program, allowed a female to visit the marital home, got upset on a drive from Florida, refused to allow Kathleen to accompany him on a Houston trip, allowed a female employee to work with him on the Houston trip, told a marriage counselor that he was not committed to the marriage, left the marital home on August 9, 1986, told her that he had no reason for leaving, and has refused to return. . . . Bill threw her to the ground after verbal abuse. . . . Bill has engaged in conduct designed to psychologically harm her.[90]

The husband denied the allegations and alleged cruelty on his wife's part, consisting of:

> physically attacking him, throwing a gift at him, refusing sexual relations, screaming at him, telling him she sees no reason for the marriage, instigating arguments, ordering him out of the house, knocking off his glasses and dating other men.[91]

There was a judgment for the husband, finding the wife guilty of cruelty and solely at fault in the dissolution of the marriage. Determinations of fault encourage such an accounting of marital sins, with the ultimate decision often resting on the judge's perception of the relative credibility of the spouses. The more reasonable alternative seems to be to trust our citizens enough to know when their marriages are over, without having to name "winners" and "losers."

An eloquent expression of the deficiencies of the current system is the dissenting opinion of Judge Bowes in another recent fifth circuit case.[92] After trials on the issue of fault in both the separation suit and the divorce suit—the latter occurring after the couple had been living separate and apart for more than one year—the wife was found guilty of one incident of adultery after they had physically separated.[93] Judge Bowes dissented, opining that:

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90. Id. at 448.

91. Id.

92. Helms v. Helms, 534 So. 2d 502 (La. App. 5th Cir. 1988).

93. Although alimony was not at issue in this suit, Judge Bowes recognized that finding her at fault in this suit would render that question moot. His comments in the dissent were directed toward the question of alimony, but are equally apropos of the larger issue of fault.

> [T]he "jambalaya" of positions taken by our courts heretofore in the area of "post-separation fault" is most confusing and, quite simply, fails to keep pace with the realities of contemporary life; still worse, the law today usually permits a husband whose fault is the sole cause of the break-up of the marriage to take a shameful, unfair advantage of a wife whose fault did not contribute to the failure of the marriage. Moreover, this jurisprudence does little or nothing to achieve the presumed legislative intent which is best described as "pro-marriage." . . .[94]
>
> There is not a single indication of any kind in the record that Mrs. Helms' alleged post-separation adultery was "a cause in the breakdown of the marriage" or that it was an "independent contributory or proximate cause of the final divorce." Rather, it seems crystal clear that the breakdown of the marriage occurred solely because of Dr. Helms' stipulated (and proven) cruel treatment to Mrs. Helms. . . . The effect of Mrs. Helms' post separation action on Dr. Helms was not a spoiled reconciliation, but only jubilation over the fact that the trap he'd set had worked and an unjust escape by him from permanent alimony that he should pay as a result of a separation that he had already been judicially determined to be the sole cause of! . . .[95]
>
> The practical effect of such decisions . . . is to permit the husband, who has been found at fault in the separation (and therefore has nothing left to lose) to enjoy post-separation promiscuous and sexual freedom while denying to his (soon to be ex-) wife the right to fall into one human error during the interim period prior to divorce. She must conduct herself with the deportment of a nun, while he is not subject to pay the alimony that he rightfully should, no matter how outrageous or immoral his behavior is. . . .[96]
>
> The issues addressed in this case will very probably be considered by the Louisiana Supreme Court and/or the Legislature of this state. If either body considers that the views taken by the majority herein are technically correct, but that my views expressed above have some merit, then I say to them quite humbly, but frankly, please change the law![97]

Applying the proposed revisions to the facts of these cases, and countless others not mentioned herein, it becomes apparent that the

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94. 534 So. 2d at 509 (Bowes, J., dissenting).
95. Id. at 511 (Bowes, J., dissenting).
96. Id. (Bowes, J., dissenting).
97. Id. at 512 (Bowes, J., dissenting).

requirement of proof of fault contributes nothing to our system of justice, violates our public policy of respect for the marital privilege regarding "confidential connubial conversations,"[98] and continues the desecration of one of our most revered institutions. Respecting the decisions of the participants, rather than enforcing the continuation of such an intimate relationship against the will of at least one of the spouses, seems to solve many of these problems.

> The only rational test . . . is an acknowledgement by both parties, after due time for reflection and self-examination, that the marriage is beyond saving, or a claim to that effect by one party, demonstrated to the satisfaction of the court.[99]

VI. CONCLUSION

This article presents an argument for the adoption of the Louisiana State Law Institute's proposed revision of Louisiana divorce laws. Although a more complete solution would require the elimination or minimization of fault as a consideration in this process, the revision solves many of the problems in our current fault-based system.

Focusing on the elimination of fault as a consideration, an analysis of current divorce law and practices was made and compared to the new proposals. Information on and criticisms of comparable provisions in other states helped to evaluate the successes and failures of similar efforts. Contrasting Louisiana decisions under existing law and projecting the differences one could expect under the revision attempted to define the effects adoption of the proposals would have. The development of the revision was recounted, demonstrating the effort and expertise that has been brought to fruition in the form of this revision. The proposals espoused should be considered a significant step forward, in light of the personal and economic realities within which our judicial system must operate.

> [The State] cannot select a spouse for one of its citizens nor should it try to coerce him or her to remain with a person with whom satisfactory personal communication no longer is possible. If the State occupies any role in this process, it should be to assist the spouses to resolve their infelicitous union through an amicable settlement rather than to vent their frustrations through the legal process.[100]

No-fault divorce law has not been a panacea for the problems of divorcing couples. It has not solved the economic inequities which have

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98. "Pillow Talk."
99. Gitlitz, supra note 24, at 29.
100. Carbonneau, supra note 15, at 1036.

plagued divorce law, and may have aggravated them. However, proof of fault as a requirement for obtaining a short-term divorce seems to create more problems than it solves.

At its best, marriage is a mutually-supportive and beneficial relationship for the parties and those affected by the quality of the marriage, most importantly their children. At its worst, marriage is a debilitating and destructive entwining of personal lives that has a deleterious effect on those caught in its path. Because of the innately intimate nature of the relationship, no public policy is important enough to force the continuation of a marriage against the wishes of one or both of the parties. This is not to say that the Legislature should abolish all restraints upon divorce and allow "divorce upon demand." Because of the important benefits derived from the stability and economic efficiency of continuing marriages, the Legislature has a right and a duty to provide for a mandatory period of reflection and evaluation of the decision to divorce. This, however, is where the duty and the right of the State ends.

Stephanie Bienvenu Laborde