

COMMON LAW DIVORCE

Michael J. Higdon

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Michael J. Higdon*

Common law marriage has existed in the United States for more than 200 years. Although not permitted as widely today, every state continues to recognize a common law marriage from one of the handful of states that still permit parties to wed in this informal manner. In contrast, never has there been anything even approaching common law divorce—and for good reason. Namely, the states’ desire to ensure that those who leave unsuccessful marriages do so in such a way that their interests (as well as their children’s) are adequately protected. Nonetheless, even though not sanctioned by law, informal divorce not only exists but is far from uncommon. Specifically, by insisting on strict formality, states have perpetuated a system of divorce that—although much more accessible today than it was historically—effectively denies a large segment of the population the ability to legally dissolve a marriage. As a result, these individuals are more likely to forgo divorce altogether and instead simply go their separate ways without any judicial oversight whatsoever of the dissolution. In fact, a number of recent studies have not only revealed the extent of this practice but also revealed more troubling news that these individuals do not appear randomly in the population; instead, it is typically those of lower socioeconomic backgrounds, lesser education, and minority racial and ethnic communities who tend to informally separate in lieu of formally divorcing. This practice, dubbed a “poor man’s divorce,” is quite dangerous given that it leaves unsophisticated parties largely unprotected as they must decide amongst themselves—during a time of power imbalance and great interpersonal conflict—how to divide property and apportion parental responsibilities. Importantly, however, these informal “divorces” likewise compromise a number of important state interests. By focusing on those state harms and offering suggestions for reform, it is the goal of this Article that courts, legislators, and policy makers alike will be more incentivized and greater equipped to institute more meaningful access to divorce—particularly for those from marginalized communities—thus providing greater agency to those seeking to dissolve unsuccessful marriages.

“Marriage is the rare contract you can’t get out of by both parties saying, ‘I don’t want to do this anymore’”¹

INTRODUCTION

Despite the implications of its name, “common law marriage” is very much an American invention²—one that came into existence following the 1809 case, *Fenton v. Reed*.³ In *Fenton*, a New York court awarded a widow’s pension to Mrs. William Reed despite the fact she had married Mr. Reed while still legally

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1. Olga Khazan, *The High Cost of Divorce*, ATLANTIC (June 23, 2021), <https://web.archive.org/web/20210623113012/https://www.theatlantic.com/politics/archive/2021/06/why-divorce-so-expensive/619041/>.

2. See LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 202–04 (2d ed. 1985) (“Probably there was no such institution [as common law marriage] in England.”); Adair Dyer, *The Internationalization of Family Law*, 30 U.C. DAVIS L. REV. 625, 626 (1997) (noting that “the informal contractual status known as ‘common law marriage’ may have been an American innovation”).

3. *Fenton v. Reed*, 4 Johns. 52 (N.Y. Sup. Ct. 1809); see also Charles P. Kindregan, Jr., *Same-Sex Marriage: The Cultural Wars and the Lessons of Legal History*, 38 FAM. L.Q. 427, 434 n.45 (2004) (“Informal marriage appears to have first been recognized by the New York court in *Fenton v. Reed* . . .”).

married to another man, John Guest.⁴ Mrs. Reed did so on the mistaken assumption that Guest (who had disappeared after previously leaving the state for “foreign parts”) was no longer alive.⁵ Subsequently, however, Guest reappeared but then died a few years later, thus allowing Mr. and Mrs. Reed to marry once more—this time legally.⁶ When the couple instead chose to continue relying on their previous (admittedly invalid) marriage, the New York court nonetheless validated the union.⁷ It did so by first holding that formal marriage is but one way to effectuate a legal marriage: “A marriage may be proved . . . from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which a marriage may be inferred.”⁸ Next, the court found that, although her first attempt at marrying Reed was invalid given the existing marriage to Guest, she and Reed subsequently effectuated a common law marriage⁹ following Guest’s death: “The parties cohabited together as husband and wife, and under the reputation and understanding that they were such, from 1800 [when Guest died] to 1806, when Reed died.”¹⁰

Other states very quickly embraced this notion of informal marriage and the attendant protections it held for those in marriage-like relationships, which, for one reason or another, failed to conform to the state’s formal marriage requirements.¹¹ After all, in the absence of marriage, the state has very little ability to step in and protect the financial interests of adults in long-term domestic relationships.¹² Thus, at a time when many citizens lacked access to formal marriage,¹³ common law marriage proved to be a powerful tool for expanding the number of people who enjoyed the state protections that

4. *Fenton*, 4 Johns. at 52.

5. *Id.*

6. *Id.* at 54.

7. *Id.*

8. *Id.* at 54 (“No formal solemnization of marriage was requisite. A contract of marriage made *per verba de presenti* amounts to an actual marriage . . .”).

9. Although the court in *Fenton* never used the term “common law marriage,” the form of marriage it recognized would eventually take on that moniker. See Rebecca Probert, *Common-Law Marriage: Myths and Misunderstandings*, 20 CHILD & FAM. L.Q. 1, 2–3 (2008) (explaining the evolution of the term “common law marriage”).

10. *Fenton*, 4 Johns. at 54 (emphasis omitted).

11. See Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 65 (1981) (“The idea that marriage could be validated by the mere consent of the spouses gained strength from cases that . . . recognized informal or ‘common law’ marriages and appeared in community property as well as in common law states.” (footnotes omitted)).

12. See, e.g., Jessica Feinberg, *Gradual Marriage*, 20 LEWIS & CLARK L. REV. 1, 25 (2016) (“With the declining marriage rate and increasing rate of non-marital cohabitation, a substantial number of individuals currently lack legal protections within their important relationships.”); Jackie Gardina, *The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage*, 86 B.U. L. REV. 881, 891 (2006) (“The protections provided to married couples lie in sharp contrast to the lack of protections provided to their unmarried counterparts.”).

13. See Perry Dane, *A Holy Secular Institution*, 58 EMORY L.J. 1123, 1147 (2009) (identifying as one of the reasons states embraced common law marriage “the difficulty of requiring resort to either a governmental or religious official in a dispersed frontier society”).

accompany legal marriage.¹⁴ Although the practice would eventually begin to lose favor,¹⁵ today eight states and the District of Columbia still allow their citizens to effectuate marriage through informal means.¹⁶ More importantly, even states that do not permit common law marriage nonetheless employ the doctrine to find marriages between couples that spent time in states that do permit informal marriage.¹⁷ Often, those states do so by liberally construing the common law marriage requirements of a sister state with the goal of protecting economically dependent “spouses” from the harms that would result from a finding that there was never a valid marriage.¹⁸ Consider, for instance, the case of *Renshaw v. Heckler*, where the court held that a couple from New York (which does not permit common law marriage) had nonetheless effectuated a common law marriage after spending a single night in a hotel in Pennsylvania (which at that time did permit common law marriage) once a year for seven years.¹⁹

Despite the benefits common law marriage has afforded the states, the law of divorce has always demanded strict formality.²⁰ Though marriage and divorce are often described as “two sides of the same coin,”²¹ no state has ever recognized anything even approaching “common law divorce.”²² Instead, “a fundamental premise in American law is that divorce constitutes a civil *judicial*

14. See, e.g., Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 964 (2000) (“As common law marriage triumphed as a dominant legal rule over the course of the nineteenth century, it took as its premise that the law should protect innocent women from the whims and contrivances of irresponsible or rakish men.”). Notably, these protections were not only limited to spouses, but to children as well. See Kristin A. Collins, *Illegitimate Borders: Jus Sanguinis Citizenship and the Legal Construction of Family, Race, and Nation*, 123 YALE L.J. 2134, 2166 (2014) (“Judges and lawyers acknowledged that a primary purpose of common law marriage was to ensure that children born of such a union were legitimate.”).

15. See Ashley Hedgecock, *Untying the Knot: The Propriety of South Carolina’s Recognition of Common Law Marriage*, 58 S.C. L. REV. 555, 562 (2007) (“Beginning in the late nineteenth century, many jurisdictions that previously recognized common law marriage began to abolish the doctrine.”). This decline is typically attributed to a number of factors including urbanization, industrialization, concerns about fraud, the ideology of the family, racism, and eugenics. See Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 732 (1996).

16. See *Common Law Marriage by State*, NAT’L CONF. STATE LEGISLATURES (Mar. 11, 2020), <http://www.ncsl.org/research/human-services/common-law-marriage.aspx> (listing states).

17. See Adam Candeub & Mae Kuykendall, *Modernizing Marriage*, 44 U. MICH. J.L. REFORM 735, 759 (2011) (“[C]ourts in states that do not recognize common law marriage sometimes stretch doctrine to recognize common law marriages of couples who reside there.”).

18. See, e.g., *Blaw-Knox Constr. Equip. Co. v. Morris*, 596 A.2d 679, 686 (Md. Ct. Spec. App. 1991) (holding that a Maryland couple effectuated a common law marriage after spending two nights at a Pennsylvania hotel to attend a funeral); *Coney v. R.S.R. Corp.*, 563 N.Y.S.2d 211, 212 (N.Y. App. Div. 1990) (holding that a couple effectuated a common law marriage after spending three days traveling through Georgia).

19. *Renshaw v. Heckler*, 787 F.2d 50, 54 (2d Cir. 1986).

20. See, e.g., *Kergosien v. Kergosien*, 471 So. 2d 1206, 1210 (Miss. 1985) (“Divorce is a creature of statute. . . . It is a statutory act and the statutes must be strictly followed as they are in derogation of the common law.”); D. James Greiner et al., *Using Random Assignment to Measure Court Accessibility for Low-Income Divorce Seekers*, PROC. NAT’L ACAD. SCI., Mar. 2021, at 1, 2 (noting that “the only way to dissolve a marriage is via the court system”).

21. Susan Frelich Appleton, *Obergefell’s Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 940 (2016).

22. See *infra* notes 226–237 and accompanying text.

process”²³—an approach that, at least on first blush, one can certainly appreciate. When a marriage is ending, a concern arises that the spouses may not fairly divide up their property and apportion their child-rearing responsibilities or may not do so in the best interests of all involved—the state included.²⁴ For these reasons, the state has a strong interest in requiring that all divorce proceedings go through the formal divorce process.²⁵ Thus, just as common law marriage was seen as offering states greater ability to protect those in economically dependent relationships, common law divorce has been perceived as something that would do just the opposite.²⁶

This Article, however, explores the question of whether the contemporary law of divorce is *too formal* and, as a result, the states have unintentionally promoted a form of common law “divorce.” This question has become particularly salient given a number of recent studies revealing the extent to which a significant percentage of the population is being denied meaningful access to divorce—couples that instead utilize permanent separation as a vehicle for informally dissolving their marriages.²⁷ There is of course nothing in the law that prevents couples from making that choice; however, for many, there is no meaningful choice given that they lack the necessary resources to obtain a formal divorce.²⁸ As Professor Dmitry Tumin explains: “Long-term separation seems to be the low-cost, do-it-yourself alternative to divorce for many disadvantaged couples . . . Separation may not be their first choice, but they may feel it is their best choice.”²⁹ Further, what makes these studies most troubling is the degree to which they reveal how this class of individuals is overwhelmingly comprised of those who share similar demographics, including members of racial and ethnic minority communities as well as those with lower socioeconomic and educational backgrounds.³⁰

While other scholars have addressed the harms to the individual that flow from the inability to divorce,³¹ states have nonetheless persisted in perpetuating

23. Margaret Ryznar & Angélique Devaux, *Voilà! Taking the Judge Out of Divorce*, 42 SEATTLE U. L. REV. 161, 162 (2018) (emphasis added).

24. Lynda B. Munro et al., *Administrative Divorce Trends and Implications*, 50 FAM. L.Q. 427, 442 (2016) (“With no judicial review, one or both of the parties may end up with a result that is unfair or inequitable and with no remedy.”).

25. Donna J. Zenor, *Untying the Knot: The Course and Patterns of Divorce Reform*, 57 CORNELL L. REV. 649, 652 (1972) (“Unfortunately, [the states] have been loath to relinquish fully the ultimate control over the dissolution process they have traditionally exercised.”).

26. See, e.g., *In re Marriage of Brooks*, 486 N.E.2d 267, 271 (Ill. App. Ct. 1985) (“For us to hold that a de facto termination extinguishes marital property rights would create, in effect, ‘common law divorce’ [and] [l]aw and policy will not support such a result.” (emphasis omitted)).

27. See *infra* Part II.

28. See *id.*

29. Jeff Grabmeier, *Marital Separation an Alternative to Divorce for Poor People*, OHIO STATE NEWS (Aug. 19, 2012), <https://news.osu.edu/marital-separation-an-alternative-to-divorce-for-poor-people/>.

30. See *infra* Part II.

31. See Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1683–89 (2011) (discussing the harms that can accrue to those denied access to divorce).

divorce laws that directly contribute to the troubling statistics revealed by these recent studies. Accordingly, this Article takes a different approach and instead argues why the states *themselves* should be deeply concerned by statistics like these. First, the Supreme Court, in the one opinion directly dealing with the constitutional right to divorce, has made clear that state laws that effectively deny an individual access to divorce are unconstitutional.³² Even ignoring that limitation, however, there are a number of state interests that are significantly undermined when spouses elect permanent separation over formal divorce,³³ and it is those interests that comprise the basis for this Article.

As an initial matter, these policy concerns might not be self-evident. After all, the legal literature relating to marriage frequently notes the states' interest in promoting marriage while simultaneously discouraging divorce.³⁴ However, there exists an important middle ground—one that arises in situations where a married couple has already made the final decision to end the marriage and go their separate ways. In those situations, the states have a particularly strong interest in promoting divorce over what the parties may perceive to be the easier, less expensive option of permanent separation.³⁵ As an initial matter, those interests implicate the states' underlying goal of promoting marriage given that this interest necessarily encompasses remarriage, which is something that is legally impossible for those unable to divorce a previous spouse.³⁶

There are, however, other significant concerns at play. For instance, the states have a strong interest in safeguarding the economic interests of current spouses, which the law of divorce is designed to protect by forcing the couple to first obtain judicial approval of their plans for dissolution.³⁷ Further, encouraging divorce likewise protects subsequent spouses whose property interests could be jeopardized if it is revealed that their “spouse” never divorced

32. See *Boddie v. Connecticut*, 401 U.S. 371, 374, 382–83 (1971) (holding that “due process does prohibit a State from denying, solely because of inability to pay, access to its courts to individuals who seek judicial dissolution of their marriages”); see also *infra* Subpart I.B.

33. See *infra* Part III.

34. See, e.g., Margaret F. Brinig & Steven L. Nock, *What Does Covenant Mean for Relationships?*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 137, 172 (2004) (“[P]olicymakers increasingly view promoting marriage and discouraging divorce as legitimate public policy objectives.”); Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 290–91 (1997) (“Since marriage and the modern American family still serve a valuable social, legal, economic, and institutional function, the underlying public policy of most states continues to promote marriage and discourage divorce unless the parties comply with the required statutory guidelines for divorce.” (footnotes omitted)).

35. See Michael J. Higdon, *Polygamous Marriage, Monogamous Divorce*, 67 DUKE L.J. 79, 107 (2017) (noting that “when the options are either desertion or divorce[], the law does wish to encourage divorce”); Melissa Lawton, *The Constitutionality of Covenant Marriage Laws*, 66 FORDHAM L. REV. 2471, 2513 (1998) (“Once an individual realizes that, contrary to one’s original beliefs, divorce is inevitable, there are sound reasons why the state’s granting of the divorce should not be delayed.”).

36. See Mary Patricia Byrn & Morgan L. Holcomb, *Wedlocked*, 67 U. MIA. L. REV. 1, 4 (2012) (“Married couples also seek divorce knowing that without a divorce decree neither partner can remarry.”); see also *infra* Subpart III.A.

37. See *infra* Subpart III.B.

a previous spouse, thus invalidating the subsequent marriage.³⁸ Finally, under the states' role as *parens patriae*, there exists a number of vulnerable populations—primarily children but also victims of domestic violence—for whom divorce plays a large role in protecting them from harm.³⁹ Thus, by perpetuating a legal system in which a significant percentage of the population cannot gain access to divorce and thus rely instead on permanent separation, the states are putting these interests at great risk.

By focusing on the states' interest in promoting divorce, it is the goal of this Article to encourage judges, legislators, and policy makers alike to reexamine existing divorce law to make the system more inclusive and thus more protective. In doing so, this Article posits that a number of current laws and procedures related to divorce are, despite their best intentions, in practice responsible for excluding certain populations from meaningful access to judicial divorce.⁴⁰ After identifying some of those laws, this Article then proposes specific changes the states should adopt in order to make divorce accessible to the needs of diverse populations. Doing so will help curb the prevalence of informal separation as a form of common law divorce, but at the same time will borrow one of the most attractive features of common law marriage—namely, giving the parties themselves much greater autonomy and more meaningful control when it comes to marital status.⁴¹ Specifically, this Article concludes that states must do three specific things: (1) stop conditioning no-fault divorce on spousal consent; (2) provide more funding and incentives for programs that offer legal services to pro se divorce seekers; and (3) recognize that judicial divorce may not be required in all instances—something a few states have already addressed through the adoption of summary dissolution proceedings.⁴²

With that in mind, this Article proceeds in four parts. Part I looks at the expansion of divorce access within the United States, which is largely due to evolving state law, but is also influenced by the Supreme Court's holding that due process prohibits states from unduly restricting access to judicial divorce. Part II then turns to recent studies that reveal how, despite this expanding access, a significant percentage of couples are simply abandoning unsuccessful marriages without ever formally divorcing—couples that tend to be poorer, have less education, and represent already marginalized racial and ethnic minority communities. Next, Part III details the various harms that can befall the state when couples employ permanent separation as a form of informal

38. See *infra* Subpart III.C.

39. See *infra* Subpart III.D.

40. See *infra* Part IV.

41. See Peter Nicolas, *Common Law Same-Sex Marriage*, 43 CONN. L. REV. 931, 939 (2011) (“One oft-cited rationale [for common law marriage] is a libertarian concept of autonomy and independence, the idea that marriage is a natural right and that individuals should be free to enter into marriages without the need to invoke the power of the state.”).

42. See *infra* Subpart IV.C.

divorce and why the states should be concerned about the results of these studies. Finally, Part IV suggests three discrete areas of legal reform that states should consider in order to give divorce seekers more meaningful control over the process of marital dissolution, further advancing the states' interests in promoting divorce among those couples that have already decided to end their marriages.

I. EXPANDING ACCESS TO DIVORCE

Writing in 2007, one commentator observed that “[t]he past century of marriage and divorce law in the United States has been largely characterized by the steady deregulation of intimate relationships by the states.”⁴³ Much of that came at the hands of the Supreme Court in several landmark cases concerning marriage—cases like *Griswold v. Connecticut*,⁴⁴ *Loving v. Virginia*,⁴⁵ and *Obergefell v. Hodges*.⁴⁶ However, just as more and more people have been given access to the institution of marriage in the United States, the past century has likewise resulted in greater access to divorce.⁴⁷ That expansion has come not only from the Supreme Court⁴⁸ but, more significantly, from the states themselves as their understanding of divorce and its attendant benefits has evolved.⁴⁹ What follows is a brief exploration of that evolution as well as what the Supreme Court has had to say regarding the constitutional right to divorce.

A. *A Short History of Divorce at the State Level*

Controversy surrounding access to divorce has been shaping American law longer than the country itself has even officially existed.⁵⁰ When the first English colonists arrived, the law of England “continued to adhere to the doctrine of indissolubility.”⁵¹ However, with these early American settlers came the influence of protestant reformers like Martin Luther and John Calvin, both

43. Sherry Honeycutt Everett, *The Law of Alienation of Affections After McCutchen v. McCutchen: In North Carolina, Breaking Up Just Got Harder to Do*, 85 N.C. L. REV. 1761, 1764 (2007).

44. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965).

45. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

46. *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

47. Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 219–20 (2010) (noting that even beyond the adoption of no-fault divorce, “modern divorce law, with only a few exceptions, has gone even further in easing access to divorce” (footnote omitted)).

48. *See infra* Subpart I.B.

49. *See infra* notes 92–109 and accompanying text.

50. *See Massachusetts v. U.S. Dep’t of Health & Hum. Servs.*, 698 F. Supp. 2d 234, 237–38 (D. Mass. 2010) (noting that “[s]everal issues relevant to the formation and dissolution of marriages have served historically as the subject of controversy” (citation omitted)), *aff’d*, 682 F.3d 1 (1st Cir. 2012).

51. MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW 31 (1972).

of whom believed that “marriage and divorce were civil concerns.”⁵² As such, the Puritans “adopted both civil marriage and divorce in clear violation of the laws of the Church of England,”⁵³ with the Massachusetts Bay Colony granting divorces as early as 1639⁵⁴ and Connecticut doing so in 1655.⁵⁵

Not all colonies were as permissive as the New England colonies, however, and “most colonies outside New England followed the ecclesiastical law of the Church of England and did not allow divorce.”⁵⁶ The southern colonies in particular continued to adhere to “English thinking”⁵⁷ and thus were quite hostile to the idea of divorce⁵⁸ with the middle colonies taking a more “scattered”⁵⁹ approach given that they “drew their population and their customs from a variety of sources.”⁶⁰ Following the American Revolution, however, those differences became less salient, and with the repudiation of English rule, so too went the previous limitations regarding marital dissolution.⁶¹ As a result, divorce soon became widely available throughout the United States.⁶²

Divorce at this point in history, however, was much different than it is today. For starters, it was a legal remedy that existed only for those who could establish fault, meaning that “[a] spouse was entitled to a divorce if, and only if, the other spouse had committed an offense against the marriage.”⁶³ In other words, a divorce action was an adversarial proceeding in which “[t]he plaintiff came before the court as an innocent victim arguing that the defendant,

52. GLENDA RILEY, *DIVORCE: AN AMERICAN TRADITION* 11 (1991) (“Before migrating to the colonies in 1620, many Separatists embraced Martin Luther’s and John Calvin’s belief that marriage and divorce were civil concerns.”).

53. Judith Areen, *Uncovering the Reformation Roots of American Marriage and Divorce Law*, 26 *YALE J.L. & FEMINISM* 29, 83 (2014).

54. See Lynda Wray Black, *The Long-Arm’s Inappropriate Embrace*, 91 *ST. JOHN’S L. REV.* 1, 19 n.139 (2017) (“The first divorce in the United States was granted in Massachusetts Bay in 1639 to Mrs. James Luxford on the grounds of bigamy.”).

55. See CHRISTINA KASSABIAN SCHAEFER, *THE HIDDEN HALF OF THE FAMILY: A SOURCEBOOK FOR WOMEN’S GENEALOGY* 75 (1999) (noting that the first Connecticut divorce is granted “for three years’ desertion, seven years’ absence without word, cruelty, fraudulent contract, and adultery”).

56. Ryznar & Devaux, *supra* note 23, at 173.

57. RILEY, *supra* note 52, at 26.

58. See Ayelet Hoffmann Libson, *Not My Fault: Morality and Divorce Law in the Liberal State*, 93 *TUL. L. REV.* 599, 603 (2019) (“In America, the southern colonies generally followed the English tradition . . .”).

59. RILEY, *supra* note 52, at 25.

60. NELSON MANFRED BLAKE, *THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES* 41 (1962); see also CLARE A. LYONS, *SEX AMONG THE RABBLE: AN INTIMATE HISTORY OF GENDER AND POWER IN THE AGE OF REVOLUTION, PHILADELPHIA, 1730–1830* 35 (2006) (“Colonial Pennsylvania’s marriage law allowed the colony’s diverse cultural groups to follow their own traditions.”).

61. See J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 *CALIF. L. REV.* 1091, 1095 (1992) (reviewing STEPHEN D. SUGARMAN & HERMA HILL KAY, *DIVORCE REFORM AT THE CROSSROADS* (1990)) (“After the American Revolution, most states quickly accepted the idea of absolute divorce . . .”).

62. See, e.g., RILEY, *supra* note 52, at 34–35 (noting that even “[s]outhern legislatures, except in South Carolina, made a radical change in their divorce policy after the American Revolution [despite having] opposed absolute divorce during the colonial period”).

63. Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault*, 86 *VA. L. REV.* 1497, 1498 (2000).

husband or wife, had broken the marriage contract.”⁶⁴ And, as initially formulated, those grounds were extremely limited, typically permitting divorce only in instances of “adultery, desertion, and some form of cruelty.”⁶⁵ Although some states were more liberal than others, some made it practically impossible to escape an unhappy marriage. South Carolina, for instance, refused to allow divorce of any kind until 1949.⁶⁶ New York was less restrictive in that it did permit divorce, but from 1787 until 1968, it only did so on the single ground of adultery.⁶⁷ For couples living in states like these, they were forced to seek out other avenues and strategies for terminating unsuccessful marriages.

For instance, divorce seekers in New York famously turned to thinly veiled collusion,⁶⁸ essentially manufacturing evidence of adultery. As Joanne Grossman and Lawrence Friedman describe:

New York developed what has been called soft-core adultery. The husband would check in to a hotel. A woman (for some reason, she was usually a blonde) would come to his room. They would take off some of their clothes (usually not all) . . . [T]here would be a knock on the door—a maid with towels, or a bellboy with a telegram. Then a photographer would burst in and take pictures. The woman would then collect her fee (\$50 was normal), and disappear. The photos would show up in court, as evidence of adultery.⁶⁹

Similar schemes played out in other states,⁷⁰ leading some commentators of the time to conclude that “anyone who believes divorce law to function in practice . . . as it reads in the law books is a proverbial ostrich.”⁷¹

For the more affluent,⁷² there emerged another avenue to divorce—one that did not require collusive perjury but did require a temporary relocation to another state. Given that some states were less restrictive, divorce seekers began to forum shop for states that maintained more permissive grounds for

64. *Id.* at 1501; *see also* Kerry Abrams, *The End of Annulment*, 16 J. GENDER RACE & JUST. 681, 683 (2013) (“In the days of fault-based divorce, [a court would grant a divorce] when one spouse had ‘breached’ the marital contract by committing an act that was grounds for divorce . . .”).

65. Friedman, *supra* note 63, at 1501.

66. *See* James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 917 (2000) (“With the exception of ten years during the Reconstruction Era, South Carolina courts allowed no divorces until 1949.”).

67. *See* RILEY, *supra* note 52, at 46 (“New York was the only northeastern state to limit divorce to the sole ground of adultery.”).

68. In this context, collusion is defined as “pretending to have grounds for divorce when in fact you have none, or when you choose (as often happened) not to tell the truth about the ones you do have.” Friedman, *supra* note 63, at 1512.

69. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 167–68 (2011) (footnote omitted).

70. *See generally* Friedman, *supra* note 63, at 1536 (“What do we see when we look at divorce practice in the 1930s and 1940s? The whole edifice was rotten to the core.”).

71. 2 LEON C. MARSHALL & GEOFFREY MAY, *THE DIVORCE COURT: OHIO* 23 (1933).

72. *See* Wylene Rholetter, *New York*, in 2 CULTURAL SOCIOLOGY OF DIVORCE: AN ENCYCLOPEDIA 880, 880 (Robert E. Emery ed., 2013) (“Migratory divorce was the choice of the wealthy.”); Jane Biondi, *Who Pays for Guilt?: Recent Fault-Based Divorce Reform Proposals, Cultural Stereotypes and Economic Consequences*, 40 B.C. L. REV. 611, 613 n.21 (1998) (“[M]igratory divorces were common only among the wealthy who could afford an extended trip to a jurisdiction that granted quick divorces.”).

divorce.⁷³ Of course, to avail themselves to the laws of those other states, the divorce seekers had to first establish residency.⁷⁴ For that reason, states that offered a combination of short residency requirements and more relaxed fault grounds became particularly attractive.⁷⁵ From the mid-1800s to the late 1960s, several states emerged as popular destinations for those willing to undertake an extended “vacation” for purposes of obtaining a divorce.⁷⁶ Nevada was probably the most notable “divorce mill,”⁷⁷ given that it offered extremely liberal divorce grounds and, more importantly, permitted a new visitor to establish residency after a mere six weeks.⁷⁸ However, after witnessing the resulting financial success that Nevada enjoyed, a number of other states began relaxing their own residency requirements in hopes of competing for these “divorce tourists”⁷⁹ and the bountiful revenues that came with them.⁸⁰

Of course, for migratory divorce to work as intended, the divorce seeker’s original state had to be willing to recognize an out-of-state divorce secured during a temporary stay in the degree-granting state. Whereas some states were willing to do so out of comity,⁸¹ others refused. They balked at the idea that one

73. Rhonda Wasserman, *Divorce and Domicile: Time to Sever the Knot*, 39 WM. & MARY L. REV. 1, 13 (1997) (“With substantial variation among the states’ divorce laws and with increasing mobility, migratory divorce began to rear its ugly head—unhappily married persons who could not obtain divorces at home began going to states with more permissive laws and seeking divorces there.”).

74. See Judith M. Stinson, *The Right to (Same-Sex) Divorce*, 62 CASE W. RESRV. L. REV. 447, 449 (2011) (“[M]ost states impose no residency requirement for marriage, but every state requires residency for divorce.” (footnote omitted)).

75. See Friedman, *supra* note 63, at 1503 (“‘Easy’ laws were easy in two senses: They permitted a long list of ‘grounds’ for divorce (and interpreted them loosely), and they had very short residency requirements.”).

76. See RODERICK PHILLIPS, *UNTYING THE KNOT: A SHORT HISTORY OF DIVORCE* 160 (1991) (“The distinction of being the most popular divorce haven was shared by several midwestern and western divorce states at different times.”).

77. See, e.g., Neil Ribner & Jason Ribner, *United States: 1901 to 1950*, in 3 CULTURAL SOCIOLOGY OF DIVORCE: AN ENCYCLOPEDIA 1244, 1247 (Robert E. Emery ed., 2013) (using the term “divorce mills” and defining it as “cities in liberal states that offered divorce like it was another tourist attraction”).

78. Nevada lowered its residency requirement from six months to three months in 1927 and eventually to six weeks in 1931. See Jeanne Louise Carriere, *“It’s Déjà Vu All Over Again”: The Covenant Marriage Act in Popular Cultural Perception and Legal Reality*, 72 TUL. L. REV. 1701, 1735 (1998) (describing Nevada as “the most notorious and longest-lived of the divorce mills”).

79. See GROSSMAN & FRIEDMAN, *supra* note 69, at 168–69 (“Today we have eco-tourism, and sex tourism; in the past there was a flourishing business of divorce tourism.”).

80. See ALICIA BARBER, *RENO’S BIG GAMBLE: IMAGE AND REPUTATION IN THE BIGGEST LITTLE CITY* 118 (2008) (noting that “Reno’s hold on the lucrative divorce industry . . . seemed even more precarious once Idaho and Arkansas each” adopted three-month residency provisions); PHILLIPS, *supra* note 76, at 196 (describing the “veritable divorce trade war [that] broke out among states such as Nevada, Idaho, and Arkansas”).

81. See David F. Cavers, *Migratory Divorce*, 16 SOC. FORCES 96, 103 (1937). As defined by the Supreme Court, “[c]omity . . . is the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.” *Hilton v. Guyot*, 159 U.S. 113, 163–64 (1895); see also Lindsay Loudon Vest, Comment, *Cross-Border Judgments and the Public Policy Exception: Solving the Foreign Judgment Quandary by Way of Tribal Courts*, 153 U. PA. L. REV. 797, 804 (2004) (noting that “[t]he doctrine of comity thus grants a court the discretion to recognize a foreign judgment without compelling it to do so”).

spouse could leave the state and, simply by virtue of having spent sufficient time in another, terminate a marriage not only for themselves but also for the spouse who never even left the state. Faced with the resulting question of when a state was required to recognize a foreign divorce, the Supreme Court, over a period spanning more than seventy years, issued twelve opinions on the subject.⁸² However, those opinions were not particularly helpful and, indeed, frequently only further complicated the issue.⁸³ As one commentator observed, “by the middle of the twentieth century, divorce law in the United States had become one of the most unsettled and heterogeneous areas of law in the nation”⁸⁴

While the courts were trying to arrive at some standard governing the legal recognition of out-of-state divorces, many Americans grew increasingly concerned at how their state’s divorce laws were essentially being thwarted by the more liberal laws of sister states.⁸⁵ As the Supreme Court itself observed in one of its many decisions on the topic: “[T]he states whose laws were the most lax as to length of residence required for domicile [sic], as to causes for divorce and to speed of procedure concerning divorce, *would in effect dominate all the other states.*”⁸⁶ In response, critics began looking for a legal solution to the “divorce problem,”⁸⁷ largely through the proposal of constitutional amendments⁸⁸ and uniform laws.⁸⁹ Nonetheless, those efforts ultimately proved unsuccessful, and the divorce mills remained in business for decades, fueled quite simply by

82. See Michael J. Higdon, *If You Grant It, They Will Come: The History and Enduring Legal Legacy of Migratory Divorce*, 2022 UTAH L. REV. 295, 318–28; see also James D. Sumner, Jr., *Full Faith and Credit for Divorce Decrees—Present Doctrine and Possible Changes*, 9 VAND. L. REV. 1, 1 (1955) (noting that “the burden of prescribing [such] policies and criteria [was] shouldered” by the Supreme Court).

83. See, e.g., Frederic M. Bloom, *State Courts Unbound*, 93 CORNELL L. REV. 501, 520–21 (2008) (“[A] steady stream of divorce appeals reached the Supreme Court, each offering a new full faith and credit riddle to solve. Over time, these cases folded together in a kind of ‘patchwork without pattern’—a ‘crazy quilt,’ to borrow Justice Jackson’s metaphor, of American divorce laws.” (footnotes omitted)); Note, *Migratory Divorce: The Alabama Experience*, 75 HARV. L. REV. 568, 570 (1962) (“Nor has the migratory-divorce problem proved susceptible to judicial solution.”).

84. Sarah E. Fette, *Learning from Our Mistakes: The Aftermath of the American Divorce Revolution as a Lesson in Law to the Republic of Ireland*, 7 IND. INT’L & COMPAR. L. REV. 391, 410 (1997).

85. See, e.g., W. O. Hart, *Uniform Divorce Laws*, 28 COM. L. LEAGUE J. 137, 137 (1923) (“The great evil in divorce suits is what is known as the migratory divorce”).

86. *Haddock v. Haddock*, 201 U.S. 562, 574 (1906) (emphasis added), *overruled on other grounds by Williams v. North Carolina*, 317 U.S. 287 (1942).

87. WILLIAM L. O’NEILL, *DIVORCE IN THE PROGRESSIVE ERA* 252 (1967) (noting how “uniformity was the single most-talked about solution to the divorce problem”).

88. Indeed, between the years 1884 and 1963, Congress would propose over seventy-five constitutional amendments aimed at nationalizing the law of divorce. See generally Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 666 (2004) (compiling all proposed amendments regarding marriage to the U.S. Constitution, including those “relating to the evasion of state marriage or divorce laws”); RILEY, *supra* note 52, at 111 (“[B]eginning in 1884, at every session of Congress, members considered motions suggesting that the Constitution be amended.”).

89. ALLEN M. PARKMAN, *NO-FAULT DIVORCE: WHAT WENT WRONG?* 17 (1992) (“The increased use of migratory divorce[] . . . created pressures for uniform divorce laws throughout the United States.”).

Americans' growing demand for divorce.⁹⁰ As one Nevadan at the time responded when asked how his state could justify granting a divorce after only six weeks of residence—"You can't change human nature by law. So what we're trying to do is to make human nature legal."⁹¹

Indeed, only after other states began to appreciate this idea of human nature would the practice of migratory divorce begin to draw to a close. This shift took place throughout the early twentieth century when other states finally began to adjust their divorce laws to reflect the reality of marriage in the United States and enact more liberal approaches to marital dissolution, typically by making it easier to establish fault.⁹² As one commentator explains, "[d]ivorce laws accommodated more and more couples by adding more and more grounds, and the judiciary added to this process by broadening definitions of what constituted [the existing grounds of] cruelty and discord."⁹³ Specifically, Professor Shaakirrah Sanders has described how "cruelty was extended in most states to include mental cruelty [and] [n]ew grounds included nonsupport, insanity, voluntary separation, and incompatibility."⁹⁴ In 1966, even New York finally amended its divorce laws to allow for grounds other than adultery.⁹⁵

Despite these expansions, the American legal system was beginning to question the wisdom of ever conditioning divorce on a showing of fault. For one thing, as the grounds for fault-based divorce grew, so too did the recognition that divorce law was becoming overly complex and increasingly subject to judicial discretion.⁹⁶ Further, as long as divorce was based on statutorily defined fault, situations would continue to arise whereby couples that desired a divorce simply could not obtain one because they failed to qualify under any of the enumerated grounds. As one early critic pointed out, "[s]tatutory categories cannot possibly encompass all events that may destroy a marital relationship nor, conversely, does the specified conduct per se necessarily evidence a need for the dissolution of a marriage."⁹⁷ Finally, the very

90. See, e.g., Joanna L. Grossman, *Fear and Loathing in Massachusetts: Same-Sex Marriage and Some Lessons from the History of Marriage and Divorce*, 14 B.U. PUB. INT. L.J. 87, 100 (2004) (describing the "percolating demand for easier, less costly, and more honest divorce").

91. William G. Shepherd, *Making Human Nature Legal*, COLLIER'S WKLY, June 20, 1931, at 14.

92. Kathleen A. Portuan Miller, *Who Says Muslim Women Don't Have the Right to Divorce?—A Comparison Between Anglo-American Law and Islamic Law*, 22 N.Y. INT'L L. REV. 201, 205 (2009) (noting how "[u]p to the middle of the 20th century, additional grounds for divorce were promulgated and included in the fault-based divorce process").

93. PHILLIPS, *supra* note 76, at 215.

94. Shaakirrah R. Sanders, *The Cyclical Nature of Divorce in the Western Legal Tradition*, 50 LOY. L. REV. 407, 422 (2004) (footnotes omitted).

95. See *Christian v. Christian*, 365 N.E.2d 849, 852 (N.Y. 1977) ("With the enactment of the Divorce Reform Law of 1966, New York abandoned its position as the only State in the union which regarded adultery as the sole ground for absolute divorce." (citation omitted)).

96. See PHILLIPS, *supra* note 76, at 215 (noting that in the 1960s, there emerged a "recognition that legislation was becoming impossibly unwieldy and that the determination of grounds would fall increasingly to the discretion of the courts").

97. Zenor, *supra* note 25, at 653.

concept of “fault” became problematic as it became increasingly understood that “the breakdown of a marriage is seldom the ‘fault’ of one of the partners. It results, rather, from a much more complex interaction between two, and frequently more than two, personalities.”⁹⁸

It was against this backdrop that the idea of no-fault divorce emerged and, as a result, “divorce law in the United States underwent a revolution.”⁹⁹ In truth, the idea of divorce without fault was one that had been discussed as far back as the early 1900s.¹⁰⁰ Writing in 1915, for example, William English Carson predicted that “divorce by mutual consent is likely to form one of the provisions of the future divorce law.”¹⁰¹ However, it would not be until the 1960s when the idea of no-fault divorce began to take hold as a realistic possibility for reform.¹⁰² What made this move so revolutionary was the fact that “[i]nstead of holding a trial to determine whether a spouse was guilty of a serious marital offense, no fault statutes allowed spouses to obtain divorces by mutual consent or on grounds of incompatibility or ‘irretrievable breakdown’ of the marriage.”¹⁰³ In other words, no-fault divorce “changed the concept of divorce from a punishment of an offending spouse to a ‘remedy for situations which are unavoidable and unendurable.’”¹⁰⁴

Ultimately, California took the lead in 1970 and adopted the nation’s first purely no-fault divorce law.¹⁰⁵ It is important to note, however, that as originally enacted, the California law would have still been somewhat restrictive when it came to obtaining a divorce. As Grossman and Friedman explain:

The law defined “irreconcilable differences” as “those grounds which are determined by the court to be substantial reasons for not continuing the marriage.” This seemed to be asking the court to conduct some sort of hearing, and make some findings of fact. Indeed, the statute went on to say

98. Joseph Goldstein & Max Gitter, *On Abolition of Grounds for Divorce: A Model Statute & Commentary*, 3 FAM. L.Q. 75, 79 (1969).

99. Ray D. Madoff, *Lurking in the Shadow: The Unseen Hand of Doctrine in Dispute Resolution*, 76 S. CAL. L. REV. 161, 172 (2002).

100. See, e.g., RILEY, *supra* note 52, at 161 (“Early in the twentieth century, several Americans began to support a radical plan to soften the process by replacing adversarial divorce with divorce by mutual consent.”).

101. WILLIAM E. CARSON, *THE MARRIAGE REVOLT; A STUDY OF MARRIAGE AND DIVORCE* 450 (1915).

102. See Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 406 (2007) (“Most writers date the transformation of divorce law in the United States to the 1960s, when New York revised its antiquated divorce statute and California adopted the nation’s first pure no-fault divorce law.”).

103. See Steven Mintz, *Children, Families and the State: American Family Law in Historical Perspective*, 69 DENVER U. L. REV. 635, 655, 648 (1992) (describing how the law once “viewed families as instruments of the state”).

104. RILEY, *supra* note 52, at 164.

105. Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 1, 39 n.130 (2005) (“The first no fault divorce law was passed by California and became effective on January 1, 1970.”).

that “If from the evidence at the hearing, the court finds that there are irreconcilable differences,” it can order the dissolution of the marriage.¹⁰⁶

Nonetheless, in interpreting this language, the law of no-fault very quickly evolved into one of unilateral divorce with the understanding that “if either party wanted out, and for any reason, the marriage was over.”¹⁰⁷ As one of the early no-fault divorce cases held when deciding whether there had been a “breakdown of marriage” as required by the statute: “Marriage is a relationship between two people, and if one of those people has determined it shall not continue, this would seem to be plain evidence the relationship has broken down.”¹⁰⁸ Thus, with the advent of no-fault divorce, the state no longer played a role in deciding what grounds justified marital dissolution; instead, that decision resided with the individual spouses themselves.¹⁰⁹

Not only did no-fault divorce allow greater flexibility to those seeking to end their marriages, but it also made divorce itself a much more attractive option. For instance, by eliminating the need to prove fault, no-fault was more protective of marital privacy.¹¹⁰ As one early commentator explained: “The fault system not only encourages perjury and hypocrisy, but also alienates the citizen from the law by demanding in some instances a public revelation of intimate marital details.”¹¹¹ Second, by casting the spouses in adversarial roles, the fault-based system tended to exacerbate marital discord,¹¹² preventing “the development of amicable relations after divorce—relations essential to the well-being of the children and of the newly reorganized ‘family.’”¹¹³ Finally, the availability of no-fault divorce made marital dissolution actions much less expensive given that “a no-fault action seldom involved high court, attorney, and other costs.”¹¹⁴

For those reasons, no-fault divorce instantly became quite popular with divorce seekers and the states alike, effectively “bur[ying] the fault system under tons of rubble.”¹¹⁵ As one commentator described, “the movement blew through state legislatures like dry summer wildfires driven by the Santa Ana

106. GROSSMAN & FRIEDMAN, *supra* note 69, at 176 (footnote omitted).

107. *Id.*

108. *In re Marriage of Morgan*, 218 N.W.2d 552, 560 (Iowa 1974).

109. See Goldstein & Gitter, *supra* note 98, at 83 (“In establishing statutory grounds the state, not the individuals directly concerned, decides what conduct justifies divorce.”).

110. Laura Bradford, Note, *The Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws*, 49 STAN. L. REV. 607, 611 (1997) (“The spectacle of couples parading their marital problems in front of judges fed the impetus for reform.”).

111. Zenor, *supra* note 25, at 654.

112. *Id.* (“By demanding that the parties assume the posture of combatants, the fault system merely exacerbates the discord that first prompted the divorce effort.”).

113. Goldstein & Gitter, *supra* note 98, at 81.

114. RILEY, *supra* note 52, at 165.

115. Friedman, *supra* note 63, at 1500.

winds,”¹¹⁶ and by the mid-1980s, most of the other states had adopted some form of no-fault divorce.¹¹⁷ New York was the final holdout, but even it eventually adopted no-fault divorce in 2010¹¹⁸ with the result that divorce has now gone “[f]rom being almost impossible without evidence of fault or the agreement of one’s spouse” to essentially unilateral throughout the United States.¹¹⁹

B. *Constitutional Limitations on the States*

To understand how the Supreme Court views divorce, one must begin with the Court’s understanding of marriage—an understanding that has evolved over time. In 1888, for instance, the Supreme Court in *Maynard v. Hill* recognized that “[m]arriage . . . has always been subject to the control of the legislature.”¹²⁰ Since then, however, the Supreme Court has held that under the Due Process Clause of the Fourteenth Amendment, there are notable limits to a state’s ability to regulate marriage.¹²¹ Beginning in 1923 when the Court recognized that the liberty safeguarded by the Fourteenth Amendment included “the right of the individual . . . to marry,”¹²² the Court would eventually characterize that right as “fundamental” and thus subject to strict scrutiny.¹²³ As a result, state action that effectively strips individuals of their ability to wed is unconstitutional unless necessary to serve a compelling government objective—a level of scrutiny routinely described as “strict in theory, fatal in fact.”¹²⁴

116. Gary H. Nichols, *Covenant Marriage: Should Tennessee Join the Noble Experiment?*, 29 U. MEM. L. REV. 397, 411 (1999).

117. Ira Mark Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 782 (1996) (“Essentially all the American states moved to laws that allowed divorce on no-fault grounds in the 1970s and early 1980s . . .”).

118. See Lauren Guidice, Note, *New York and Divorce: Finding Fault in a No Fault System*, 19 J.L. & POL’Y 787, 788 (2011) (“On August 15, 2010, . . . Governor Patterson signed a three-bill package that overhauled New York divorce laws[, placing them] on equal footing with that of the forty-nine other states that do not require fault in order for a couple to dissolve their marriage.” (footnote omitted)).

119. PARKMAN, *supra* note 89, at 18; see also Friedman, *supra* note 63, at 1500 (describing “the no-fault principle” as currently “a dominant feature of divorce law”).

120. *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

121. See *United States v. Windsor*, 570 U.S. 744, 766 (2013) (“State laws defining and regulating marriage, of course, must respect the constitutional rights of persons . . .” (citation omitted)).

122. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

123. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (“[O]ur past decisions make clear that the right to marry is of fundamental importance . . .”); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (characterizing “[t]he freedom to marry” as “fundamental” and noting that it “has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness”).

124. *Wittmer v. Peters*, 87 F.3d 916, 918 (7th Cir. 1996) (noting how “subject to strict scrutiny” has often been thought of as a “euphemism for ‘absolutely forbidden’”).

In contrast, the Court has never explicitly recognized the right to divorce as rising to that same level.¹²⁵ In fact, just as *Maynard* indicated that marriage was once a subject left exclusively to the states, in 1877 the Supreme Court in *Pennoyer v. Neff* offered a similar observation regarding divorce.¹²⁶ In *Pennoyer*, the Court described the state as having the “absolute right to prescribe the conditions upon which the marriage relation between its own citizens shall be created, and the causes for which it may be dissolved.”¹²⁷ Nonetheless, in ways that paralleled its changing views on marriage, the Court’s view on divorce has likewise evolved. Just as the Court in the 1920s would retreat from its view of marriage as a legal union left exclusively to state control,¹²⁸ nearly half a century later, it would follow a similar pattern when it came to divorce.

Indeed, the Supreme Court has made clear that, unlike some other civil remedies, divorce is not something that states can wholesale restrict, and instead, “[s]ome federal limits, it appears, are acceptable in the realm of divorce.”¹²⁹ The leading case in that regard is *Boddie v. Connecticut*, a 1971 Supreme Court case involving a state law that required divorce seekers to first pay a number of fees as a condition precedent to initiating a divorce action.¹³⁰ Indigent plaintiffs who could not afford those fees brought suit, claiming that the law operated as an unconstitutional denial of due process.¹³¹ Despite the fact that the case centered on divorce, the Supreme Court took a number of opportunities within the opinion to discuss the role of marriage, pointing out “the basic position of the marriage relationship in this society’s hierarchy of values” as well as the understanding that “marriage involves interests of basic importance in our society.”¹³² Thus, the Court in *Boddie* tended to view the idea of divorce through the lens of its relationship to the fundamental right to marry.¹³³

When it came to the discrete topic of divorce, the Court began its opinion by acknowledging the unique position occupied by those challenging the law at issue, noting that when it comes to these “would-be plaintiffs, we think

125. See *Estin*, *supra* note 102, at 427 (“The Supreme Court has never recognized a constitutional right to divorce in the broad terms of its other due process decisions.”).

126. *Pennoyer v. Neff*, 95 U.S. 714 (1877), *overruled on other grounds by* *Shaffer v. Heitner*, 433 U.S. 186 (1977).

127. *Id.* at 734–35. Or, as a state court writing in 1900 once put it: “There can be no such thing as a ‘legal right’ to a divorce vested in any married person.” *Allen v. Allen*, 46 A. 242, 242 (Conn. 1900).

128. See *supra* notes 117–121 and accompanying text.

129. Meg Penrose, *Unbreakable Vows: Same-Sex Marriage and the Fundamental Right to Divorce*, 58 VILL. L. REV. 169, 204 (2013).

130. *Boddie v. Connecticut*, 401 U.S. 371, 371 (1971).

131. *Id.* at 373.

132. *Id.* at 374, 376 (citations omitted).

133. *Id.* at 374 (noting that the Court’s decision is based, in part, on “the basic position of the marriage relationship in this society’s hierarchy of values”); see also Wendy Dunne Dichristina, *Putting the Cart Before the Horse: Why Supreme Court Law Regarding Access to Courts Requires Fifty State Same-Sex Divorce*, 48 FAM. L.Q. 375, 392 (2014) (“Although divorce may not be a fundamental right per se, it is closely related to a fundamental relationship and a necessary part of ordering people’s lives and affairs.”).

appellants' plight . . . is akin to that of defendants faced with exclusion from the only forum effectively empowered to settle their disputes."¹³⁴ The Court reached this conclusion after noting the complete absence of any "jurisdiction where private citizens may covenant for or dissolve marriages without state approval."¹³⁵ In other words, the Court observed that those seeking a divorce were prevented from doing so without having meaningful access to the state courts, and on that basis, ruled that the law at issue was unconstitutional for two reasons.

First, the Court noted "that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard."¹³⁶ Second, the Court relied on its previous rulings that "a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question."¹³⁷ Applying these two principles, the Court found that the Connecticut law was unconstitutional because when it came to divorce, it effectively deprived the plaintiffs of the ability to be heard.¹³⁸ Further, despite the state's interest in requiring the payment of filing fees—including the desire to prevent frivolous litigation—the Court ruled that "none of these considerations is sufficient to override the interest of these plaintiff-appellants in having access to the only avenue open for dissolving their allegedly untenable marriages."¹³⁹

In light of the Court's holding and rationale, some scholars have argued that *Boddie* at least suggests that there exists a constitutional right to divorce. One commentator pointed out: "The Court's willingness to view divorce as part of the right to marriage, and the ability to dissolve the marriage as part of the right to personal privacy and association, suggests that the Court should provide constitutional protection to an individual's decision to divorce."¹⁴⁰ Professor Theodore Hass took a similar position when he wrote the following in 1988: "The argument for such a constitutional right is as follows: (1) There is a fundamental right to marry under *Zablocki v. Redhail*; (2) the right to divorce is

134. *Boddie*, 401 U.S. at 376 ("Resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of the defendant called upon to defend his interests in court.").

135. *Id.* ("[W]e know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.").

136. *Id.* at 377.

137. *Id.* at 379.

138. *Id.* at 382 (holding "that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce").

139. *Id.* at 381.

140. Bradford, *supra* note 110, at 626.

as important as the right to marry under *Boddie v. Connecticut*; (3) therefore, there is a fundamental right to divorce.”¹⁴¹

Most contemporary scholars, however, tend to read *Boddie* more narrowly, interpreting it as a case not recognizing divorce as a fundamental right, but one that is more concerned with the proposition that because states condition divorce on a judicial proceeding, due process forbids restrictions that effectively bar certain individuals from accessing those courts.¹⁴² In fact, four years after deciding *Boddie*, the Court seemingly confirmed this more narrow interpretation in *Sosna v. Iowa*, in which it upheld a state law that required plaintiffs to establish a year of residency prior to filing for divorce.¹⁴³ In distinguishing *Boddie*, the Court observed that:

[T]he gravamen of appellant Sosna’s claim is not total deprivation, as in *Boddie*, but only delay. The operation of the filing fee in *Boddie* served to exclude forever a certain segment of the population from obtaining a divorce in the courts of Connecticut. No similar total deprivation is present in appellant’s case, and the delay which attends the enforcement of the one-year durational residency requirement is [thus] consistent with the provisions of the United States Constitution.¹⁴⁴

Nonetheless, the combination of these two cases makes clear that because divorce remains a remedy that only a court can grant, states face significant limitations when it comes to laws that impose too much of a burden on an individual’s ability to secure a divorce—a remedy the Court in *Boddie* defined as “the adjustment of a fundamental human relationship.”¹⁴⁵

II. SEPARATION AS INFORMAL DIVORCE WITHIN MARGINALIZED GROUPS

Despite the movement to no-fault divorce¹⁴⁶ as well as the Supreme Court’s ruling that states have a constitutional obligation to not interfere with access to divorce,¹⁴⁷ recent studies have revealed that for many, such access remains illusory. This is not to imply that these individuals are forced to continue living

141. Theodore F. Haas, *The Rationality and Enforceability of Contractual Restrictions on Divorce*, 66 N.C. L. REV. 879, 897 (1988) (footnotes omitted).

142. See, e.g., Carol Rice Andrews, *A Right of Access to Court Under the Petition Clause of the First Amendment: Defining the Right*, 60 OHIO ST. L.J. 557, 568 (1999) (describing *Boddie* as one of “[t]he defining cases for access to court under due process”); Tom Bosworth, *The Federal Constitutional Right to Divorce*, 14 J. CONTEMP. LEGAL ISSUES 103, 104 (2004) (“*Boddie* established a substantive due process guarantee for the right to seek a divorce.”); Lisa V. Martin, *Modernizing Capacity Doctrine*, 73 FLA. L. REV. 821, 831 n.46 (2021) (describing *Boddie* as “holding that impediments to court access that deny individuals the right to be heard violate due process rights”).

143. *Sosna v. Iowa*, 419 U.S. 393, 409 (1975).

144. *Id.* at 410.

145. *Boddie v. Connecticut*, 401 U.S. 371, 383 (1971).

146. See *supra* notes 96–106 and accompanying text.

147. See *supra* Subpart I.B.

life as a married couple. Instead, they will simply use permanent separation as a form of informal “divorce” in lieu of formally dissolving their marriages.¹⁴⁸ Of course, separation is not—in and of itself—a negative result given that most couples will part company at some point prior to commencing formal divorce proceedings.¹⁴⁹ As one commentator described, “[s]eparation may be conceptualized as an intermediate stage in the marital dissolution process in which spouses seriously consider the possibility of terminating the marital relationship but also would consider returning to the marriage if conditions improved.”¹⁵⁰ For those couples who do not reconcile, studies show that more than three-quarters will divorce within three years.¹⁵¹

Most troubling, however, is the fact that a number of recent studies have found that there exists a significant number of couples—around fifteen percent—that will permanently separate without ever obtaining a formal divorce.¹⁵² Importantly, those who fall in this category typically share similar demographics: they tend to be underrepresented minorities, have lower educational attainment, and come from poorer socioeconomic backgrounds.¹⁵³ The fact that the individuals who opt for informal separation over formal divorce do not appear randomly in the population but instead are often concentrated within the same, already disadvantaged communities is concerning on a number of levels. However, it is especially worrisome when one considers that there is no evidence that these individuals are opposed to the idea of divorce—they simply lack the resources to acquire one.¹⁵⁴ As Jesse Choper once wrote, “although the bottom economic groups produce the highest separation rates, they also show very low divorce rates, thus giving inferential support to the intuitive conclusion that many poor people who desire a divorce simply cannot afford one.”¹⁵⁵

As an initial matter, many studies have revealed the impact that race and ethnicity play when it comes to the likelihood that a separated couple will formally divorce. As one study noted, “the separations of [W]hite women are much more likely to result in divorce than the separations of [B]lack or Hispanic

148. See Dmitry Tumin et al., *Estimates and Meanings of Marital Separation*, 77 J. MARRIAGE & FAM. 312, 313 (2015) (“For other couples, marital separation may become an alternative to divorce, lasting for many years without resolving in either divorce or reconciliation.” (citation omitted)).

149. HIROMI ONO, EXPANDING ON EXPLANATIONS OF RECENT PATTERNS IN U.S. DIVORCE RATES 107 (1995) (noting that “separation is almost always experienced by couples who divorce”).

150. *Id.*

151. See Tumin et al., *supra* note 148, at 317 (reporting that “53.6% of separations ended in divorce within 1 year, 80.3% ended in divorce within 3 years, and 86.9% ended in divorce within 5 years”).

152. See Grabmeier, *supra* note 29 (“Researchers found that about 80 percent of all respondents who went through a marital separation ultimately divorced . . . [b]ut 15 percent of separations didn’t lead to divorce or reconciliation within 10 years.”).

153. See *infra* notes 156–173 and accompanying text.

154. See generally *supra* note 148 and accompanying text.

155. See Jesse H. Choper, *Consequences of Supreme Court Decisions Upholding Individual Constitutional Rights*, 83 MICH. L. REV. 1, 150–51 (1984) (footnote omitted).

women.”¹⁵⁶ Specifically, one study found that within five years of separation, ninety-seven percent of White women will obtain a formal divorce, compared with only seventy-seven and sixty-seven percent for Latina and Black women, respectively.¹⁵⁷ Researchers have proposed a number of “social, economic, and demographic factors” for this disparity, focusing their research primarily on the impact those factors pose for Black women in particular.¹⁵⁸

One possible explanation is simply that “the high sex ratio (women relative to men) in the [B]lack population puts [B]lack women at a disadvantage in the remarriage market.”¹⁵⁹ As another researcher explained, “Black women . . . may have less incentive to complete the divorce process because of their low prospects of remarriage.”¹⁶⁰ Another possible explanation comes from data suggesting that even when remarriage is a possibility, “the economic gains associated with remarriage are lower for [B]lack women than for [W]hite women in part because [B]lack men on average are in poorer economic positions than [W]hite men”¹⁶¹—given that Black men are frequently “denied job prospects by hyper-segregation and deindustrialization.”¹⁶² Nonetheless, that same study found that even “controlling for resource differences,” when it comes to separated Black couples, they “are less likely to divorce than separated [W]hite couples.”¹⁶³

Beyond race and ethnicity, poverty also plays a significant role in a couple’s decision regarding whether to formally dissolve an unsuccessful marriage.¹⁶⁴ As one study revealed, “both spouses’ resources increase the couples’ risk of

156. Matthew D. Bramlett & William D. Mosher, *Cohabitation, Marriage, Divorce, and Remarriage in the United States*, VITAL & HEALTH STATISTICS, July 2002, at 1, 22.

157. *Id.*; see also Michael T. Flannery, *Is “Bird Nesting” in the Best Interest of Children?*, 57 SMU L. REV. 295, 295 n.1 (2004) (“African American and Hispanic parents are less likely to separate, divorce, and then remarry, than are non-Hispanic Whites.”).

158. ONO, *supra* note 149, at 117.

159. *Id.* (citing Lynda Dickson, *The Future of Marriage and Family in Black America*, 23 J. BLACK STUD. 472, 478 (1993)).

160. Tumin et al., *supra* note 148, at 313 (citation omitted); see also David S. Mitchell, Comment, *An Unhappy Union: Married Taxpayers Filing Separately and the Affordable Care Act’s Premium Tax Credit*, 69 TAX LAW. 453, 464 (2016) (“Blacks are also less likely to finalize a divorce after separating than their white counterparts, perhaps in part because the remarriage prospects for black women are low.”).

161. ONO, *supra* note 149, at 117 (citing MAVIS MACLEAN, SURVIVING DIVORCE: WOMEN’S RESOURCES AFTER SEPARATION (1991)); Twila L. Perry, *Race Matters: Change, Choice, and Family Law at the Millennium*, 33 FAM. L.Q. 461, 464 (1999) (“A second critical factor affecting the rates of marriage for Black people is the precarious economic situation of many Black men. In this country, Black men are disproportionately unemployed, underemployed, and undereducated.”).

162. STEPHANIE COONTZ, THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 251 (2000).

163. ONO, *supra* note 149, at 134. Perhaps, though, the answer again relates to the desire to remarry. See, e.g., R. Richard Banks & Su Jin Gatlin, *African American Intimacy: The Racial Gap in Marriage*, 11 MICH. J. RACE & L. 115, 123 (2005) (noting that the “socioeconomic differences between Black and White women do not wholly explain the remarriage gap, as even high status Black women are less likely than their White peers to remarry”).

164. See Higdon, *supra* note 35, at 85 (“[P]oorer individuals, although more likely to separate, are nonetheless less likely to divorce.” (emphasis omitted)).

divorcing after separation.”¹⁶⁵ Once again, the possibility of remarriage plays a significant role here.¹⁶⁶ Qualities such as the “husband’s and wife’s higher earnings, their higher education, their employment stability, and more expensive houses owned”¹⁶⁷ will make them more attractive to future mates, thus increasing the odds of remarriage—an option that is legally foreclosed until the previous marriage is formally dissolved.¹⁶⁸ Thus, those with fewer assets have less prospects of remarriage and thus may face fewer incentives to formally divorce. Relatedly, a 2017 study specifically found that not only does unemployment tend to lead to marital breakdown, but “continuous unemployment or new unemployment during separation may discourage divorce from happening.”¹⁶⁹ Part of the explanation for that finding was that the unemployed spouse may not be able to afford the fees associated with divorce. After all, divorce can be quite expensive, with those who lack the means to afford those fees effectively excluded from obtaining a divorce. In the words of one commentator, “[t]he high cost of divorce encourages separation for the poor and divorce for the wealthy.”¹⁷⁰

Third, educational level also plays a significant role when it comes to a couple’s likelihood of electing permanent separation over divorce. One study, for instance, noted that “predictors of divorce initiation, such as low educational attainment, may not lead to divorce attainment after separation and may even be barriers to formal divorce after separation.”¹⁷¹ It is not difficult to understand why given that, when combined with lower socioeconomic status, these individuals may face numerous difficulties in navigating the legal complexities involved in a formal divorce proceeding.¹⁷² After all, as the Supreme Court noted in *Boddie*, those wishing to obtain a divorce are required to utilize the court system, and “[f]amily court may be the only court that these individuals have attended or encountered before.”¹⁷³

In addition, given the civil nature of divorce, there is no automatic right to counsel,¹⁷⁴ and although opportunities to receive legal aid exist within a number of other civil contexts, “[o]ut of necessity, divorce gets the least attention.”¹⁷⁵

165. ONO, *supra* note 149, at 113.

166. See, e.g., Kathleen Mullan Harris, *Family Structure, Poverty and Family Well-Being: An Overview of Panel 2*, 10 EMP. RTS. & EMP. POL’Y J. 45, 45–46 (2006) (noting that “remarriage is less likely for divorced women who live in [poor] communities”).

167. ONO, *supra* note 149, at 113.

168. See *infra* notes 251–257 and accompanying text.

169. Dmitry Tumin & Zhenchao Qian, *Unemployment and the Transition from Separation to Divorce*, 38 J. FAM. ISSUES 1389, 1391 (2017).

170. Khazan, *supra* note 1.

171. Tumin & Qian, *supra* note 169, at 1391 (citation omitted).

172. See *infra* note 329 and accompanying text.

173. Munro et al., *supra* note 24, at 441.

174. Deborah M. Weissman, *Law as Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 742 (2002) (noting that within “civil matters . . . there is no right to counsel”).

175. Khazan, *supra* note 1.

Thus, when it comes to those who cannot afford an attorney and who lack the education and background sufficient to navigate the process—not to mention the fact that many of these individuals have jobs that are not conducive to taking the necessary time off to file and pursue litigation—they face considerable hurdles. As one commentator describes:

Divorce laws vary by state and county, but in general, a person may have to hire a process server to get the divorce paperwork to their spouse, which costs about \$200. They may have to file complicated forms, face multiple waiting periods, and make multiple trips to the post office, courthouse, and a law library—none of which is likely to be open after 5 p.m.¹⁷⁶

These obstacles are not inconsequential. As others have observed, when it comes to those appearing pro se, they “are more likely to neglect time limits, miss court deadlines, and have problems understanding and applying the procedural and substantive law pertaining to their claim.”¹⁷⁷

Finally, although true of all pro se litigants, these problems are even more pronounced in this context given the sheer demand for judicial divorce. As an initial matter, a number of studies have documented the growing numbers of pro se litigation involving issues concerning domestic relationships. According to one study, “family law matters have witnessed the greatest increase in pro se litigants and, with the creation of unified family [law] courts, more individuals are seeking to resolve multi-issue disputes in child custody, support, and related domestic problems.”¹⁷⁸ In a more recent study focusing specifically on divorce, it found that within the state of California, for example, “seventy percent of the approximately 200,000 divorce petitions filed in 2010 involved at least one self-represented litigant at the beginning of the case. For the same time period, by the time of judgment, eighty percent of divorce cases in California involved a self-represented party.”¹⁷⁹

For those who must proceed pro se, the absence of legal representation can effectively thwart their ability to divorce. Consider, for instance, a 2021 study that demonstrated just how profound the impact self-representation plays on whether a couple ultimately divorces.¹⁸⁰ There, researchers identified over 300 individuals from lower socioeconomic backgrounds in the Philadelphia area

176. *Id.*; see also Katherine Elizabeth Ulrich, *Insuring Family Risks: Suggestions for a National Family Policy and Wage Replacement*, 14 YALE J.L. & FEMINISM 1, 12 (2002) (noting that one category of “family risks” includes “employee absences to attend matters related to the transition from marriage to separation or divorce, such as relocating to a new residence, meeting with attorneys, or appearing in court for divorce or child custody proceedings”).

177. Tiffany Buxton, *Foreign Solutions to the U.S. Pro Se Phenomenon*, 34 CASE W. RESV. J. INT’L L. 103, 114 (2002).

178. Lloyd Cutsumpas & B. Moses Vargas, *Summary Dissolution: Is Connecticut’s Current System as Effective as It Should Be?*, 6 CONN. PUB. INT. L.J. 327, 332 (2007).

179. Munro et al., *supra* note 24, at 432 (footnote omitted); see also *infra* notes 327–328 and accompanying text.

180. See Greiner et al., *supra* note 20, at 1.

who were seeking a divorce.¹⁸¹ Those individuals were either randomly assigned to an attorney who would provide pro bono representation (i.e., the “treated group”) or were merely given “a referral to written instructions on how to obtain a divorce coupled with an offer to answer questions by telephone” (i.e., the “control group”).¹⁸² Eighteen months later, the researchers found that sixty-one percent of the treated group, but only thirty-six percent of the control group, had filed for divorce.¹⁸³ In addition, at the three-year mark, the researchers observed that, whereas fifty percent of the treated group had terminated their marriage, the same was true for only twenty-five percent of the control group.¹⁸⁴ Further, looking more closely at those in the control group who were successful in obtaining a divorce, the researchers found that “80% had obtained attorneys on their own or had cases that were initiated by the opposing spouse.”¹⁸⁵

Taken together, these studies make clear that despite the success of earlier legal attempts to expand access to divorce,¹⁸⁶ much more needs to be done. There are simply too many people who are being denied meaningful access to the legal remedy of divorce, and this group is primarily composed of the states’ most vulnerable citizens, including racial and ethnic minorities as well as “communities with very high unemployment, poverty, receipt of public assistance and percent of women never-married and very low median family income and education.”¹⁸⁷

III. THE PROBLEM: THE STATES’ INTEREST IN PROMOTING DIVORCE

As discussed above, studies have found that about fifteen percent of separated spouses remain permanently separated instead of obtaining a formal divorce.¹⁸⁸ For those who oppose making divorce more readily available, these statistics may not seem that problematic. For instance, as sociology professor W. Bradford Wilcox, who is also the director of the National Marriage Project at the University of Virginia, recently stated: “Marriage is an important factor in fostering better social, emotional, and economic outcomes for our kids,

181. *Id.* at 2.

182. *Id.* (“A total of 74 participants (23.8%) were randomized to the treated group, while 237 participants (76.2%) were randomized to the control group[.]”).

183. *Id.* (concluding that after eighteen months, a person in the treated group was almost 30% more likely to have a divorce on file than a person in the control group).

184. *Id.* (concluding that after three years, a person in the treated group was almost 30% more likely to have obtained a divorce than a person in the control group).

185. *Id.* at 5 (“Only 12 of the 237 control group participants (5%) managed to obtain a divorce within 36 months without having either 1) an attorney of record or 2) the opposing spouse initiate the divorce lawsuit.”).

186. *See supra* Subpart I.A.

187. Bramlett & Mosher, *supra* note 156, at 22.

188. *See supra* note 152 and accompanying text.

adults, and communities [and thus] I think we should be concerned about the erosion of civil marriage in the United States since the 1970s, when no-fault divorce took off.”¹⁸⁹ Comments like these echo similar concerns raised by legal commentators at the time states were first considering adopting no-fault divorce:

State regulation of the marital relationship has most often been justified in terms of social stability. Marital stability is viewed as a component of political and economic stability, the harmonious family unit seemingly the microcosmic analogue to an internally stable and thus externally invulnerable state. Carried to its logical conclusion, such a view dictates rigid state regulation and protection of the marital union, and the erection of substantial legal obstacles to marital dissolution.¹⁹⁰

Thus, some could view the current legal system, which effectively prevents a significant portion of the population from divorcing, as the system working precisely as it should.¹⁹¹

The problem, however, is twofold. First, those spouses who opt for informal separation because they are shut out of the divorce process are no longer functioning as a married couple, so those relationships do not advance the same policy interests the state has in promoting marriage.¹⁹² In addition, those individuals are now harmed since they continue to be legally connected to their spouses in ways that can be detrimental to their own self-interests—for example, as one person put it, “[o]nce you’re divorced, your ex can no longer ruin your credit.”¹⁹³ More significantly, however, divorce provides a sense of finality as it extinguishes any claim a former spouse would have to property that the other might acquire in the future.¹⁹⁴ Further, these individuals are now legally incapable of remarrying should they wish to do so.¹⁹⁵ Indeed, it was these same considerations that once propelled divorce seekers to engage in collusive perjury, migrate to states with more liberal divorce laws, and lobby legislatures to expand the bases for dissolving an unsuccessful marriage.¹⁹⁶

189. Khazan, *supra* note 1.

190. Zenor, *supra* note 25, at 649–50 (footnotes omitted).

191. See Khazan, *supra* note 1 (“Some experts argue that divorce should be hard, so that spouses try to reconcile.”).

192. See, e.g., Obergefell v. Hodges, 576 U.S. 644, 669 (2015) (“[J]ust as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union.”).

193. Khazan, *supra* note 1.

194. See, e.g., Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self over the Marital Community*, 81 B.U. L. REV. 59, 100 (2001) (“[P]roperty acquired after divorce is considered separate property to which an ex-spouse has no claim.”).

195. Joanna L. Grossman, *Thoroughly Modern Motherhood*, 74 SMU L. REV. 277, 278 (2021) (“Under the laws of bigamy . . . an individual can have only one spouse at a time.”).

196. See *supra* Subpart I.A.

Although the concerns that drive individuals to seek out divorce have been discussed by other scholars,¹⁹⁷ what has not been addressed—and indeed, what has often been denied with little to no analysis—is the states’ interest in encouraging divorce. That is not to suggest, of course, that the states would prefer that all married couples divorce; they would, of course, prefer that couples remain happily married.¹⁹⁸ At the same time, however, the states have long recognized that they too can benefit from divorce. As one court put it, when writing back in 1896:

As the state favors marriages for the reasons stated, so the state does not favor divorces, and only permits a divorce to be granted when those conditions are found to exist, in respect to one or the other of the married parties, which seem to the legislature to make it probable that the interests of society will be better served, and that parties will be happier, and so the better citizens, separate, than if compelled to remain together. The state allows divorces, not as a punishment to the offending party nor as a favor to the innocent party, but because the state believes its own prosperity will thereby be promoted.¹⁹⁹

Indeed, one discrete situation in which the states have an interest in actively promoting divorce is when the spouses decide to permanently end their relationship.²⁰⁰ When a couple decides that “happily ever after” is no longer possible, the state is harmed when a couple opts for permanent separation over formal divorce.²⁰¹ The remainder of this Part chronicles those harms and, as a result, why states must be mindful of laws that—no matter how well-intentioned—make it difficult for spouses to obtain a divorce.

197. As one publication recently described:

One of the less-touted, though crucial, benefits of marriage is access to divorce—a legal process with structured rights and obligations that, in addition to providing finality and closure to a relationship, can guide a couple’s decisions regarding custody and support of children, division of property, and payment of alimony, or, if the couple cannot agree, will guide a judge’s decisions with regard to those issues.

Armin U. Kuder & Marcia Kuntz, *Legal Challenges of Divorce for Same-Sex Couples*, in *INSIDE THE MINDS: UNDERSTANDING THE LEGAL ISSUES SURROUNDING SAME-SEX MARRIAGE: LEADING LAWYERS ON ADAPTING TO RECENT SUPREME COURT DECISIONS IMPACTING FAMILY LAW* 27, 28 (Aspatore 2013).

198. Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 345 (2011) (“The state has an interest in supporting family forms that further children’s well-being, such as stable marriages.”).

199. *Dennis v. Dennis*, 36 A. 34, 37 (Conn. 1896).

200. See Higdon, *supra* note 35, at 104 (noting that when it comes to couples that have decided to effectively end their marriage, “states have a strong interest in promoting divorce”).

201. *Id.* (noting the states’ interests and, correspondingly, the incentives I provide to encourage formal divorce).

A. Divorce Promotes Both Marriage and Remarriage

Marriage helps provide stability to adult relationships and protect the children of those relationships.²⁰² Thus, beyond its status as a fundamental right,²⁰³ marriage is an institution that American law does indeed strive to actively promote and encourage.²⁰⁴ Not surprisingly then, to make marriage a more attractive option, the law extends a number of advantages to married couples—advantages Justice Kennedy referred to in *Obergefell* as a “constellation of benefits”:²⁰⁵

These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers’ compensation benefits; health insurance; and child custody, support, and visitation rules. Valid marriage under state law is also a significant status for over a thousand provisions of federal law.²⁰⁶

In fact, according to Justice Kennedy, it is this panoply of rights that partly contributes to the very classification of marriage as a fundamental right: “The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.”²⁰⁷

Additionally, it is true that just as states aim to encourage marriage, they seek to discourage divorce.²⁰⁸ Recall, however, that in the not-too-distant past, states have intentionally made it much easier for couples to divorce.²⁰⁹ The most

202. See Maxine Eichner, *Marriage and the Elephant: The Liberal Democratic State’s Regulation of Intimate Relationships Between Adults*, 30 HARV. J.L. & GENDER 25, 44 (noting the “important role the state can play in creating a stable environment that fosters the well-being of children by formalizing and privileging relationships such as marriage”).

203. See *supra* notes 123–124 and accompanying text.

204. See *Huiet v. Atlanta Gas Light Co.*, 28 S.E.2d 83, 84 (Ga. Ct. App. 1943) (“Marriage is encouraged by the law, and every effort to restrain or discourage marriage by contract, condition, limitation, or otherwise, shall be invalid and void.” (quoting GA. CODE ANN. § 53-107 (1933) (current version at GA. CODE ANN. § 19-3-6 (2022))).

205. *Obergefell v. Hodges*, 576 U.S. 644, 670 (2015); see also Adam Chase, *Tax Planning for Same-Sex Couples*, 72 DENVER U.L. REV. 359, 359 (1995) (noting the “panoply of entitlements and privileges that come as part of the institution of marriage”).

206. *Obergefell*, 576 U.S. at 670 (citation omitted); see also Kara S. Suffredini & Madeleine V. Findley, *Speak Now: Progressive Considerations on the Advent of Civil Marriage for Same-Sex Couples*, 45 B.C. L. REV. 595, 598 n.10 (2004) (detailing some of the “1138 federal benefits, rights, and obligations” that flow from marriage).

207. *Obergefell*, 576 U.S. at 670.

208. See Note, *Interlocutory Decrees of Divorce*, 56 COLUM. L. REV. 228, 228 (1956) (“It is the policy of all states to encourage the continuance of the marital state and to discourage divorces.”).

209. See *supra* notes 92–95 and accompanying text; see also JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 291 (Kathleen Barry ed., 1991) (noting that since 1969, all state reforms related to marriage dissolution “have generally made divorce easier to obtain”).

notable example is the adoption of no-fault divorce.²¹⁰ The states did so because, somewhat ironically, this shift was necessary in order to promote marriage.²¹¹ With the sexual revolution, the stigma that accompanied cohabitation without marriage was greatly eroded, so much in fact that couples faced an increasing temptation to opt for more informal living situations.²¹² At the same time, this temptation to cohabit without marriage was even greater given how difficult it was to extricate oneself from an unsuccessful marriage.²¹³ As Richard Posner explains: “The more costly a mistake is, the less likely it is to be committed; and a mistake in choosing a spouse is more costly in a system that forbids divorce (or makes it very difficult or expensive) than in one that permits it.”²¹⁴ Thus, lawmakers realized that making divorce easier to obtain can actually encourage more couples to elect for marriage in the first place.²¹⁵

It bears noting, however, that the states’ interest in promoting marriage applies to *all* marriages, not just first marriages.²¹⁶ This point is an important one given that remarriage would be legally impossible without divorce. Because “monogamy is the controlling principle of Anglo–American marriage law,” currently no state permits a person to have more than one spouse at a given time.²¹⁷ Thus, divorce promotes subsequent marriages due to the simple fact that a married couple who decides to separate must first divorce before either can legally remarry. To incentivize that behavior even further, every state maintains criminal laws against bigamy, meaning that one who remarries

210. See *supra* notes 99–109 and accompanying text; see also Rebecca E. Silberbogen, Note, *Does the Dissolution of Covenant Marriages Mirror Common Law England’s Subordination of Women?*, 5 WM. & MARY J. WOMEN & L. 207, 224 (1998) (“Since the introduction of no-fault divorce, divorces are easier to obtain . . .”).

211. RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* 571–72 (1988) (describing no-fault divorce as resulting from “wide-sweeping liberalization of attitudes toward many institutions and forms of behavior that was characteristic of the 1960s and 1970s”).

212. See Symposium, *End No-Fault Divorce?*, FIRST THINGS 24 (1997) (“The states adopted no-fault divorce laws in the 1970s in an effort to bring legal norms into closer conformity with the more permissive extralegal norms.”). As Whitehead explains: “The divorce revolution was a cultural rather than legal phenomenon. It grew out of a historic transformation in ideas and practices regarding sex, marriage, and parenthood.” *Id.*

213. See Antony W. Dnes, *Cohabitation and Marriage*, in *THE LAW AND ECONOMICS OF MARRIAGE AND DIVORCE* 118, 129 (Antony W. Dnes & Robert Rowthorn eds., 2002) (“[T]he growth in cohabitation may be nothing more than a rational response to rather messy marital laws.”).

214. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 5.2, at 165 (Vicki Been et al. eds., Wolters Kluwer L. & Bus. in N.Y., 9th ed. 2014).

215. See Symposium, *supra* note 212, at 28 (“For a generation so worried and confused, the impact of fault law is more likely to discourage marriage than encourage it.”); see also Elizabeth S. Scott, *Rational Decisionmaking About Marriage and Divorce*, 76 VA. L. REV. 9, 13 (1990) (noting how fault-based divorce imposed “costs on divorce”).

216. See, e.g., Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 22 (2017) (including remarriage within the states’ “desire to promote marriage”); Barbara J. Redman, *Jewish Divorce: What Can Be Done in Secular Courts to Aid the Jewish Woman?*, 19 GA. L. REV. 389, 413 (1985) (“The state has a strong interest in encouraging remarriage.”).

217. HOMER H. CLARK, JR. & ANN LAQUER ESTIN, *CASES AND PROBLEMS ON DOMESTIC RELATIONS* 114 (7th ed. 2005).

without first divorcing a current spouse could be criminally prosecuted.²¹⁸ Simply put, “going through the formal divorce process is a condition precedent to the taking of a second wife or husband.”²¹⁹ Indeed, it was partly this principle that animated the Supreme Court’s decision in *Boddie*: “[W]e know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, *and more fundamentally the prohibition against remarriage*, without invoking the State’s judicial machinery.”²²⁰

Thus, states must remember that when divorce becomes more difficult to obtain, couples are more likely to not get married in the first place given that people tend to avoid entering situations that they may have difficulty exiting. In addition, more meaningful access to divorce increases the odds that those who have left unsuccessful marriages will formally terminate those relationships to remarry, thus giving legal effect to any subsequent relationships they may enter. For both of these reasons, the states’ interest in promoting marriage renders it imperative that states do more to facilitate divorce for those wishing to dissolve unsuccessful marriages.

B. Divorce Safeguards the Interests of Economically Weaker Spouses

One of the strongest policies underlying divorce law is “the protection of an economically vulnerable spouse from great financial hardship at the end of marriage.”²²¹ To understand this need, consider how divorce differs from other dissolutions like, for instance, those involving business partnerships. As Posner points out, unlike a business partnership, “the division of the marital income may not be determined by the relative value of each spouse’s contribution,”²²² the reason being that “each may derive utility from the consumption expenditures of the other.”²²³ For this and other reasons, divorce proceedings contain a number of safeguards that do not exist in proceedings to divide a business partnership:

218. See ROBERT L. MADDEX, *ENCYCLOPEDIA OF SEXUAL BEHAVIOR AND THE LAW* 36 (Diane Maddex ed., 2006) (“Bigamy is a crime in all states and the District of Columbia, with little variation among these laws.”); see also Maura Strassberg, *The Crime of Polygamy*, 12 *TEMP. POL. & C.R. L. REV.* 353, 420 (2003) (characterizing the Model Penal Code’s definition of bigamy as, essentially, “the practice of entering into a second purportedly legal marriage without ever legally dissolving an unsuccessful first marriage” (footnote omitted)).

219. *Thomas v. LaRosa*, 400 S.E.2d 809, 815 (W. Va. 1990).

220. *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971) (emphasis added); see also *supra* Subpart I.B.

221. Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 *YALE J.L. & FEMINISM* 229, 233 (1994).

222. POSNER, *supra* note 214, § 5.1, at 161; see also Ira Mark Ellman, *The Theory of Alimony*, 77 *CALIF. L. REV.* 1, 35 (1989) (“The complete elimination of alimony probably alone renders the partnership model unacceptable.”).

223. POSNER, *supra* note 214, § 5.1, at 161.

When a conventional partnership is dissolved, the assets of the partnership must be distributed among the partners, and it is the same with marriage. But determining the spouses' respective shares of the assets acquired by the household during the marriage is difficult. If the wife has had very little market income, all or most of the household's tangible assets will have been bought with the husband's money. Yet, his earning capacity may owe much to her efforts. She may have supported him while he was a student in law school or medical school, reducing her own consumption and also forgoing opportunities to increase her own earning capacity through advanced training.²²⁴

Despite these inherent difficulties, courts strive to ensure that the marital property is divided both equitably and in a way that “compensate[s] both parties . . . for their respective contributions.”²²⁵ In fact, the very structure of divorce proceedings aims to ensure that the rights and benefits of each former spouse are adequately protected.

First and foremost, as noted in the Introduction, no state permits couples to dissolve a marriage by informal means.²²⁶ Nor does any state appear to be moving in that direction,²²⁷ which is quite telling given the increasing amount of control states have given married couples over the terms of their marriages. As Professor Theodore F. Haas explains: “Private ordering of marital and postmarital relationships generally has been accepted with respect to certain incidents of those relationships—ownership of property and, to a lesser extent, support. However, divorce itself—the change of marital status—has remained a matter of public rather than private ordering.”²²⁸ In fact, even marriages entered into informally can only be dissolved by a formal divorce: “[I]f there is a valid common-law marriage, it cannot thereafter be dissolved except in the same manner as a valid ceremonial marriage—the parties themselves, for instance, cannot dissolve it by an agreement to do so, or by a denial that it occurred[.]”²²⁹

This limitation exists because public policy demands that divorces play out under the supervision of a court of law to ensure that each spouse's contributions to the marriage are fully considered and appropriately

224. *Id.* § 5.3, at 168.

225. Ann Laquer Estin, *Maintenance, Alimony, and the Rehabilitation of Family Care*, 71 N.C. L. REV. 721, 748 (1993).

226. Haas, *supra* note 141, at 881 n.13 (“[S]uch a method of divorcing is unknown to Anglo-American law . . .”); Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 287 n.156 (1998) (“There is no such thing as ‘common law divorce’ . . .”).

227. See Haas, *supra* note 141, at 881 n.13 (“There is no readily discernible trend either toward the reinstatement of common law marriage or toward the institution of common law divorce.”).

228. *Id.* at 880–81 (footnote omitted).

229. *Chivers v. Couch Motor Lines, Inc.*, 159 So. 2d 544, 550 (La. Ct. App. 1964) (citation omitted).

protected.²³⁰ In fact, courts are so opposed to the notion of informal divorce that many have outright refused any holding that, in the court's opinion, would even approximate the recognition of such an option. For instance, in *In re Marriage of Brooks*,²³¹ Harry and Maureen Brooks married in 1950, separated in 1965, and officially divorced in 1978.²³² During the divorce proceedings, Harry objected to the court's classifying the property he had acquired after their separation as "marital property."²³³ The court, however, rejected his argument: "For us to hold that a *de facto* termination extinguishes marital property rights would create, in effect, 'common law divorce.'"²³⁴ According to the court, "[l]aw and policy will not support such a result."²³⁵

Cases like *Brooks* offer a glimpse into why the law refuses to sanction informal divorce. Aside from the evidentiary benefit that comes from the existence of a formal divorce decree, family law, in general, is reluctant to allow divorcing couples to make decisions regarding property distribution on their own—as they would, out of necessity, have to do in an informal divorce—because "[d]espite the resemblance that marriage bears to a business partnership, the marital relationship is not . . . an unalloyed example of free-market principles."²³⁶ Indeed, courts recognize that people in an emotional relationship with one another are not dealing at arm's length, so the presence of the court is required in order to help safeguard the economic interests of the two parties.²³⁷

A second way in which divorce law has been structured to protect the rights and benefits of divorcing spouses resides in the court's treatment of settlement agreements. As an initial matter, courts prefer that divorcing couples come to an agreement on their own regarding the terms of the divorce.²³⁸ If the parties can themselves agree, then the divorce is less likely to be acrimonious while the final product is more likely to embody a more workable solution than one the court might craft based on its comparatively limited knowledge of the parties.²³⁹

230. See Munro et al., *supra* note 24, at 442 ("[Otherwise,] the parties will be left to their own devices and may find themselves with an agreement that sounded fair at the time that they signed, but in reality leaves one party with significantly more assets than the other party.").

231. *In re Marriage of Brooks*, 486 N.E.2d 267, 267 (Ill. App. Ct. 1985).

232. *Id.* at 269.

233. *Id.* at 271.

234. *Id.*

235. *Id.*

236. POSNER, *supra* note 214, § 5.2, at 164; see also Louis E. Wolcher, "The Enchantress" and Karl Polanyi's *Social Theory*, 51 OHIO ST. L.J. 1243, 1261 (1990) ("Marriage in its typical form is arguably one of the most emotional and relational, and least rational and individualistic, of all human transactions.").

237. See *supra* notes 221–223 and accompanying text.

238. Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 14 (2008) ("Generally, courts encourage divorcing couples individually to craft separation agreements regarding the incidents of divorce (except agreements involving child support, visitation and custody) . . .").

239. See, e.g., *DeLorean v. DeLorean*, 511 A.2d 1257, 1259 (N.J. Super. Ct. Ch. Div. 1986) ("[C]ourts should 'welcome and encourage such agreements at least 'to the extent that the parties have developed

Thus, states have adopted a number of laws aimed at incentivizing these agreements. Under Tennessee law, for instance, a divorcing couple is not entitled to a no-fault divorce unless they first resolve via a settlement agreement all issues relating to “the custody and maintenance of any children of that marriage and [to] the equitable settlement of any property rights between the parties.”²⁴⁰

Nonetheless, recognizing the possibility of overreaching and even coercion, the courts do not give couples unfettered discretion when it comes to setting the terms of those agreements. Instead, “[a]t the final hearing[,] most jurisdictions require the judge to review settlement agreements for unfairness or unconscionability.”²⁴¹ As Professor Sally Burnett Sharp explains:

[I]t is commonly said that a settlement agreement, like any other contract, must be free from any fraud, duress, undue influence, or overreaching of any kind. Most states, however, impose as an additional safeguard the requirement that an agreement be submitted to a court for its approval and that it cannot be merged or incorporated into the final decree without such approval. Judicial approval, at least in theory, will be withheld unless the court finds that the proposed agreement is equitable, or fair and reasonable, or not unconscionable.²⁴²

Although there exists some debate as to just how meaningful these safeguards really are,²⁴³ their existence nonetheless points to the law’s awareness of the harms that can result from a lack of judicial oversight during divorce proceedings. As one court put it: “[A]n agreement in anticipation of divorce is not the same as any ordinary contract. [Although] [p]ublic policy favors parties settling their own disputes in a divorce, . . . the family court has a statutorily authorized role to play in divorce proceedings to assure a fair and equitable dissolution of the state-sanctioned institution of marriage.”²⁴⁴

Courts take this role so seriously that even when both sides are represented by counsel, a court will nonetheless set aside a settlement agreement found to be inequitable to one of the parties. For example, in *Bellow v. Bellow*,²⁴⁵ the court set aside a settlement agreement that included a number of errors regarding the

comprehensive and particularized agreements responsive to their peculiar circumstances[.]” (quoting *D’Onofrio v. D’Onofrio*, 491 A.2d 752, 755 (N.J. Super. Ct. App. Div. 1985))).

240. TENN. CODE ANN. § 36-4-103(b) (2017).

241. Penelope Eileen Bryan, *Women’s Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153, 1238 (1999).

242. Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1407–08 (1984) (footnotes omitted).

243. *Id.* at 1409 (“[J]udicial review requirements as currently applied by courts fail in any event to provide a meaningful review for either substantive or procedural fairness.”); see also Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. REV. 493, 569 (1989) (“[R]eview of divorce agreements often has been perfunctory. Evidence of patent misconduct, such as fraud or concealment, is generally necessary to attract judicial intervention.” (footnote omitted)).

244. *Pouech v. Pouech*, 904 A.2d 70, 77–78 (Vt. 2006).

245. *Bellow v. Bellow*, 352 N.E.2d 427, 427 (Ill. App. Ct. 1976).

husband's property, despite the fact the wife had approved those terms.²⁴⁶ In so ruling, the court noted:

In reaching our decision we are aware the plaintiff had the benefit of able counsel all through the proceedings[,] [and] [w]e are reluctant to overturn the property settlement voluntarily entered into Nevertheless, we find there is evidence to support the judgment of the trial court [that, as drafted, the settlement agreement leads to an “inequitable result”]²⁴⁷

Coupled then with the absence of informal divorce, the fact that any agreement arrived at by the parties is subject to independent judicial review reveals the depths to which the state views divorce as an essential tool for protecting economically weaker spouses. These mechanisms not only safeguard the interests of the divorcing parties, but they also incentivize participants to engage in the formal divorce process in the first place. After all, individuals who question whether they are leaving the marriage with everything to which they are entitled would be tempted to invoke the protections of the court to receive not only an answer to that question but also an enforceable order to that effect. In contrast, those who simply elect to go their separate ways may do so without the property to which they are entitled—a scenario the states have a strong interest in preventing.

C. Divorce Protects Subsequent Spouses

To understand how divorce protects subsequent spouses, it is important to first acknowledge the pressures parties face to eschew divorce altogether. As discussed earlier, “owing to strained finances and a lack of legal assistance,” some individuals “often forgo divorce and dissolve their marriages informally.”²⁴⁸ Or, as one commentator described it:

Historically, the cost of lawyers and court fees, the bewildering jargon of “complaints” and “cross-complaints,” the time-consuming and seemingly complex legal process, and the popular association of courts with crime, have served to dissuade the poor from seeking legal divorce. At the point of breakup it often seems much easier simply to separate—or for the man to desert—than to go through the hassles and traumas of a legal divorce.²⁴⁹

Further, although no state currently permits “common law divorce,” there is absolutely nothing in the law preventing married couples from simply going

246. *Id.* at 430–31 (noting that the agreement failed to refer to a \$10,000 account that the husband had withdrawn, incorrectly classified a jointly owned apartment as the separate property of the husband, and estimated the husband's income to be \$30,000 when it was in fact \$150,000).

247. *Id.* at 432 (citing *Bilsky v. Bilsky*, 309 N.E.2d 697 (Ill. App. Ct. 1974)).

248. LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT: SPOUSES, LOVERS, AND THE LAW* 206 (1981).

249. *Id.* at 194 (“Thus[,] common-law divorce has always been most prevalent among poverty subcultures.”).

their separate ways without ever officially divorcing. In this context, then, informal permanent separation is often dubbed “the ‘poor man’s divorce,’”²⁵⁰ given its appeal to those for whom a divorce proceeding is simply too costly.

As noted earlier, however, one of the most powerful incentives parties face to instead obtain a formal divorce comes from the rule that a person can only have one spouse at a time.²⁵¹ Thus, parties may informally separate, but once either of them wishes to remarry, he or she must first obtain a divorce from the first spouse. Despite that incentive, however, when it comes to the “significant segment of our society [who] utilizes desertion as a means of dissolving marriages,”²⁵² some of them will nonetheless “remarry” even though they remain legally wed to another. Indeed, as one commentator points out, when it comes to using desertion as a form of informal divorce, “[t]he real problem develops when . . . they decide to remarry and want to make the second marriage work.”²⁵³

Of course, in the absence of a divorce, a subsequent marriage is invalid.²⁵⁴ Also, for the party who had not yet divorced his or her first spouse, the subsequent marriage would likewise qualify as bigamous, exposing that person to potential criminal liability.²⁵⁵ However, for the subsequent (i.e., innocent) spouse, the consequences of a void marriage could be even more dire given that this person would then be left without any of the various rights and safeguards that accompany marriage.²⁵⁶ After all, “[t]he invalid marriage disqualifies the second spouse from the default protection marriage provides a (legitimate) surviving spouse, while the lawful marriage simultaneously protects the valid marriage partner’s interest [(i.e., the first spouse’s interest)] and prevents the bigamous partner from profiting from the illegitimacy of the marriage.”²⁵⁷

Far from being just a theoretical problem, various courts have routinely confronted cases that raise these very issues. One legal commentator even described this scenario as the “not so uncommon American story . . . of the man who marries, deserts his wife without judicial dissolution of the marriage[.]”

250. Sidney B. Jacoby, *Legal Aid to the Poor*, 53 HARV. L. REV. 940, 957 (1940) (“[D]esertion is called in popular speech the ‘poor man’s divorce’ due to the practical inability of many poor persons to obtain a divorce.”).

251. See *supra* notes 217–219 and accompanying text.

252. E. Hunter Taylor, Jr., *Repeal of the Presumption of the Validity of Subsequent Marriages: Another Irrational Step Toward Increasing the Welfare Roles*, 21 MERCER L. REV. 465, 479 (1970).

253. WEITZMAN, *supra* note 248, at 194.

254. See, e.g., *Dorsey v. Dorsey*, 66 So. 2d 135, 140 (Ala. 1953) (citing *Sloss-Sheffield Steel & Iron Co. v. Watford*, 17 So. 2d 166 (Ala. 1944)) (“A woman can have but one lawful husband living, and so long as he is alive and the marriage bond remains in full force, all her subsequent marriages, whether meretricious or founded in mistake and at the time supposed to be lawful, are utterly null and void.”).

255. See *supra* note 218 and accompanying text.

256. See *supra* notes 205–207 and accompanying text.

257. Lynne Marie Kohm, *Why Marriage Is Still the Best Default in Estate Planning Conflicts*, 117 PENN. ST. L. REV. 1219, 1231 (2013).

and then takes a new wife.”²⁵⁸ Consider, for instance, *Chandler v. Central Oil Corp.*,²⁵⁹ in which the court had to decide which woman was the legal wife of the deceased husband. In *Chandler*, the man married one woman in 1964 and another in 1972.²⁶⁰ Although he did divorce his first wife, he failed to do so until 1973—a year after entering into his second “marriage.”²⁶¹ He then married a third woman in 1985; yet, he did so without ever having divorced his second wife.²⁶² Further complicating the case was the fact that he had children with two of the women, raising concerns that some of those children might be declared “illegitimate” should their mothers not be recognized as having been legally married at the time of the child’s birth.²⁶³ A more recent case from 2005 raised similar issues for a man who lost his life in the attacks on the World Trade Center in 2001.²⁶⁴ The man had immigrated to the United States, leaving behind a wife in South America.²⁶⁵ Although he never filed for divorce and even continued to financially support his wife, he “married” another woman while living in New York.²⁶⁶ After his death, both women came forward claiming to be his spouse and seeking workers’ compensation death benefits.²⁶⁷ In both of these cases (and the others like them),²⁶⁸ the courts found themselves in the delicate position of having to adjudicate the identity of the person’s legal spouse, understanding that the losing “spouse” could be left with no legal protections whatsoever.

In light of the harms that could flow to the subsequent spouses in cases like these, the law has developed a number of doctrines—for instance, the last-in-time marriage presumption,²⁶⁹ marriage by estoppel,²⁷⁰ and putative

258. Taylor, *supra* note 252, at 465.

259. *Chandler v. Central Oil Corp.*, 853 P.2d 649 (Kan. 1993), *disapproved of by In re B.D.-Y.*, 187 P.3d 594 (Kan. 2008).

260. *Id.* at 651.

261. *Id.*

262. *Id.* Thus, the second wife argued that she was the legal spouse given that the husband “lacked capacity to enter into the subsequent marriage with [third wife] because his prior common-law marriage to [second wife] had not been dissolved.” *Id.*

263. *Id.*; *cf.* *Fowler v. Tex. Expl. Co.*, 290 S.W. 818, 822 (Tex. Civ. App. 1926) (noting that when determining which marriage is valid, the court should consider what “is necessary to protect the legitimacy of children”).

264. *Gomez v. Windows on World*, 804 N.Y.S.2d 849, 850 (N.Y. App. Div. 2005).

265. *Id.* at 850.

266. *Id.* at 851–52 (“[First wife] affirmatively testified that she and decedent never divorced and that decedent continued to provide for her and their three children following his emigration.” (citation omitted)).

267. *Id.* at 850.

268. *See, e.g.*, *United States v. Burns*, 95 F. Supp. 628 (E.D. Ark. 1951). For a list of cases raising similar facts, see Annotation, *Presumption as to Validity of Second Marriage*, 14 A.L.R.2d § 17–18 (1950).

269. *See generally* Peter Nash Swisher & Melanie Diana Jones, *The Last-in-Time Marriage Presumption*, 29 FAM. L.Q. 409, 409 (1995) (“The last-in-time marriage presumption is based upon ‘one of the strongest presumptions known to the law’ that an existing marriage, once shown, is valid.”).

270. *See, e.g.*, Michael J. Higdon, *(In)Formal Marriage Equality*, 89 FORDHAM L. REV. 1351, 1382 (2021) (“Marriage by estoppel prohibits a party from using an invalid divorce to void a subsequent marriage.”).

marriage²⁷¹—aimed at trying to protect those who “marry” a person who is still legally married to someone else. Nonetheless, the protections they provide are far from perfect given they are limited as to when and how far a court can utilize them, not to mention the fact that no guarantees exist that a court will even apply them in the first place.²⁷² Thus, from the states’ perspective, divorce proceedings not only protect the rights and obligations of divorcing spouses, but they also represent the best means of ensuring that future spouses will enjoy similar safeguards.

D. *Divorce and the States’ Role as Parens Patriae*

Although the focus here is more on the states’ interest in promoting divorce and less so on the interests of the spouses themselves, the foregoing makes clear that these two interests are far from mutually exclusive. That overlap becomes even stronger, however, when it comes to the states’ role as *parens patriae*, where the states have the “power and responsibility, beyond [their] police power over all citizens, to protect, care for, and control citizens who cannot take care of themselves.”²⁷³ Divorce frequently implicates this doctrine, especially when it comes to the states’ interest in protecting marital children and those for whom divorce is necessary to protect a spouse’s health and safety.²⁷⁴ Thus, ensuring meaningful access to marital dissolution directly advances the states’ strong interest in protecting both of these classes of people.

As an initial matter, divorce frequently encompasses a number of legal determinations beyond the mere legal dissolution of the marriage. Chief among those other layers of “divisible divorce”²⁷⁵ are determinations impacting the support and custody of the “over one million of our children each year [who]

271. See generally Christopher L. Blakesley, *The Putative Marriage Doctrine*, 60 TUL. L. REV. 1 (1985) (detailing the historical evolution of the doctrine and its basic components).

272. See, e.g., *Guzman v. Alvarez*, 205 S.W.3d 375, 380 (Tenn. 2006) (noting that marriage by estoppel “is applicable only in exceptional circumstances” (citing *Martin v. Coleman*, 195 S.W.3d 757, 760 (Tenn. 2000))); *Dolan v. Celebrezze*, 381 F.2d 231, 236 (2d Cir. 1967) (explaining that the last-in-time marriage presumption “is not resorted to unless the actual evidence is inadequate” for determining which is the legal marriage); *Williams v. Williams*, 97 P.3d 1124, 1130 (Nev. 2004) (allowing a putative spouse to recover some but not all marital benefits).

273. Natalie Loder Clark, *Parens Patriae and a Modest Proposal for the Twenty-First Century: Legal Philosophy and a New Look at Children’s Welfare*, 6 MICH. J. GENDER & L. 381, 382 (2000).

274. See, e.g., Philip F. Schuster II, *Constitutional and Family Law Implications of the Sleeper and Troxel Cases: A Denouement for Oregon’s Psychological Parent Statute?*, 36 WILLAMETTE L. REV. 549, 643 n.316 (2000) (“[W]hen parties decide to divorce . . . they necessarily involve the state as *parens patriae*.”).

275. Characterizing divorce as “divisible” simply means that a particular state may not be able to adjudicate all of the issues—including dissolution, property division, child custody, child support, etc.—arising out of a divorce proceeding absent jurisdiction over both parties. This concept of divisible divorce was first articulated by the Court in *Estin v. Estin*, in which it held that a husband who obtained an ex parte divorce in Nevada could not use the existence of that divorce to avoid an alimony order his wife had obtained earlier in New York. *Estin v. Estin*, 334 U.S. 541, 549 (1948) (“The result in this situation is to make the divorce divisible—to give effect to the Nevada decree insofar as it affects marital status and to make it ineffective on the issue of alimony.”).

are affected by divorce.”²⁷⁶ Recognizing that those children are particularly vulnerable during the time their parents are planning to go their separate ways, the state—acting as *parens patriae*—plays an active role in monitoring their interests during the divorce proceedings. After all, “[t]he state’s obligation to protect its youngest and most helpless citizens is critical, as the very survival and prosperity of any nation depends upon the health and well-being of its children.”²⁷⁷ Those concerns are particularly acute when it comes to divorce given that “we do not want to economically punish children for their parents’ divorce.”²⁷⁸ As one commentator explained: “The relationship between children and parents is a vital one that is accorded much protection by the courts [and thus] when disrupted by divorce, is subject to control by the state, due to the state’s *parens patriae* interest in protecting children when their physical or mental health is jeopardized.”²⁷⁹

Accordingly, by ensuring that separating couples utilize formal divorce procedures, the state is in a much better position to review the decisions being made concerning those children’s futures and whether those decisions are indeed in the children’s best interests. In this sense, legal divorce “serves to reinforce informal social norms, weakened in the context of divorce, by directing parents to fulfill their prescribed responsibilities despite the breakdown of the marriage.”²⁸⁰ When courts feel that these responsibilities are not being met, they are empowered to order alternative arrangements regarding custody and support.²⁸¹ Not surprisingly, then, divorce typically becomes more complicated when children are involved, and the process often takes longer because more is required of the parents as they contend with such things as mandatory parenting plans and child support guidelines.²⁸²

Further, beyond the dissolution itself, divorce proceedings open the door to continued monitoring by the state given that “in most states the court under its *parens patriae* authority retains jurisdiction over the children of divorce until

276. Margaret “Pegi” Price, *Special Needs and Disability in Custody Cases: The Perfect Storm*, 46 FAM. L.Q. 177, 178 (2012).

277. Karin Carmit Yefet, *Unchaining the Agunot: Enlisting the Israeli Constitution in the Service of Women’s Marital Freedom*, 20 YALE J.L. & FEMINISM 441, 486 (2009).

278. Jane Rutheford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539, 572 (1990).

279. Mark D. Matthews, *Curing the “Every-Other-Weekend Syndrome”: Why Visitation Should Be Considered Separate and Apart from Custody*, 5 WM. & MARY J. WOMEN & L. 411, 421 (1999) (footnote omitted).

280. Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CALIF. L. REV. 615, 669 (1992).

281. Int. of A. L. S., 829 S.E.2d 900, 904 (Ga. Ct. App. 2019) (noting “the power of our courts to reject inadequate, overreaching, unconscionable or otherwise invalid settlement agreements of child custody disputes” (quoting *Wright v. Burch*, 771 S.E.2d 490, 494 (Ga. Ct. App. 2015))).

282. See Peter E. Bronstein, *The Changing Face of Marriage and Divorce in New York*, in INSIDE THE MINDS, NEW YORK FAMILY LAW STRATEGIES: LEADING LAWYERS ON OVERSEEING MEDIATION, SETTling CHILD CUSTODY ISSUES, AND MANAGING DIVORCE PROCEEDINGS 73, 77 (Aspatore 2009) (“A divorce without children is like a checkers game on one level. Once you add children, you suddenly have a three-dimensional checkers game, which gets much more complicated.”).

their attainment of majority.”²⁸³ For this reason, even when divorced parents seek to modify support or custody determinations, state law provides that any such modification requires court approval.²⁸⁴ However, these state interests would be drastically undermined should couples elect to permanently separate in lieu of divorce. Although determinations regarding child custody and support can and do exist outside of marriage,²⁸⁵ it is often the process of divorce that brings those issues to the court’s attention.²⁸⁶ Thus, for married couples who permanently separate without a legal dissolution, the children of those marriages could easily escape the state’s notice and—alongside it—the state’s ability to help safeguard the children’s best interests.

Although children are the primary subjects of the state’s interest as *parens patriae*, they are not the only ones the state has an interest in protecting when it comes to divorce. Although the doctrine of *parens patriae* might sometimes be regarded as merely the state’s right to intervene in family affairs for purposes of protecting children, it is more broadly understood as both the right and the duty²⁸⁷ of the state “to protect the interests of *all* vulnerable citizens.”²⁸⁸ As discussed earlier, encouraging divorce permits the state to protect the economic interests of both current and subsequent spouses.²⁸⁹ More importantly, however, studies have revealed that divorce likewise benefits the health and safety of “particularly defenseless members of society.”²⁹⁰

Chief among that group are victims of domestic violence. As the Supreme Court of Iowa stated in 2001: “[T]he State’s interest in protecting victims of domestic abuse is equal to, if not greater than, its interest in actions determining child custody or terminating parental rights because it involves the safety of the

283. Richard K. Schwartz, *A New Role for the Guardian Ad Litem*, 3 OHIO ST. J. ON DISP. RESOL. 117, 170 (1987).

284. See, e.g., *Lownds v. Lownds*, 551 A.2d 775, 779 (Conn. Super. Ct. 1988) (“A support order can be modified only by the court . . . The court is vested with the ultimate responsibility for determining and safeguarding the best interests of children.” (citations omitted)).

285. See Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1404 (2001) (“[T]he framework of legal rules governing paternity determination, child support, and custody for nonmarital children has grown enormously, and under those rules the parental rights and obligations of unmarried biological parents are now largely equivalent to those of married parents.”).

286. See, e.g., Claudia Wright, *Representation of Children in a Unified Family Court System in Florida*, 14 U. FLA. J.L. & PUB. POL’Y 179, 180 (2003) (“Families in trouble come to the attention of the courts in a variety of ways: through divorce, domestic violence, abandonment or abuse of children, or misbehavior of children.”).

287. See Mary Koll, *Growth, Interrupted: Nontherapeutic Growth Attenuation, Parental Medical Decision Making, and the Profoundly Developmentally Disabled Child’s Right to Bodily Integrity*, 2010 U. ILL. L. REV. 225, 244 (“*Parens patriae* confers on the state a ‘right, indeed, a duty, to protect children’ by intervening ‘in family matters to safeguard the child’s health.’”).

288. Tammy L. Henderson & Patricia B. Moran, *Grandparent Visitation Rights: Testing the Parameters of Parental Rights*, 22 J. FAM. ISSUES 619, 621 (2001) (emphasis added); see also Koll, *supra* note 287, at 244 (“[P]arens patriae . . . empowers courts to make decisions that are in the best interests of vulnerable persons.”).

289. See *supra* Parts III.B.–C.

290. Guidice, *supra* note 118, at 814.

protected parties.”²⁹¹ Although that interest is what drives laws targeting domestic violence,²⁹² studies have also revealed the importance that access to divorce plays in protecting these victims.²⁹³ Most notably, in their landmark study from 2006, economists Betsey Stevenson and Justin Wolfers found “a striking decline in female suicide and domestic violence rates arising from the advent of unilateral divorce.”²⁹⁴ Specifically, the study found that, after the adoption of no-fault divorce, there was “a 8–16 percent decline in female suicide, roughly a 30 percent decline in domestic violence for both men and women, and a 10 percent decline in females murdered by their partners.”²⁹⁵ The likely explanation for these statistics is that improved access to divorce makes it easier for spouses to escape toxic relationships given that “[n]o-fault grounds for divorce grants an individual the authority to dissolve his or her marriage without the consent of their spouse.”²⁹⁶

However, as discussed earlier, even though every state has long since moved to no-fault divorce,²⁹⁷ recent studies make clear that many Americans are still being effectively denied access to formal divorce.²⁹⁸ Thus, given the strong interests the states have when it comes to encouraging divorce among those couples that have decided to effectively end their marriages, states must rethink current divorce law by looking at it more through the lens of these state interests with the goal of making judicial divorce more accessible and, by extension, more inclusive.

IV. SUGGESTED REFORMS

The Supreme Court has made clear that states cannot take actions that effectively bar some individuals from obtaining a divorce.²⁹⁹ Although this Article is not arguing that any state has gone so far as to violate this constitutional guarantee, the studies detailed earlier make clear that many

291. Bartsch v. Bartsch, 636 N.W.2d 3, 9 (Iowa 2001).

292. Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 855 (2005) (“[D]omestic violence laws aim to protect the vulnerable . . .”).

293. See, e.g., Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 872 (“This ability to break the marital bond is not only consistent with liberal philosophy, but it is also integral to preventing the worst forms of marital abuse and unhappiness.”).

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

295. *Id.* at 267.

296. Ali Kunen, *Divorce and Domestic Violence in the United States: A Focus on New York State’s Adoption of No-Fault Legislation and Its Impact on the Incidence of Domestic Violence*, 11 CARDOZO PUB. L. POL’Y & ETHICS J. 353, 381 (2013); see also Stevenson & Wolfers, *supra* note 294, at 286 (noting that “[c]hanges in divorce law led to one spouse being able to obtain a divorce without his or her partner’s consent”).

297. See *supra* notes 115–119 and accompanying text.

298. See *supra* Part II.

299. See *supra* Subpart I.B.

people still lack meaningful access to divorce,³⁰⁰ and that reality threatens a number of important state interests.³⁰¹ What follows then are three suggestions on ways in which the states might combat this problem to better neutralize those potential harms: (1) states should make no-fault divorce truly unilateral; (2) states should increase legal aid for divorce seekers who cannot afford representation; and (3) states should adopt some form of summary dissolution.

Before getting into those three discrete areas, however, a more global comment is warranted—one directed at the disturbing revelation that a larger percentage of those being denied access to divorce are racial and ethnic minorities. As noted earlier, Black people, Indigenous people, and people of color (collectively, “BIPOC”) are less likely to divorce due largely to the economic disadvantages they face as a result of systemic racism.³⁰² Thus, although the suggestions that follow can help ameliorate this consequence of systemic injustice, this Article in no way suggests they offer remedies “in which racial discrimination would be eliminated root and branch.”³⁰³ Instead, as states consider implementing the specific steps below, they must also be mindful of how these statistics further underscore the need for large-scale reform aimed at addressing systemic racism and the numerous harms this discrimination has produced.³⁰⁴

A. *Ensure Unilateral Access to No-Fault Divorce*

In most states, no-fault divorce essentially operates as unilateral divorce. As one commentator describes, “[m]odern divorce law is not only no-fault, it is also unilateral. In addition to not having to prove grounds, either spouse can obtain a divorce without the other’s consent.”³⁰⁵ Another commentator has described current divorce law as “unilateral no-fault divorce, which exists de jure in most states, and de facto in all states.”³⁰⁶ These descriptions, however, are not entirely accurate. Indeed, a handful of states have passed statutes that expressly condition no-fault divorce on the consent of the other party. As a result, those who live in these states have a much harder time exiting a marriage, making it more likely they may instead opt to permanently separate and thus implicate the numerous state harms outlined above.

300. See *supra* Part II.

301. See *supra* Part III.

302. See *supra* notes 156–and accompanying text.

303. *Green v. Cnty. Sch. Bd.*, 391 U.S. 430, 438 (1968) (citations omitted).

304. See Natalie Gomez-Velez, *Reimagining Public Education Equity After COVID-19: Will Public Voices from New York’s Epicenter Be Heard over the Siren Song of Billionaires?*, 48 *FORDHAM URB. L.J.* 313, 333–34 (2021) (describing how “the United States [is] experienc[ing] a societal reckoning about deep and longstanding harms associated with inequality and systemic racism”).

305. Laufer-Ukeles, *supra* note 47, at 220 (footnote omitted).

306. Lynn D. Wardle, *Divorce Reform at the Turn of the Millennium: Certainties and Possibilities*, 33 *FAM. L.Q.* 783, 783 (1999) (emphasis omitted).

Consider, for instance, the law of Tennessee, which allows divorce on the no-fault ground of “[i]rreconcilable differences between the parties.”³⁰⁷ Like many states, however, Tennessee has also retained fault-based divorce, listing thirteen specific grounds.³⁰⁸ However, as divorce seekers in the state consider whether to proceed on fault or no-fault grounds, there is an important statutory qualification that they must keep in mind:

No divorce shall be granted on the ground of irreconcilable differences unless the court affirmatively finds in its decree that the parties have made adequate and sufficient provision by written agreement for the custody and maintenance of any children of that marriage and for the equitable settlement of any property rights between the parties . . . If there has been a contest or denial of the grounds of irreconcilable differences, no divorce shall be granted on the grounds of irreconcilable differences.³⁰⁹

Thus, should the parties be unable to agree on those matters, the divorce must proceed as a fault-based action. Mississippi takes a similar approach, providing that “[d]ivorce from the bonds of matrimony may be granted on the ground of irreconcilable differences, but only upon the joint complaint of the husband and wife.”³¹⁰ Likewise, a South Dakota statute mandates that “[t]he court may not render a judgment decreeing the legal separation or divorce of the parties on the grounds of irreconcilable differences without the consent of both parties unless one party has not made a general appearance.”³¹¹ Accordingly, when it comes to divorce in states like these, “fault grounds continue to dominate.”³¹²

Such restrictions are problematic in that they revive the very harms that prompted states to move to no-fault divorce over fifty years ago,³¹³ making access to divorce much more tenuous for a large number of present-day litigants. Indeed, divorce seekers in these more restrictive states could effectively be denied the very opportunity to divorce if their spouse will not consent and they are then unable to satisfy one of the enumerated grounds for fault. Even if they could satisfy the fault requirement, they are then forced to adopt a more adversarial posture vis-à-vis their spouse, something that—as

307. TENN. CODE ANN. § 36-4-101(a)(14) (2017).

308. *Id.* § 36-4-101(a); see also Suzanne A. Kim & Edward Stein, *Gender in the Context of Same-Sex Divorce and Relationship Dissolution*, 56 FAM. CT. REV. 384, 386 (2018) (noting that “the majority of jurisdictions retain fault grounds as a pathway to divorce”).

309. TENN. CODE ANN. § 36-4-103(b), (e) (2017).

310. MISS. CODE ANN. § 93-5-2 (2021).

311. S.D. CODIFIED LAWS § 25-4-17.2 (1992).

312. Karin Carmit Yefet, *Divorce as a Formal Gender-Equality Right*, 22 U. PA. J. CONST. L. 793, 818 (2020).

313. See *supra* notes 92–104 and accompanying text; see also Kerry Abrams, *Family History: Inside and Out*, 111 MICH. L. REV. 1001, 1017–18 (2013) (“[W]e have no-fault divorce today because people want it.”).

noted earlier³¹⁴—does not lend itself to a beneficial relationship between the spouses post-divorce.

Further, fault-based divorce is legally more complicated, more expensive, and much less protective of marital privacy—concerns that all led to the promulgation of no-fault divorce in the first place.³¹⁵ In terms of the added complexity, Professor Deborah Bell has noted that “[p]roving fault-based grounds is a more complicated divorce process than no-fault divorce. The petitioner must understand the varied, complex fault-based grounds for divorce, the elements of each ground, the evidence that will satisfy each element, and how to present the proof.”³¹⁶ In turn, because it is more complicated, fault-based divorce “is far more expensive to obtain because of the greater amount of litigation that it entails.”³¹⁷ Finally, this litigation comes at the expense of marital privacy, with fault-based proceedings leading to “every aspect of life being examined and the courtroom being turned into a forum to air dirty laundry.”³¹⁸ For those reasons, critics have long concluded that “[e]nding a marriage could be a complicated, embarrassing, and expensive undertaking in the era of fault-based divorce”³¹⁹—and, as noted earlier, for victims of domestic violence, the availability of no-fault divorce can even have significant impacts on health and safety.³²⁰

The fact that these states would condition no-fault divorce on spousal consent not only resurrects those earlier concerns but, more to the point of this Article, increases the odds that a couple may elect informal separation over formal divorce, thus undermining the states’ interests outlined above.³²¹ To understand why, recall the studies mentioned earlier that found one of the reasons individuals forgo formal divorce proceedings is because the process is already too costly, forcing many divorce seekers to try and navigate the complex legal landscape pro se.³²² Although many of these studies were not state-specific, they all took place well after the no-fault revolution and at least one of them took place in Pennsylvania,³²³ which does permit unilateral no-fault divorce.³²⁴ Thus, the fact that the complexity and expense of unilateral divorce—even when it is a feasible option—can foreclose some from pursuing

314. See *supra* notes 112–113 and accompanying text.

315. See *supra* notes 110–114 and accompanying text.

316. Deborah H. Bell, *The Cost of Fault-Based Divorce*, 82 MISS. L.J. SUPRA 131, 135 (2013).

317. Sanders, *supra* note 94, at 436 n.172.

318. Elizabeth Horowitz, *The “Holy” Bonds of Matrimony: A Constitutional Challenge to Burdensome Divorce Laws*, 8 U. PA. J. CONST. L. 877, 890 n.98 (2006).

319. Nicholas H. Wolfinger, *The Mixed Blessings of No-Fault Divorce*, 4 WHITTIER J. CHILD & FAM. ADVOC. 407, 408 (2005).

320. See *supra* notes 291–296 and accompanying text.

321. See *supra* Part III.

322. See *supra* notes 164–170 and accompanying text.

323. See *supra* notes 180–185 and accompanying text.

324. See 23 PA. CONS. STAT. § 3301(d) (1991).

divorce makes it particularly alarming that not all states have even adopted that less restrictive form of divorce.

Instead, these states are making divorce even more costly, more complex, and more invasive by essentially forcing many divorce seekers to utilize a fault-based scheme. Because of this, and as evidenced by the studies discussed earlier,³²⁵ many who find themselves in that category will simply give up and go their separate ways to the detriment of all involved—including the state.

B. *Invest in Legal Aid for Divorce Seekers*

Within the United States, family law disputes account for the highest number of litigants appearing pro se.³²⁶ This is particularly true when it comes to marital dissolution given “the increase in the divorce rate and the inability of litigants to afford representation.”³²⁷ For instance, one study of divorce proceedings found that at least one party lacked representation in about ninety percent of cases and that neither party had representation in about fifty-two percent.³²⁸ Numbers like these are troubling for a variety of reasons, but particularly so given the legal intricacies of family law. As Professor Jessica Dixon Weaver explains:

Often attorneys and laypersons underestimate the complexities of family law. Generally, family law is thought of as “touchy, feely” law centered on relationships, primarily the dissolution of marriages. In reality, family law is more varied and encompasses a host of legal issues, including paternity establishment, child visitation and support, child abuse and neglect, criminal law, probate law, bankruptcy, employment, and tax law. Family law is transubstantive, and the family law practitioner must be well versed in diverse areas of law in order to provide competent and comprehensive representation to clients.³²⁹

Given the challenges this area of law holds even for those with law degrees, the difficulties it poses for pro se litigants can be insurmountable. Indeed, this complexity is one of the reasons noted earlier that many divorce seekers make the decision to forgo divorce altogether.³³⁰

325. See *supra* Part II.

326. Danielle Linneman, *Online Dispute Resolution for Divorce Cases in Missouri: A Remedy for the Justice Gap*, 2018 J. DISP. RESOL. 281, 294 (2018) (noting that “most pro se litigants nationwide appear in cases involving domestic disputes” (emphasis omitted)).

327. Amy C. Henderson, *Meaningful Access to the Courts?: Assessing Self-Represented Litigants’ Ability to Obtain a Fair, Inexpensive Divorce in Missouri’s Court System*, 72 UMKC L. REV. 571, 571 (2003).

328. Margaret Martin Barry, *Accessing Justice: Are Pro Se Clinics a Reasonable Response to the Lack of Pro Bono Legal Services and Should Law School Clinics Conduct Them?*, 67 FORDHAM L. REV. 1879, 1884 (1999) (detailing a 1990 study from Maricopa County, Arizona). More recent studies reveal similar results. See *supra* notes 178–179 and accompanying text.

329. Jessica Dixon Weaver, *Overstepping Ethical Boundaries? Limitations on State Efforts to Provide Access to Justice in Family Courts*, 82 FORDHAM L. REV. 2705, 2712 (2014) (footnotes omitted).

330. See *supra* Part II.

The Supreme Court has, of course, made clear that, when it comes to civil matters, there is no categorical right to representation.³³¹ As a result, all kinds of legal aid exist to assist pro se litigants attempting to navigate the various forms of civil litigation.³³² Nonetheless, legal assistance concerning family law matters remains relatively uncommon. Part of this scarcity stems from not only the overwhelming number of family law litigants in need of legal assistance but also the belief that, compared with other civil concerns, family law issues are simply not as compelling.³³³ As Deborah Rhode explained: “In some jurisdictions, poor people must wait over two years before seeing a lawyer for matters like divorce that are not considered emergencies, and other offices exclude such cases entirely.”³³⁴ A survey out of New York revealed that “[r]elatively few legal services programs across the state will accept matrimonials,” and approximately 80% of pro bono legal assistance programs indicated that ‘divorce is an area where demand consistently exceeds the supply of attorneys.’³³⁵

Thus, to combat the problems outlined earlier, states must increase their investment in legal services aimed at assisting pro se litigants who are seeking a divorce. Such a recommendation is hardly a novel one—indeed, Professor Marsha Garrison made the same point back in 1996 when she wrote that “[w]ithout large-scale public funding of legal services, it is thus unlikely that the current, relatively low rate of legal representation at divorce will increase.”³³⁶ Nonetheless, it is clear that the message bears repeating given the fact that divorce access continues to remain a very real problem to this day—one made even more troubling by the studies revealing the significant numbers of divorce seekers who fail to divorce at all, partly in response to their inability to navigate the dissolution process on their own.³³⁷ For instance, as noted earlier, a study published in 2021 found that litigants matched with a volunteer attorney are over five times as likely to file for divorce within three years.³³⁸

This is not to suggest that states must provide legal representation to every divorce seeker who is unable to retain counsel; in fact, such a result is highly unrealistic. As one recent article pointed out, “[d]espite commendable efforts in the legal community to increase pro bono representation and civil legal aid, for now and the foreseeable future there will not be enough resources to assign

331. See, e.g., *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 32 (1981) (holding that “the Constitution [does not] require[] the appointment of counsel in every parental termination proceeding”).

332. See, e.g., Barry, *supra* note 328, at 1891–1912 (describing programs in several states).

333. See, e.g., WEITZMAN, *supra* note 248, at 195 (noting that, when it comes to legal aid, “[d]ivorce cases tend to be given the lowest priority and are often rejected as unnecessary or unimportant”).

334. DEBORAH L. RHODE, *ACCESS TO JUSTICE* 13 (2004).

335. Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 517 n.390 (1996) (emphasis omitted).

336. *Id.* at 517.

337. See *supra* Part II.

338. See *supra* notes 180–185 and accompanying text.

free lawyers to every family litigant who needs one.”³³⁹ At the same time, however, to the extent states can help expand the availability of legal representation for these litigants—either through increased funding for legal aid organizations or even “economic incentives, centralized state commands, [or] social and professional norms”³⁴⁰—they should certainly do so.

However, legal aid takes many forms, and there are other ways the states can assist. Although it is beyond the scope of this Article to delve too deeply into the various programs the states might establish and support, there are a number of approaches states might explore. For instance, some states have found success with pro se clinics, which essentially “train people to represent themselves in divorces”³⁴¹ by “provid[ing] sufficient information to allow participants to understand and access the type of pleadings required, basic rules such as service of process, basic information that the court will require to render a decision, and a sense of the range of remedies available.”³⁴² Other states have adopted programs that allow the courts to hire family law facilitators, who typically are attorneys “legislatively authorized to provide basic assistance to pro se litigants in order to help expedite cases through the family court system.”³⁴³ Although currently limited, there is data to suggest that these facilitators, who “provide a wide range of services . . . [including] how to initiate or respond to a marriage dissolution,”³⁴⁴ have proved quite popular with those who cannot afford an attorney.³⁴⁵

These are but two options that have been met with some success in the few states that have adopted them. Regardless of the approach taken, however, states must do more to empower the large numbers of divorce seekers who, for a variety of reasons, are effectively forced to proceed pro se to prevent more of them from simply giving up and using permanent separation as a form of informal divorce. Further, states must ensure that whatever efforts they undertake in this regard, they effectively target those populations most at risk of not divorcing—populations that, as detailed earlier,³⁴⁶ include members of racial and ethnic minority communities as well as those with lower socioeconomic and educational backgrounds.

339. Andrew Shepard et al., *If We Build It, They Might Come: Bridging the Implementation Gap Between ADR Services and Separating and Divorcing Families*, 24 HARV. NEGOT. L. REV. 25, 40 (2018).

340. Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936, 940 (1991).

341. Elizabeth McCulloch, *Let Me Show You How: Pro Se Divorce Courses and Client Power*, 48 FLA. L. REV. 481, 482 (1996).

342. Barry, *supra* note 328, at 1883.

343. Henderson, *supra* note 327, at 581.

344. Carol R. Flango, *Family-Focused Courts*, 2 J. CTR. FOR FAMS. CHILD. & CTS. 99, 101 (2000).

345. Drew A. Swank, *In Defense of Rules and Roles: The Need to Curb Extreme Forms of Pro Se Assistance and Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1575 (2005).

346. See *supra* Part II.

C. Institute Summary Dissolution

Some states have recently begun experimenting with a process called “summary dissolution”—a more relaxed form of divorce that could hold great promise for the problems raised in this Article. Summary dissolution, which is sometimes referred to as “simplified” or “expedited” dissolution, permits “a couple who meets certain eligibility requirements to convert their agreement into a formal divorce decree with minimal time and process, sometimes without even appearing in court.”³⁴⁷ For those who qualify, summary dissolution is seen as “a cost-effective and efficient, alternative pathway to dissolution of marriage, enabling parties to proceed like shoppers in the fast lane at the supermarket, unencumbered and without an attorney.”³⁴⁸

To better understand how summary dissolution operates, consider the approach Minnesota has adopted. There, a couple may elect this more informal process if they have no children, no real estate, no debt in excess of \$8,000, and no non-marital assets in excess of \$25,000.³⁴⁹ In addition, the wife cannot be pregnant, the couple cannot have been married more than eight years, and neither can have been the victim of domestic abuse at the hands of the other.³⁵⁰ For those couples that meet these qualifications, all they need to do to obtain a divorce is watch a series of educational videotapes and then file a sworn joint declaration that, among other things, verifies that they meet the requirements for a summary dissolution, lists their marital and nonmarital property, and states how the marital property is to be divided.³⁵¹ Per the statute, “[t]he district court administrator shall enter a decree of dissolution 30 days after the filing of the joint declaration if the parties meet the statutory qualifications and have complied with the procedural requirements of this subdivision.”³⁵²

Most states that offer summary dissolution do so in ways that are substantially similar to Minnesota’s approach.³⁵³ Typically, the process requires relatively little (if any)³⁵⁴ interaction with the court as couples “only need to prepare, file, and serve a small number of forms and wait a few months before the judgment is final.”³⁵⁵ Importantly, however, as the Minnesota approach illustrates, the process is reserved only for those who have minimal assets, no

347. Rebecca Aviel, *Family Law and the New Access to Justice*, 86 *FORDHAM L. REV.* 2279, 2283 (2018).

348. Munro et al., *supra* note 24, at 427–28.

349. *See* MINN. STAT. § 518.195 (2006).

350. *Id.*

351. *Id.*

352. *Id.*

353. *See generally* Cutsumpas & Vargas, *supra* note 178 (detailing how other states have approached summary dissolution).

354. In some states, the parties may not need to appear in court at all. *See id.* at 336 (citing COLO. REV. STAT. § 14-10-120.3 (2006)), which provides that “[f]inal orders in a proceeding for dissolution of marriage or legal separation may be entered upon the affidavit of either or both parties” when specified criteria are met).

355. *Id.* at 328.

children, and have only been married for a relatively short period.³⁵⁶ Other states, however, go one step further, permitting a summary dissolution even when the parties have children as long as certain other conditions are met.³⁵⁷ For instance, in Montana, the parties can still pursue a summary dissolution as long as they have “executed an agreed-upon parenting plan and the child support and medical support have been determined by judicial or administrative order for all children from the relationship born before or during the marriage or adopted by the parties during the marriage.”³⁵⁸ Thus, the presence of children will not defeat one’s ability to secure a summary dissolution in Montana so long as the issues concerning the children have already been satisfactorily resolved.

The benefits of summary dissolution include making divorce much easier to obtain. After all, parties need not spend as much money on attorney’s fees and, for those forced to proceed *pro se*, the requirements are much more straightforward, making the entire process much simpler to navigate. Further, divorce seekers “spend substantially less time in court and are thus absent from work less.”³⁵⁹ As a result, many of the obstacles that studies have identified as preventing divorce seekers from actually obtaining a divorce³⁶⁰ are effectively neutralized by the summary dissolution process, meaning that more couples can obtain formal divorces and thus help advance the various state interests discussed above.³⁶¹

Beyond those interests, though, there are additional benefits to the state when it comes to the availability of summary dissolution. As a recent article on the subject explained: “Summary dissolutions allow parties who satisfy the requisite criteria to engage in the marital dissolution process on their own, with no need for motions, discovery, hearings, or trial. A decreased number of litigants frees up the court docket, thus expediting the court processes and resources for everyone.”³⁶² Again, this is a significant advantage given the increasing number of litigation involving domestic relations.³⁶³ As one commentator points out, “[w]hatever the cause of the increase in marital dissolutions may be, the result is that the courts now lack sufficient judicial resources to dispose of each case at the same rate at which new cases are entering the courts.”³⁶⁴

356. See *supra* notes 349–350 and accompanying text.

357. See, e.g., COLO. REV. STAT. § 14-10-120.3(1)(a) (2016); NEV. REV. STAT. § 125.181(3) (2018).

358. See MONT. CODE ANN. § 40-4-130 (2019).

359. Munro et al., *supra* note 24, at 441.

360. See *supra* Part II.

361. See *supra* Part III.

362. Munro et al., *supra* note 24, at 441 (footnote omitted); see also Cutsumpas & Vargas, *supra* note 178, at 342 (arguing that “[t]his simplified process would free up judges to devote meaningful time to cases requiring more of their attention and scrutiny and would remove the routine, no problem cases requiring no judicial scrutiny from the docket”).

363. See *supra* note 178 and accompanying text.

364. Munro et al., *supra* note 24, at 431.

Finally, not only does summary dissolution increase access to divorce, but it does so in a way that gives litigants greater agency. In that way, it shares one of the key features of common law marriage, which—as discussed in the Introduction—gave parties greater control over access to marriage.³⁶⁵ Professor Rebecca Aviel recently described the greater autonomy that comes from summary dissolution proceedings:

Simplified dissolution, however, is about more than just speed, lowering costs, or reducing the inconvenience of appearing in court. For those couples who qualify, it is a chance to choose a minimalist role for the state in the dissolution of their marriage. As captured by one judge discussing the importance of offering a simplified dissolution procedure, when it comes to couples who want and are eligible for it, “we need to get out of their way.” The opportunity to weaken the state’s monopoly over divorce should be recognized as an access-to-justice value.³⁶⁶

Of course, there are inherent risks to systems like summary dissolution that must be acknowledged. Specifically, as discussed earlier, the less involved courts are in divorce proceedings, the greater the chance the parties may be harmed as the couple divides property and goes their separate ways.³⁶⁷ As one commentator put it, “[t]he court’s supervision over the dissolution . . . ultimately ensures that the rights of both parties during a divorce are protected.”³⁶⁸ This concern also extends to children of the marriage given that “[w]hether or not we characterize them as unwilling victims of their parents’ decision to separate, they are affected,” both financially and psychologically.³⁶⁹

States have attempted to balance these concerns by—as described earlier—carefully delineating the requirements that a couple must first satisfy in order to elect this more relaxed form of divorce.³⁷⁰ In analyzing the effectiveness of this criteria in protecting the parties, one article concluded that the potential drawbacks tend to be outweighed by the benefits. More specifically, the authors argued:

The chances are slim that parties with short marriages, minimal assets, minimal debts, and no children will find themselves bound by an agreement that provides one party with a windfall and leaves the other party with substantially less. Indeed, with minimal assets, minimal debts, and no children, there is little room for gross inequity.³⁷¹

365. See *supra* note 41 and accompanying text.

366. Aviel, *supra* note 347, at 2284 (footnotes omitted).

367. See *supra* Subpart III.B.

368. Munro et al., *supra* note 24, at 429.

369. Margaret F. Brinig, *Property Distribution Physics: The Talisman of Time and Middle Class Law*, 31 FAM. L.Q. 93, 108 (1997).

370. See *supra* notes 349–350 and accompanying text.

371. Munro et al., *supra* note 24, at 445 (footnote omitted).

Nonetheless, more study is likely required in order to determine the criteria that would best balance the states' competing concerns of promoting divorce while protecting the parties to that divorce.

Thus, given the states' interest in promoting formal divorce over informal separation,³⁷² states need to take various steps to correct the problems that essentially prevent certain populations from obtaining a formal divorce. First, more states should follow the lead of those that have opened the door to less formal divorce proceedings and experiment with programs like summary dissolution. Doing so will not only facilitate divorce among those desiring to end unsuccessful marriages, but it will also provide divorce seekers with more autonomy when it comes to ending unsuccessful marriages. At the same time, the states must be mindful of conditioning no-fault divorce on spousal consent, which can lead a number of divorce seekers to basically give up—an all-too-common scenario that, as detailed earlier, is in direct opposition to a number of important state interests. Finally, states need to gauge what assistance they are providing to those forced to pursue divorce as pro se litigants, ensuring not only that sufficient resources exist but that they effectively target the marginalized populations most at risk of being denied access to formal divorce.³⁷³

CONCLUSION

In the not-too-distant past, divorce was a remedy available to only a small subset of the population. As demand grew, however, states eventually made divorce much easier to obtain, but recent studies have revealed that despite these developments, a significant percentage of the population continues to end marriages not by formal divorce, but informally via permanent separation.³⁷⁴ In other words, despite the fact that common law divorce contravenes both the letter and the spirit of the law, “informal” divorce not only exists within the United States, but most troubling of all, it is most prevalent within marginalized communities, including racial and ethnic minorities, those with less education, and those from lower socioeconomic backgrounds. For all these reasons, it is imperative that states redouble their efforts to ensure meaningful access to formal divorce—if not for the safeguards legal divorce offers those couples, then at the very least for the significant harms that can redound to the state in the face of informal marital dissolution.

372. *See supra* Part III.

373. *See supra* Part II.

374. *See supra* Part II.