

# THE ECONOMIC ANALYSIS OF THE EFFECT OF NO-FAULT DIVORCE LAW ON THE DIVORCE RATE

MARTIN ZELDER\*

## I. INTRODUCTION

Almost all American states adopted a no-fault divorce statute during the 1970's.<sup>1</sup> This widespread legal "silent revolution" was largely uncontroversial at the time.<sup>2</sup> Recently, however, Lenore Weitzman has drawn attention to one unexpected consequence of no-fault divorce law—a precipitous decline in the economic status of divorced women and a corresponding improvement in the economic status of divorced men.<sup>3</sup> Another important consequence of no-fault is its effect on the divorce rate. While no-fault might be expected to increase the divorce rate, previous studies typically have found no lasting effect of no-fault divorce law on the divorce rate.<sup>4</sup> Most of these statisti-

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\* Visiting scholar, Northwestern University School of Law, and Assistant Professor of Economics and Law, College of William and Mary. B.A. Oberlin College, 1983; M.A. University of Chicago, 1985; Ph.D. University of Chicago, 1989.

This article is based on my Ph.D. dissertation from the University of Chicago. See Martin Zelder, *Children as Public Goods and the Effect of No-Fault Divorce Law on the Divorce Rate* (1989) (available in University of Chicago Library), for a detailed account of the empirical evidence. Gary S. Becker, Charles Kahn, and Robert Willis merit special appreciation for their guidance. Important contributions were made by Trotter Hardy, Austin Kelly, Seth Sanders, and Ray Zelder. Additionally, particularly helpful comments were received from Mary Becker, Mike Brien, Margaret Brinig, Brad Case, Lloyd Cohen, Robert Cooter, Neal Devins, Mike Gerhardt, Keith Hylton, Herbert Jacob, Avery Katz, Stewart Schwab, Meg Simpson, Jeff Smith, Alan Sykes, Ken Troske, and Joanne Zelder, as well as from participants in workshops at the University of Chicago, College of William and Mary, Vassar College, and College of the Holy Cross. Dan Henry rendered valuable research assistance. Financial support was provided by the Ford Motor Company, the Earhart Foundation, the Bradley Foundation, and the University of Chicago.

1. The exceptions were Illinois, Pennsylvania, and South Dakota, each of which offered only fault grounds until the 1980s; Alaska, New Mexico, and Oklahoma, each of which offered no-fault, in addition to fault grounds, before 1969; and Kansas, which adopted a no-fault law, in addition to fault grounds, in 1969. See Henry H. Foster, Jr. & Doris Jonas Freed, *Divorce in the Fifty States: An Overview*, 14 *FAM. L.Q.* 229, 241-245 (1980); Doris Jonas Freed, *Grounds for Divorce in the American Jurisdictions*, 6 *FAM. L.Q.* 179, 180, 189, 198-99, 201 (1972).

2. See HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* 82 (1988).

3. See LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION* 323 (1985). Jacob, however, finds in general that no-fault had no effect on divorced women's income. See Herbert Jacob, *Another Look at No-fault Divorce and the Post-Divorce Finances of Women*, 23 *LAW & SOC'Y REV.* 95, 111 (1989).

4. See GARY S. BECKER, *A TREATISE ON THE FAMILY* 228-229 (1981); Alan H. Frank et

cal analyses, however, have failed to recognize an important factor that increases the divorce rate under no-fault: the amount of income a married couple spends on children relative to their spending on other things.

This article presents a basic economic model of marriage and divorce that offers two predictions: first, no-fault divorce law should be expected to increase the divorce rate; and, second, these additional divorces should occur among couples who devote much of their income to children relative to other "goods" within marriage. The prediction that no-fault divorce law will increase the divorce rate seems obvious; commentators perceived the switch from fault to no-fault as a shift to "easier" divorce laws, so more divorces would be expected to occur. Whether or not divorce became easier, however, the American divorce rate did not increase under no-fault during the 1970s as a consequence of divorce becoming easier.<sup>5</sup> Instead, the divorce rate increased under no-fault because of greater spending by parents *on children* compared to parents' spending on other "goods." This article verifies this theory, and disproves the easier divorce hypothesis by interpreting a statistical analysis of divorce data. Furthermore, the statistical data and underlying theory suggest that "too many" divorces occur under no-fault, while the "right" number occurs under fault from an economic efficiency point-of-view. Thus, this article offers a clear-cut public policy recommendation: no-fault divorce laws should be replaced with fault divorce laws.<sup>6</sup> The "silent revolution" in

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al., *No-Fault Divorce and the Divorce Rate: The Nebraska Experience—An Interrupted Time Series Analysis and Commentary*, 58 NEB. L. REV. 1 (1979); H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437 (1986); Robert Schoen et al., *California's Experience with Non-Adversary Divorce*, 12 DEMOGRAPHY 223, 223-243 (1975); H. Elizabeth Peters, *The Impact of Regulation of Marriage, Divorce, and Property Settlements* (1983) (unpublished Ph.D. dissertation, University of Chicago); Annemette Sørensen, *The Flight from Unhappiness: Causes and Implications of the Recent Upturn in Divorce: The Case of Denmark* (1980) (unpublished Ph.D. dissertation, University of Wisconsin).

5. See, e.g., Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 80 (1976), who claim that under no-fault, "[t]he process is easier and cheaper."

6. Fault divorce law is a legal regime characterized by grounds for divorce, such as adultery or cruelty, which must be the fault of one spouse but not the other. No-fault divorce law is a legal regime characterized by grounds for divorce involving "incompatibility," "irreconcilable differences," or "irretrievable breakdown," which can be proven by either or both spouses.

For a radically different justification for fault, see Elizabeth S. Scott, *Rational Decision-making About Marriage and Divorce*, 76 VA. L. REV. 9, 72-94 (1990) (proposing to reform divorce law to encompass fault as a means to enable "pre-commitment" to marriage).

divorce law should be quashed.

The remaining five sections of this article critique existing hypotheses while advocating a return to a fault-based divorce regime. Section II summarizes the economic analysis of marriage and divorce. Section III presents four propositions that examine the effect of no-fault divorce law on the divorce rate, given four different sets of assumptions. The new theory presented in this article, identified as Proposition 4, describes the specific hypothesis formulated by the author—greater spending on children relative to other goods will create a higher divorce rate under no-fault than under fault. Section IV briefly reviews previous analyses of the effect of no-fault divorce law on the divorce rate and summarizes the new evidence regarding this effect. Section V offers a public policy rationale for favoring fault divorce over no-fault divorce—namely that no-fault divorce law is economically inefficient compared to fault divorce law—and reviews the assessments of no-fault by other commentators. Section VI concludes the article by recommending that no-fault be replaced with fault so that economically efficient marriages will be preserved.

## II. THE ECONOMICS OF MARRIAGE AND DIVORCE

The model of decisionmaking employed in this analysis is founded upon the assumption of rational, utility-maximizing behavior as it is applied to marriage and divorce (along with numerous other human decisions).<sup>7</sup> The essence of this model is that individuals weigh the value of each of their alternatives (remaining single, marrying person A, marrying person B, etc.) and choose the alternative with the highest value. Thus, Gatsby

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Scott's analysis rests, however, on a foundation of irrational behavior, a basic assumption that is contrary to the spirit and logic of this inquiry.

7. See BECKER, *supra* note 4, at 219-236. Becker provides arguments for the widespread applicability of economic analysis in GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 10 (1976). For more specific support for the economic theory of marriage, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 127-146 (3rd ed. 1986); Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; or, "I Gave Him the Best Years of My Life,"* 16 J. LEGAL STUD. 267, 267-271 (1987). The proposition that economic analysis can be applied to marriage and divorce is not a radical one. It only requires that people have preferences over "loved ones" (specifically, you care whom you marry) and that your time is allocated in a sensible and systematic way (e.g., less time is spent on loved ones when your time is more costly). Myopic behavior (in which immediate and long-run goals are in conflict), as discussed by Scott, *supra* note 6, at 38-70, conflicts with the rational model employed in this analysis, as myopia implies that individuals sometimes make decisions that are not in their best interests.

and Daisy get married when they each expect their well-being to be enhanced by that marriage (as compared to the next-best alternative, that is, marrying someone else or remaining single). To facilitate the analysis, assume that well-being from marriage or divorce can be measured in terms of dollars. This assumption does not mean that people actually explicitly calculate (in dollar terms) their well-being in a particular marriage, but rather that people behave *as if* they do.<sup>8</sup> Furthermore, it is assumed that this measurement of well-being captures all values, tangible and intangible, pecuniary and non-pecuniary. That is, the value of all good and bad characteristics of a relationship is incorporated in this measurement of well-being.

In this context, divorce is also a rational decision; although Gatsby and Daisy each *expect* to be made better off by marriage to each other, they may discover in *actuality* that each can be made better off by marrying someone else or by becoming single again. Expectations of well-being within marriage are often disappointed because marriage, like many contracts, is consented to without complete information. That is, neither spouse has complete information regarding the other spouse (this is rational, since complete information—everything about another person—is prohibitively costly to acquire). In evaluating whether or not to divorce, then, each person compares his or her well-being at any given time within a particular marriage with his or her potential well-being from choosing the next-best alternative. For each person, the gain from marriage is the difference between that person's well-being in marriage and that person's well-being in divorce (the latter also takes account of his or her possible subsequent marriage).<sup>9</sup>

For example, if Gatsby's expected well-being from marriage to Daisy is 300, and Gatsby's well-being in the next-best alternative (divorce with the possibility of remarriage) is 100, then Gatsby's gain from marriage is 200 (see Table 1). Similarly, if Daisy's expected well-being from marriage to Gatsby is 250, and Daisy's well-being from the next-best alternative (divorce with the possibility of remarriage) is 150, then Daisy's gain from marriage is 100. Thus, in the circumstances presented

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8. This assumption (well-accepted in economics) comes from MILTON FRIEDMAN, *ESSAYS IN POSITIVE ECONOMICS* 16-23 (1953).

9. Note that divorce-based well-being is also "expected"; it is possible to divorce, remarry someone else, and then divorce from *that* person.

TABLE I  
EXAMPLE IN WHICH EACH SPOUSE GAINS FROM  
MARRIAGE TO THE OTHER

This is an example illustrating the calculation of the gain from marriage for each spouse. In this example, the gain from marriage is positive for each spouse, so they will remain married.

	Gatsby	Daisy
Well-being from marriage	300	250
Well-being from divorce	100	150
Gain from marriage	200	100

above, both Gatsby and Daisy are better off married to each other rather than divorced. The sum of the two spouses' individual gains to marriage is called the "surplus" to marriage. In this example, illustrated in Table 1, the surplus to marriage is 300 (Gatsby's 200 plus Daisy's 100). When each spouse gains from marriage, the surplus to marriage is positive.

In contrast, in situations where each spouse gains from divorce, the surplus to marriage is negative. Suppose Gatsby gains 100 from divorce, and Daisy gains 130 from divorce; then, the surplus to divorce is 230. Consequently, one might suppose that this situation would lead automatically to divorce. In order to get divorced, however, there is a transaction involved. Not surprisingly, this transaction, like any other, comprises several costs, including time lost, legal costs, and any displeasure involved in engaging in the transaction. If the surplus to divorce is 230 (and the surplus to marriage is -230), the couple will divorce as long as the surplus to divorce is greater than the transactions costs. So, if the transactions costs are 200, they will divorce, but if the transactions costs are 290, they will remain married.

### III. WHAT IS THE EFFECT ON THE DIVORCE RATE OF A CHANGE FROM FAULT TO NO-FAULT DIVORCE? FOUR PROPOSITIONS

Given this straightforward model of marriage and divorce, the question of how no-fault affects the divorce rate can be an-

swered. This section demonstrates, however, that the answer to this question depends critically on assumptions regarding the nature of transactions between husbands and wives. Indeed, four "propositions" that yield predictions about the effect of no-fault on the divorce rate can be formulated.

A. *Proposition 1: When No-Fault Has No Effect on Transactions Costs, and Transactions Costs Are Not "Prohibitive,"*  
 THE DIVORCE RATE IS UNAFFECTED

What is the effect of no-fault divorce law on the divorce rate if transactions costs are the same under fault and no-fault, and transactions costs are not "prohibitive" (where prohibitive means "larger than the surplus from transacting," that is, large enough to prevent transactions from occurring)? Economists have proposed that, under these circumstances, a change from fault to no-fault should not affect the divorce rate.<sup>10</sup> This hypothesis is based on the observation that a fault-based divorce regime confers upon each spouse a property right to continued marriage and that a no-fault regime confers upon each spouse a property right to divorce.<sup>11</sup> Why do these different divorce laws assign property rights in these particular ways? Fault-based divorce is essentially a system of mutual-consent divorce. In order for divorce to occur under fault, one spouse must be found at fault (*e.g.*, for adultery or cruelty) while the other spouse remains "innocent." Divorce is denied if both spouses are at fault. Thus, the "guilty" spouse could veto a fault divorce by demonstrating the other spouse's fault. Consequently, each spouse possesses a right to *marriage* under fault; a spouse will only relinquish this right *and consent to divorce* if he or she is compensated within divorce by the other spouse. To induce the guilty spouse's consent to divorce *and to give up his or her property right to remain married*, compensation in the form of a sufficient divorce settlement is necessary.<sup>12</sup>

10. See BECKER, *supra* note 4, at 226-227; Elisabeth M. Landes, *The Economics of Alimony*, 7 J. LEGAL STUD. 35, 36-39 (1978).

11. The distinction applied here is between a *property right* and a *liability rule*. A property right is a legal right which can be bought or sold (*e.g.*, a right to manufacture steel). A liability rule is a legal restriction which cannot be bought or sold (*e.g.*, a rule designating a fine if a traffic law is violated). This distinction was first made in Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972). See also WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 29-31 (1987).

12. See WEITZMAN, *supra* note 3, at 43. If neither spouse was at fault, they could col-

In contrast, a no-fault divorce only requires the consent of one spouse. If at least one spouse can demonstrate that the marriage is "irretrievably broken" or that there exist "irreconcilable differences" or "incompatibility," divorce is granted. Consent of both spouses is not necessary.<sup>13</sup> Consequently, each spouse possesses a right to *divorce* under no-fault; a spouse will only relinquish this right *and stay married* if he or she is compensated within marriage by the other spouse. This compensation is made through renegotiation of the informal marriage contract so that the spouse who consents to remain married receives a larger share of the surplus to marriage.

Economists predicted that changing from fault to no-fault, and thus shifting property rights from marriage to divorce, would have no effect on the divorce rate.<sup>14</sup> Regardless of the law, marriage will continue when the surplus from marriage is positive, and divorce will occur when the surplus from marriage is negative.

This proposition can be demonstrated. Suppose that Gatsby's gain to marriage is 100 and Daisy's gain to divorce is 50, so that the surplus to marriage is positive; this situation is represented in column 1 in Table 2. Consider the result of a fault-based divorce regime. Daisy must induce Gatsby's consent in order for divorce to occur. Will Gatsby consent? No. Daisy is only willing to offer Gatsby a divorce settlement of 50, but Gatsby requires a minimum of 100 to grant consent. Thus, Gatsby rejects Daisy's offer and marriage continues.

Now consider the consequence of a no-fault regime. In this case, Gatsby must elicit Daisy's consent to remain married. Will Daisy consent? Yes—because Gatsby gains more from staying married, 100, than Daisy loses by staying married, 50, Gatsby can renegotiate the marriage contract (e.g., he agrees to clean the bathroom more often) so that both he and Daisy are better off, and they remain married. Thus, when the surplus to marriage is positive, marriage continues *regardless* of divorce law, according to Proposition 1.

A similar conclusion can be reached in the situation where the surplus to marriage is negative, as in case 2 in Table 2. Sup-

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lude and designate one of the two as the "guilty" spouse, manufacturing evidence of, e.g., adulterous liaisons. See RODERICK PHILLIPS, *PUTTING ASUNDER* 568 (1988).

13. See WEITZMAN, *supra* note 3.

14. See BECKER, *supra* note 4; Landes, *supra* note 10.

TABLE 2

WHEN NO-FAULT HAS NO EFFECT ON TRANSACTIONS  
COSTS AND TRANSACTIONS COSTS ARE NOT PROHIBITIVE,  
*THE DIVORCE RATE IS UNAFFECTED*

WHEN THE LAW SWITCHES FROM FAULT TO NO-FAULT

Changing the law from fault to no-fault will not affect the decision between staying married and getting divorced when transactions costs are the same under fault and no-fault, and transactions costs are not prohibitive. When there is a positive surplus to marriage, as in Case 1, they will stay married regardless of the law. When there is a negative surplus to marriage, as in Case 2, they will divorce regardless of the law.

Case (1): Positive surplus to marriage

Case (2): Negative surplus to marriage

	(1)	(2)
Gatsby's gain to marriage	100	50
Daisy's gain to divorce	50	100
Surplus to marriage	50	-50
Does divorce occur under fault?	No	Yes
Does divorce occur under no-fault?	No	Yes

pose now that Gatsby's gain to marriage is 50 and Daisy's gain to divorce is 100. For fault divorce to occur, Gatsby must consent. Will he? Yes—Daisy will transfer some amount between 50 and 100 to elicit Gatsby's consent. Now, will they divorce under no-fault? Yes—Gatsby attempts to prevent Daisy from dissolving the marriage, but he is unsuccessful, as he is only willing to offer a maximum of 50 to Daisy, and she demands at least 100 to stay married. Thus, when the surplus to marriage is *negative*, divorce occurs regardless of whether mutual or unilateral consent is required.

This result, that the choice of marital status is unaffected by the type of legal regime, is just an illustration of the Coase Theorem,<sup>15</sup> which states that different legal assignments of property rights do not affect the allocation of resources if

15. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

transactions costs are not prohibitive.<sup>16</sup> As was noted above, divorce law effectively assigns a property right. Under fault, each spouse has a property right to continued marriage; under no-fault, each spouse has a property right to divorce. These property rights are relinquished only when compensation is paid, either within divorce (under fault) or within marriage (under no-fault). Whether fault or no-fault is in effect does not alter the choice of marital status, as long as transactions costs are not prohibitive. If the surplus to marriage is positive, marriage continues regardless of the law, and if the surplus to marriage is negative, divorce occurs regardless of the law.

B. *Proposition 2: When No-Fault Makes Divorce  
"Easier" (Reduces Transactions Costs),  
THE DIVORCE RATE RISES*

While economists typically assumed that transactions costs were unchanged by the switch to no-fault and that transactions costs were not prohibitive (the two assumptions made in Theory 1), legal commentators generally interpreted the switch to no-fault as *reducing* transactions costs. As Professor Jacob expresses it, "The new divorce laws made divorce easier."<sup>17</sup> The essence of this theory is that the transactions costs associated with divorce are lower under no-fault than under fault. Consequently, implementation of no-fault divorce law would increase the divorce rate.

Reconsider the example in which the surplus from divorce is 230. It is possible that while Gatsby and Daisy encountered transactions costs of, say, 310, in divorcing under fault, they might have encountered transactions costs of, say, 180, under no-fault. In this circumstance, the couple would remain married under fault, because the transactions costs (310) exceeded the surplus (230). By contrast, under no-fault the couple would divorce, as the transactions costs (180) were exceeded by the surplus (230). Thus, according to Proposition 2, *if* transactions costs fall under no-fault, the divorce rate would increase.

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16. *Id.* at 7, 16. If transactions costs are prohibitive, transacting will reduce total well-being, as the transactions costs exceed the surplus from transacting.

17. JACOB, *supra* note 2, at 8.

C. *Proposition 3: When No-Fault Has No Effect on Transactions Costs, but Transactions Costs Are Prohibitive,*  
THE DIVORCE RATE RISES

Proposition 2 demonstrated that if one of the two assumptions underlying Proposition 1 is removed (namely, the assumption that transactions costs do not fall when the law changes), the divorce rate would rise under no-fault. Proposition 3 illustrates what happens if the other assumption—transactions costs are not prohibitive—is removed. Think of transactions costs as being negotiating costs between the two spouses; these negotiating costs reflect the time spent and displeasure felt as a consequence of negotiating. Suppose these costs are the same amount, whether they are incurred in negotiations to obtain a divorce (under fault) or in negotiations to maintain a marriage (under no-fault). In addition, suppose that these costs are prohibitive of transactions, that is, larger than the surplus, under either legal regime. Under these circumstances, transactions will not occur under either fault or no-fault. The fact that transactions do not occur means that there will be some cases under fault in which marriages remain intact even though there is a negative surplus to marriage, and that there will be some cases under no-fault in which divorces will occur even though there is a positive surplus to marriage.

Reconsider the example presented in Table 2. Assume now that transactions costs are prohibitive in both cases, that they are, for example, 75, so that no transactions between spouses occur, since the surplus to transacting is only 50 in either case. Under this assumption, the cases in Table 2 can be reexamined in Table 3 to determine the impact of prohibitive transactions costs. Case 1, the example of a positive surplus to marriage, will then be resolved differently depending on whether the law requires fault or no-fault. If fault is required, then Gatsby has a right to remain married, and he will remain married regardless of transactions costs, as his gain to marriage exceeds Daisy's gain to divorce. That is, even disregarding transactions costs, Daisy is unable to induce Gatsby to divorce under fault. Under no-fault, however, Daisy has a right to divorce, and if transactions costs are prohibitive, Gatsby will be unable to induce Daisy to remain married even though the surplus to marriage is positive, since the transactions costs, 75, exceed the surplus from transacting, 50.

TABLE 3

WHEN NO-FAULT HAS NO EFFECT ON TRANSACTIONS COSTS, BUT TRANSACTIONS COSTS ARE PROHIBITIVE,  
THE DIVORCE RATE RISES

WHEN THE LAW SWITCHES FROM FAULT TO NO-FAULT

Changing the law from fault to no-fault *will* affect the decision between staying married and getting divorced when transactions costs are prohibitive, even when transactions costs are the same under fault and no-fault. When there is a positive surplus to marriage, as in Case 1, they will stay married under fault but divorce under no-fault. When there is a negative surplus to marriage, as in Case 2, they will also stay married under fault but divorce under no-fault.

Case 1: Positive surplus to marriage

Case 2: Negative surplus to marriage

	(1)	(2)
Gatsby's gain to marriage	100	50
Daisy's gain to divorce	50	100
Surplus to marriage	50	-50
Does divorce occur under fault?	No	No
Does divorce occur under no-fault?	Yes	Yes

Case 2 in Table 3 illustrates the case of a negative surplus from marriage. Now, with prohibitive transactions costs, a transaction to divorce will not occur under fault, since the cost of transacting exceeds the surplus, so they will remain married despite the fact that there is a negative surplus to marriage. Under no-fault, however, divorce will occur, as Gatsby cannot bribe Daisy enough to stay married, regardless of transactions costs. To summarize, prohibitive transactions costs cause couples with a *negative* surplus to marriage to remain married under fault, while these same couples would divorce under no-fault. Also, prohibitive transactions costs cause couples with a *positive* surplus to marriage, who remain married under fault, to divorce under no-fault. Thus, when transactions costs are prohibitive, more divorces occur under no-fault than under fault.

D. *Proposition 4: When Public Goods Within Marriage Make Some Transactions Under No-Fault Impossible,*  
 THE DIVORCE RATE RISES

Proposition 3 described circumstances in which transactions to get a divorce do not occur even when the surplus to marriage is negative, and similarly, circumstances in which transactions to remain married do not occur, even when the surplus to marriage is positive. Transactions did not occur in these circumstances because transactions costs were prohibitive.

Another situation in which transactions do not occur is when the gains to marriage are in the form of "public goods." A public good is a good which necessarily is consumed in equal amount by all members of the "public" (note that the "public" referred to in the context of a marriage is composed of the husband and wife).<sup>18</sup> Most importantly, a public good within marriage cannot be divided and transferred within a marriage. In this circumstance, some transactions within marriage will be prevented. Transactions are prevented because, by the very definition of a public good, the quantity of the public good consumed by each spouse must be equal; Gatsby cannot offer to consume less of the public good so that Daisy may consume more of it (Gatsby *can* do this with a private good). Public goods are not transferable between spouses.<sup>19</sup> Because of this non-transferability, the presence of a public good within marriage means that the type of divorce law (fault or no-fault) will affect the divorce rate.

Reconsider the example (case 1 in Tables 2 and 3) in which Gatsby's gain to marriage is 100 and Daisy's gain to divorce is 50. Originally, it was assumed that the entire amount of Gatsby's gain to marriage was in the form of private goods, and could thus be transferred to Daisy. Now, suppose that some of Gatsby's gain to marriage, say, 70, is a public good, and cannot be transferred to Daisy, so that Gatsby's transferable gain to marriage is 30, which is 100 minus 70 (see Table 4). Then, it

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18. See MICHAEL L. KATZ & HARVEY S. ROSEN, MICROECONOMICS 657-664 (1991). The public is generally a larger group, such as all Americans, each of whom benefit equally from the public good of national defense, for example. Economists also define a public good as one which can be consumed by one person without excluding any other person, and which can be consumed by additional people at zero marginal cost.

19. Note that all that is required for a good to be public and thus non-transferable is that each spouse's *consumption* of that public good be equal, not that each spouse's *enjoyment* of that public good be equal.

TABLE 4  
 WHEN PUBLIC GOODS WITHIN MARRIAGE MAKE SOME  
 TRANSACTIONS UNDER NO-FAULT IMPOSSIBLE,  
 THE DIVORCE RATE RISES

WHEN THE LAW SWITCHES FROM FAULT TO NO-FAULT

Gains to marriage in the form of public goods means that changing the law from fault to no-fault *will* affect the decision between staying married and getting divorced even when transactions costs are not prohibitive, *and* when transactions costs are the same under fault and no-fault. When there is a positive surplus to marriage, but Gatsby's transferable gain to marriage is less than Daisy's gain to divorce, they will stay married under fault but divorce under no-fault. (When there is a negative surplus to marriage, they will divorce under either fault or no-fault. This is because all of the gains to *divorce* are transferable, as they are all in the form of private goods).

Gatsby's gain to marriage	100
Daisy's gain to divorce	50
Gatsby's <i>transferable</i> gain to marriage	30
Does divorce occur under fault?	No
Does divorce occur under no-fault?	Yes

can be demonstrated that the type of legal regime in force (fault or no-fault) *will* affect the choice of marital status.

Suppose that *fault* is required for divorce to occur; then the analysis is identical to that under Proposition 1. That is, Daisy attempts to induce Gatsby's consent to divorce, but she is only willing to offer 50, and Gatsby requires 100 to consent to divorce, so their marriage continues. Under *no-fault*, however, the analysis is affected by the presence of the public good within marriage. When Gatsby's entire gain to marriage was transferable (and transactions costs were not prohibitive), he could induce Daisy to remain married. Now, however, Gatsby can only offer 30 to Daisy, as the other 70 is non-transferable, so Daisy divorces Gatsby. So, as Table 4 indicates, the type of legal regime *does* affect the occurrence of divorce: more divorces occur

under no-fault than under fault.<sup>20</sup>

Until this point, the public good within marriage has been purely an abstraction. What good might play this role within marriage? Children are the most significant measurable example of a public good within marriage.<sup>21</sup> So, if Gatsby and Daisy have two children, the number of children enjoyed by Gatsby is the same as the number of children enjoyed by Daisy—two. *Within marriage*, Gatsby cannot choose to have fewer children so that Daisy can have more. By contrast, a private good within marriage might be something like gin; the more gin Gatsby consumes, the less gin is left for Daisy. Thus, it seems that the larger a fraction of its income a couple spends on children relative to other, transferable goods, the more likely that couple is to encounter non-transferability problems under no-fault. These non-transferability problems lead some couples to get divorced. Consequently, according to Proposition 4, the larger a fraction of its income a couple spends on children relative to transferable goods, the more likely that couple is to divorce under no-fault.

#### IV. EVIDENCE ON THE EFFECT OF NO-FAULT ON THE DIVORCE RATE

In order to determine if no-fault divorce is inefficient, analysis of whether the divorce rate was affected by no-fault must be performed. While a number of previous studies found that no-

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20. Because of the nature of marriage—cohabitation with shared resources—it is assumed that *some* of the gains to *marriage* are in the form of a public good, but that *all* of the gains to *divorce* are in the form of private goods. Consequently, while, in a world with public goods within marriage there are more divorces under no-fault than there are in a world with no public goods within marriage, the number of divorces under a fault system is unaffected by the presence of a public good within *marriage*.

When some of the gains to marriage are non-transferable and the surplus to marriage is *negative*, however, whether divorce law is fault or no-fault does not affect the choice of marital status. Suppose that Gatsby's gain to marriage is 50 and Daisy's gain to divorce is 100, and that 35 of Gatsby's gain to marriage is non-transferable. Under fault, divorce occurs, as Daisy compensates Gatsby with a transfer of between 50 and 100 to get divorced. Under no-fault, divorce also occurs; Gatsby attempts to compensate Daisy to remain married, but he can only offer 15, and Daisy requires at least 100 to stay married.

21. See Landes & Posner, *supra* note 10, at 39; Gary S. Becker, *A Theory of Marriage*, in *ECONOMICS OF THE FAMILY: MARRIAGE, CHILDREN AND HUMAN CAPITAL* 299, 320 (Theodore W. Schultz ed., 1974); Yoram Weiss & Robert J. Willis, *Children as Collective Goods and Divorce Settlements*, 3 J. LAB. ECON. 268, 268 (1985). Children are the largest measurable public good within marriage. Other public goods within marriage, such as home heating, are measurable but small, while a public good such as love is large but unmeasurable.

fault had no effect on the divorce rate,<sup>22</sup> this result is questionable.<sup>23</sup> In contrast to this conclusion, two previous studies found that no-fault in fact increased the divorce rate.<sup>24</sup> Three of the propositions (Propositions 2, 3, and 4) presented in this article predict that the divorce rate will rise as a consequence of changing the law from fault to no-fault. Proposition 1, one form of the Coase Theorem, predicts that the divorce rate will *not* rise at all after such a switch in legal regimes. Thus, in order to prove that no-fault divorce laws are inefficient, it must first be demonstrated that the divorce rate actually rose as a consequence of no-fault. If this is in fact found, a second, more important matter remains—if the divorce rate rose, did it rise as a result of the non-transferability of children within marriage (Proposition 4); or because of decreased transactions costs (Proposition 2); or because of prohibitive transactions costs (Proposition 3)? This section explores the evidence regarding these alternative propositions.

Given the problematic nature of the previously-cited evidence, which seemed to indicate that no-fault divorce did not increase the divorce rate, new analysis of an informative and comprehensive data set was undertaken. This data set, the Panel Study of Income Dynamics,<sup>25</sup> annually surveys the same 6,000 households with regard to hundreds of pieces of individual information, including divorces instituted since the previous survey. From this survey, a sample was drawn that consisted of residents of no-fault states before and after the law changed in those states (these states and the dates at which they switched to no-fault are enumerated in Table 5). Other factors that conceivably could affect whether a couple divorced were statistically controlled to determine the precise effect of the switch to no-fault. These “control” variables included financial variables (husband’s and wife’s incomes and assets), marital history variables (husband’s age at marriage, duration of marriage, and number of previous divorces experienced by

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22. See BECKER, *supra* note 4, at 228-29; PETERS, *supra* note 4; Frank et al., *supra* note 4; Peters, *supra* note 4; Schoen et al., *supra* note 4, at 235; Sorenson, *supra* note 4.

23. Most of the previous research on the effect of no-fault on the divorce rate is unreliable. See Zelder, *supra* note \*, at 2-20.

24. See Thomas B. Marvell, *Divorce Rates and the Fault Requirement*, 23 LAW AND SOC’Y REV. 543, 559-563 (1989); Yoram Weiss & Robert J. Willis, *An Economic Analysis of Divorce Settlements* (1989) (unpublished manuscript, on file with the author).

25. INSTITUTE FOR SOCIAL RESEARCH, *A PANEL STUDY OF INCOME DYNAMICS: PROCEDURES AND TAPE CODES* (1982).

TABLE 5  
YEAR (AND EFFECTIVE DATE) OF STATE DIVORCE LAW  
CHANGES TO NO-FAULT

<u>1970</u>	<u>1971</u>	<u>1972</u>	<u>1973</u>
California (January 1)	Florida (July 1)	Colorado (January 1)	Arizona (August 8)
Iowa (July 1)	Oregon (October 1)	Kentucky (July 1)	Hawaii (July 1)
		Michigan (January 1)	Indiana (September 1)
		Nebraska (July 6)	Nevada (July 1)
			Washington (April 25)
<u>1974</u>	<u>1976</u>	<u>1977</u>	
Minnesota (March 15)	Montana (January 1)	Wyoming (May 27)	

Note: The exact dates at which the law became effective were determined via consultation of the relevant state codes listed below, and by conversations with state legislative information personnel. *See* ARIZ. REV. STAT. ANN. § 25-312(3) (West 1984); CAL. [CIV.] CODE § 4506(1) (West 1983); COLO. REV. STAT. § 14-10-106(II) (Bradford 1987); FLA. STAT. § 61.052(1)(a) (West 1985); HAW. REV. STAT. ANN. § 580-42 (Michie 1988); IND. CODE ANN. § 31-1-11.5-3(a)(1) (Michie 1987); IOWA CODE ANN. § 598.17 (West 1981); KY. REV. ANN. STAT. § 403.140 (Michie 1984); MICH. COMP. LAWS ANN. § 552.6(1) (West 1988); MINN. STAT. ANN. § 518.06 (West 1990); MONT. CODE ANN. § 40-4-104(b) (1991); NEB. REV. STAT. § 42-361 (1988); NEV. REV. STAT. ANN. § 125.010(3) (Michie 1986); OR. REV. STAT. § 107.025 (Butterworth 1990); WASH. REV. CODE ANN. § 26.09.030 (West 1986); WYO. STAT. § 20-2-104 (1977).

the husband),<sup>26</sup> demographic variables (education levels, race, religion, and a measure of population density), and other variables (spending on children, whether the family had recently moved, the divorce rate nationwide, and the duration of time since no-fault was passed in the state).

Using these control variables permitted the author to conduct statistical analysis to determine if couples were more likely to divorce after their states changed to no-fault. The particular variable of interest in this analysis measured the fraction of a couple's spending devoted to children relative to transferable goods. The fundamental conclusion reached from this analysis

26. Data on the wife's age at marriage and number of previous divorces were unavailable.

was that those couples with a greater fraction of spending on children were found to be more likely to divorce after the law switched to no-fault,<sup>27</sup> precisely confirming the original theory advanced in this article. This statistical finding was verified repeatedly by making numerous changes in the structure and substance of the analysis; at every point, the statistical significance of this novel explanation of higher divorce rates under no-fault was demonstrated.<sup>28</sup> These results indicated that *one* reason for a higher divorce rate under no-fault is the non-transferability of children within marriage. Thus, for the first time, evidence is offered which indicates that from an economic perspective too many divorces occur under no-fault.

What about the *other* potential reasons for a higher divorce rate under no-fault, reasons unrelated to spending on children but related to transactions costs, for example, either *lower* transactions costs (Proposition 2) or *prohibitive* transactions costs (Proposition 3)? This second reason, encompassing these two propositions, implies that no-fault increases the divorce rate *regardless* of couples' spending on children relative to transferable goods. The two earlier studies which detect a positive effect of no-fault on the divorce rate<sup>29</sup> are consistent with both reasons (large spending on children *and* transactions costs). Only the analysis conducted by the author allows the two reasons to be distinguished, and this distinction was made by including two separate no-fault variables. The first variable, the one described above, measured spending on children relative to transferable goods; this variable represents the non-transferability problem described in Proposition 4, and, as noted above, was found to increase the divorce rate. The second variable indicated whether the divorce law in a particular state was fault or no-fault in a given year, and did not measure spending on children relative to other goods. This second variable was statistically insignificant, implying that no-fault did not increase the divorce rate due to prohibitive or decreasing transactions costs. This analysis suggests that only a large fraction of income devoted to the public good, children, and not lower or prohibitive transactions costs, is responsible for the recent rise in divorce rates caused by no-fault.

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27. Specific evidence demonstrating this result is provided in the Appendix.

28. See Zelder, *supra* note \*, at 40-92.

29. See Marvell, *supra* note 24, at 555; Weiss & Willis, *supra* note 24.

## V. CHOOSING BETWEEN FAULT AND NO-FAULT DIVORCE LAW: NORMATIVE ARGUMENTS

The analysis of no-fault up to this point has been purely predictive, that is, concerned with cause-and-effect. From a public policy perspective, however, it is critical to determine whether fault or no-fault is preferred. That is, a *normative* evaluation must be made to answer the question: is fault or no-fault preferred from society's point-of-view? Because Proposition 4, the public goods theory, is empirically verified (while Propositions 1, 2, and 3 are rejected), as described in the previous section, this section explores its normative implications and reviews the comparative assessments of fault and no-fault made by other commentators.

### A. *The Public Policy Implication of Public Goods Within Marriage*

Proposition 4 (the public goods theory) has important public policy content. Not only does it imply that no-fault divorce law increases the divorce rate, but it also indicates that these additional no-fault divorces are economically inefficient. The definition of efficiency employed in this article is Kaldor-Hicks efficiency; under this definition, a transaction is efficient when the gains to the gainers exceed the losses to the losers.<sup>30</sup> In the example in Table 4 above, Gatsby and Daisy get divorced even though the benefit of the divorce to Daisy (and thus to society) is only 50, compared to the higher cost of the divorce to Gatsby (and thus to society) of 100. In other words, even though there is a positive surplus to marriage, divorce occurs. If all of this surplus could be transferred, both spouses could be made better off within marriage, but because part of the surplus is non-transferable, the two spouses are made worse off in total when they divorce (Gatsby is made worse off by more than Daisy is made better off). When some of the gains to marriage take the form of public goods, divorces occur in a no-fault regime that *should not*. No-fault divorce laws create inefficient divorces.<sup>31</sup>

30. For a good discussion of Kaldor-Hicks efficiency, see LANDES & POSNER, *supra* note 11, at 16-19.

31. By contrast, there is no transferability problem under fault, as all the gains to divorce are in the form of *private* goods. (Because the husband and wife each receive *gains to marriage* in the public good they must, by definition, receive *losses to divorce* in the public good.) If all the gains to divorce are transferable private goods, then there is exactly the efficient number of divorces under fault. See Zelder, *supra* note \*, at 2-8, for further discussion of this point.

Thus, Proposition 4, the proposition involving public goods within marriage, implies that a no-fault regime is inefficient compared to a fault regime—on efficiency grounds, too many divorces occur under no-fault, but the right number occur under fault. Furthermore, because Proposition 4 is confirmed by empirical tests, such a finding would suggest that no-fault grounds for divorce should be replaced by fault grounds.<sup>32</sup>

### B. *Fault vs. No-Fault: The Assessment of Other Commentators*

Having reached the conclusion that no-fault divorce is inefficient, it is worthwhile to examine the prevalent views on no-fault, both at its adoption and currently. At the time of its introduction in 1970 in California, no-fault divorce law was viewed as a desirable, or at worst innocuous, reform.<sup>33</sup> An important precursor to California's successful reform effort was *Putting Asunder*,<sup>34</sup> the 1966 report issued by a committee appointed by the Archbishop of Canterbury, which advocated the replacement of fault grounds with a no-fault ground of, essentially, marital breakdown.<sup>35</sup> Moreover, the proponents of no-fault in California, primarily "a small group of elite matrimonial lawyers,"<sup>36</sup> were committed to eliminating the "dishonesty" surrounding fault divorce, dishonesty resulting from collusion and

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32. Obviously, this analysis ignores children's welfare in determining efficiency. The main point is that even in a simpler model where only husbands' and wives' welfare are considered, no-fault leads to inefficient divorces. It does not seem to be the case that if children's welfare were included in the analysis, the inefficiency of no-fault would be removed. Children possess the same ability to compensate their parents with pecuniary and non-pecuniary resources in an attempt to prevent divorce under either divorce law regime. Incorporation of children's welfare into the model would not appear to change the qualitative results regarding the inefficiency of no-fault.

Also, some might quibble with the basic normative conclusion of this article, and note that eliminating no-fault and thus, requiring fault, "traps" within marriage those, such as Daisy (in Table 4) who are made worse off by marriage. There are two responses to this contention. One is that if no-fault is the rule, not only do inefficient divorces occur, but some people are trapped in divorce, even though it makes them worse off. There is no reason to endorse one form of ensnarement over another. Second, if one accepts this problem of people trapped within marriage, one remedy is to regulate the allocation of resources within marriage so that (in Table 4) Gatsby shares his gains with Daisy (to the extent possible, given that some of his gains are in the form of public goods) so that she is made better off within marriage (or at least loses less). Such a practice would, of course, be inconsistent with the state's traditional protection of family autonomy. Nevertheless, such a rule might be economically efficient if it prevented trapped spouses such as Daisy from wasting resources on harming their better-off mates in order to induce divorce.

33. See JACOB, *supra* note 2, at 60-61.

34. See *id.* at 45-46 (citing ARCHBISHOP OF CANTERBURY, *PUTTING ASUNDER* (1966)).

35. See *id.* at 41.

36. *Id.* at 50.

fraud.<sup>37</sup> Nevertheless, while lawyers and even Catholic organizations supported California's no-fault reform, feminists were not among its supporters.<sup>38</sup>

Substantial criticism of no-fault has arisen more recently. The first prominent critic of no-fault, Lenore Weitzman, attacks no-fault particularly because of its implications for the welfare of divorced women and children.<sup>39</sup> Professor Weitzman recognizes that no-fault, in various ways, diminishes women's property rights in divorce. First, Professor Weitzman objects to the fact that women have lost their property rights to remain married because of no-fault; no-fault entails *unilateral*, not mutual consent, to divorce, and Professor Weitzman sees women as disproportionately harmed by this shift. In her words, "[t]he . . . consequences of the [unilateral] consent rule have fallen most heavily on the older and economically weaker wife."<sup>40</sup> Professor Weitzman's second objection to no-fault is that it abolishes the connection between the financial settlement at divorce and the occurrence of fault. The primary beneficiaries of divorce settlements linked to fault are, according to Professor Weitzman, women, who are typically the "innocent" plaintiff in fault divorce actions.<sup>41</sup> As a consequence, under fault, women tend to receive more than half of the marital property; this share of property decreases under no-fault.<sup>42</sup> Third, no-fault creates new standards for the award of alimony, replacing the presumption that husbands will support wives after divorce with the notion that most women are self-sufficient.<sup>43</sup> Consequently, the frequency and duration of alimony awards are found by Professor Weitzman to decline under no-fault.<sup>44</sup> Finally, women's property rights with respect to children are diminished, as child custody comes to be viewed as gender-neutral under no-fault, and many states alters their presumptions away from mother custody to joint custody.<sup>45</sup> As a consequence of these changes, Professor Weitzman detects a large

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37. See *id.* at 47.

38. See *id.* at 60. Even currently, according to MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY* 175 (1991), "feminist theory has for the most part neglected divorce as a distinct subject of inquiry."

39. See WEITZMAN, *supra* note 3.

40. *Id.* at 27.

41. See *id.* at 30.

42. See *id.*

43. See *id.* at 31-32.

44. See *id.* at 32-33.

45. See *id.* at 36-37.

decrease in the standard of living of women and children in no-fault divorce compared to marriage.<sup>46</sup>

Mary Ann Glendon's<sup>47</sup> criticism of no-fault is also, in part, concerned with the same issues as Professor Weitzman's. The basis of Professor Glendon's analysis is her perception of modern American divorce law as "no-fault, no-responsibility divorce."<sup>48</sup> One aspect of this view is that American divorce law does not adequately protect the post-divorce interests of children and "dependent" spouses.<sup>49</sup> Along these lines, Professor Glendon advocates reform akin to that of European nations such as Sweden or West Germany such that the "financial obligations of the former provider" are enforced, and furthermore, that the state offer "strong programs of public benefits for families with children."<sup>50</sup> Of course, these conditions may be met under either fault or no-fault.

The second aspect of Professor Glendon's criticism is that "no-responsibility" divorce makes divorce too easy.<sup>51</sup> Most European countries require a waiting period in excess of one year for a contested no-fault divorce to be granted, unlike many American jurisdictions, which do not require a waiting period or require one of less than a year.<sup>52</sup> More fundamentally, the language and culture of American divorce "weigh[s] in heavily on the side of individual self-fulfillment,"<sup>53</sup> a pattern Professor Glendon decries.<sup>54</sup>

Martha Fineman's argument against no-fault is also founded on the same basic concern as Professor Weitzman's: no-fault inherently makes divorced women worse off.<sup>55</sup> Professor Fineman locates the source of this problem in the emphasis of feminists on "rule-equality" rather than "result-equality."<sup>56</sup> The practical consequence of advocacy of rule-equality is a

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46. See *id.* at 337-40. This empirical conclusion has been vigorously disputed. See Saul D. Hoffman & Greg J. Duncan, *What are the Economic Consequences of Divorce?*, 25 *DEMOGRAPHY* 641, 644 (1988); Jacob, *supra* note 3, at 115; Stephen D. Sugarman, *Dividing Financial Interests on Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 130 (Stephen D. Sugarman & Herma Hill Kay eds., 1990).

47. See MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* (1987).

48. *Id.* at 105.

49. See *id.* at 93-111.

50. *Id.* at 82.

51. See *id.* at 108-111.

52. See *id.* at 68.

53. *Id.* at 108.

54. See *id.*

55. FINEMAN, *supra* note 38, at 2.

56. See *id.* at 3.

diminution in women's property rights in divorce, as equal property division and joint custody presumptions place divorced women in worse positions than they had been pre-reform.<sup>57</sup> Because women are originally worse off than men, rule-equality only perpetuates that disadvantage instead of remedying it.<sup>58</sup> In order to reach result-equality, Professor Fineman argues that divorce law must be reformed away from rule-equality in terms of property division and custody.<sup>59</sup> Indeed, there is remarkable consistency in the objections to no-fault raised by Professors Weitzman, Glendon, and Fineman. Although they approach the issue from different perspectives and methodologies, they all agree with the conclusion of this article that fault divorce is substantively preferable to no-fault divorce.

## VI. CONCLUSION

Since the advent of no-fault divorce law, people have suspected that no-fault has acted to increase the divorce rate, but most evidence on this point has indicated otherwise. This article both provides a logical reason for no-fault to have increased the divorce rate and reports evidence connecting this divorce-rate increase to the shift to no-fault. The most important implication of this finding for lawmaking is that too many divorces occur under no-fault (using an economic efficiency standard): some people get divorced who would be better off jointly if they remained married. In other words, economically inefficient divorces occur under no-fault which do not occur under fault. Thus, this article makes an unconventional recommendation: eliminate no-fault so that marriage will be preserved when it is economically efficient to do so.

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57. *See id.* at 27-28.

58. *See id.* at 22-23.

59. *See id.* at 179.

APPENDIX: STATISTICAL EVIDENCE DEMONSTRATING THAT  
GREATER SPENDING ON THE PUBLIC GOOD,  
CHILDREN, RELATIVE TO TRANSFERABLE  
GOODS, INCREASES THE DIVORCE  
RATE UNDER NO-FAULT

The theory of children as public goods presented in this article offers the prediction that the probability of divorce will increase in no-fault states relative to fault states, the higher the ratio of wealth in children (which is non-transferable) relative to non-child-wealth (which is transferable); this ratio is referred to as RELATIVE CHILD-WEALTH. Thus, a variable, NO-FAULT DUMMY\*RELATIVE CHILD-WEALTH, is included in the analysis, and is expected to have a positive effect on the divorce rate according to the theory developed in this article. Other variables are defined in Table A-1 and their summary statistics presented in Table A-2. Table A-3 presents the central regression performed by the author, equation (1).<sup>60</sup> The variable of interest, NO-FAULT DUMMY\*RELATIVE CHILD-WEALTH, is positive and statistically significant.<sup>61</sup> Other regressors exhibit the expected signs. TOTAL CHILD EXPENDITURES decreases the probability of divorce (and is statistically significant), a result consistent with the interpretation of investments in children as marriage-specific investments.<sup>62</sup> Increased ASSETS decreases the probability of divorce (and is statistically significant), and increased WIFE'S INCOME increases the probability of divorce (and is statistically significant), indicating that decreased spousal specialization (between the labor market and the household) is maritally destabilizing.<sup>63</sup> Catholics are less likely to divorce; the RELIGION DUMMY is negative and statistically significant. The greater the number of previous divorces by the husband, the greater the likelihood of divorce in the current marriage, a statistically significant effect, suggesting that PREVIOUS DIVORCES reflects unobservable marriage-detrimental charac-

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60. See Table A-3; see also Zelder, *supra* note \*, at 58-59.

61. A statistically significant variable is one for which there is a 10 percent chance or less that the variable's true effect is zero. See ROBERT S. PINDYCK & DANIEL L. RUBINFELD, *ECONOMETRIC MODELS AND ECONOMIC FORECASTS* 55-56 (2d ed. 1981).

62. See Gary S. Becker et al., *An Economic Analysis of Marital Instability*, 85 J. POL. ECON. 1141, 1142 (1977).

63. HUSBAND'S INCOME appears statistically insignificant because its effect is picked up by the ASSETS variable; the correlation coefficient between the two is .81.

teristics. MARRIAGE DURATION reduces the probability of divorce and is statistically significant. The variable representing husband's AGE AT MARRIAGE is negative and statistically significant; it probably reflects that longer search for a wife leads to more stable marriages. The EDUCATION OF WIFE, probably a proxy for wife's age at marriage, also reduces the likelihood of divorce and is statistically significant. Finally, the URBAN POPULATION INDEX is negative (residents of smaller areas are less likely to divorce) and statistically significant. Other variables measuring RACE, MIGRATION, EDUCATION OF HUSBAND, and various time trends, are statistically insignificant. Additional conclusive support is provided for the results presented here by a wide variety of regressions presented in earlier papers by the author.<sup>64</sup> Changing the law from fault to no-fault for one year is estimated to increase the annual divorce rate by 24 percent.<sup>65</sup>

Finally, equations (2) and (3) in Table A-3 are similar in form to equation (1), differing only in order to test whether the effect of no-fault divorce law operates through spending on children or whether it is merely some kind of transactions costs effect (lower or prohibitive transactions costs). Equation (2) is identical to equation (1) except that the ordinary NO-FAULT DUMMY VARIABLE is substituted for NO-FAULT DUMMY VARIABLE\*RELATIVE CHILD-WEALTH. The coefficient on the NO-FAULT DUMMY is statistically insignificant. In equation (3), NO-FAULT DUMMY VARIABLE\*RELATIVE CHILD-WEALTH is retained, and NO-FAULT DUMMY VARIABLE is *added* to the set of explanatory variables. Again, NO-FAULT DUMMY is statistically insignificant, while NO-FAULT DUMMY VARIABLE\*RELATIVE CHILD-WEALTH remains statistically significant (and positive). The statistical insignificance of the NO-FAULT DUMMY in both cases indicates that no-fault divorce law did not increase the divorce rate as a consequence of either prohibitive or lowered transactions costs.

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64. See Zelder, *supra* note \*, at 40-92.

65. See Table A-3.

TABLE A-1  
VARIABLE DEFINITIONS

**TOTAL CHILD EXPENDITURES** = Real total expenditures (in 1967 dollars) on all children in family; constructed from observables and regression coefficients in Lazear and Michael.<sup>66</sup>

**NO-FAULT DUMMY** = 1 if state is no-fault; 0 if state is fault.

**RELATIVE CHILD-WEALTH** =  $(10 * \text{TOTAL CHILD EXPENDITURES}) / \text{ASSETS}$ .

**HUSBAND'S INCOME** = Sum of husband's labor income, rent, interest, and dividend income, and miscellaneous transfers; in 1967 dollars.

**WIFE'S INCOME** = Sum of wife's labor income, income from assets, and transfer income; in 1967 dollars.

**RELIGION DUMMY** = 1 if Catholic; 0 if not Catholic.

**RACE DUMMY** = 1 if nonwhite; 0 if white.

**MIGRATION DUMMY** = 1 if moved; 0 if not moved (within last sample period).

**URBAN POPULATION INDEX** = Categorized according to size of largest city in primary sampling unit: 1 = 500,000 or more, 2 = 100,000-499,999, 3 = 50,000-99,999, 4 = 25,000-49,999, 5 = 10,000-24,999, 6 = less than 10,000.

**# PREVIOUS DIVORCES** = Number of previous divorces by husband.

**AGE AT MARRIAGE** = Age of husband at beginning of marriage.

**EDUCATION OF HUSBAND** = Categorized as: 0 = cannot read or write, 1 = grades 0-5, 2 = grades 6-8, 3 = grades 9-11, 4 = grade 12, 5 = grade 12 plus nonacademic training, 6 = college but no degree, 7 = college degree, 8 = college degree plus advanced degree.

**EDUCATION OF WIFE** = Same as EDUCATION OF HUSBAND.

**DIVORCE LAW DURATION** = Time since change to no-fault divorce law.

**U.S. DIVORCE RATE** = Annual divorce rate per 1,000 married women aged 15-44.

**ASSETS** = Real (1967 dollars) non-child assets; sum of house, automobiles, and permanent income values.

**MARRIAGE DURATION** = Length of marriage in years.

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66. See EDWARD P. LAZEAR & ROBERT T. MICHAEL, ALLOCATION OF INCOME WITHIN THE HOUSEHOLD 86 (1988).

TABLE A-2  
SUMMARY STATISTICS

Variable	Mean	Standard Deviation	Minimum	Maximum
Total Child Expenditures	2001.28	1984.14	0	12459.30
No-Fault Dummy Variable	.80	.40	0	1
No-Fault Dummy* Relative Child-Wealth	.13	.14	0	.75
Relative Child-Wealth	.17	.15	0	.75
Husband's Income	7529.27	5670.67	0	71647.40
Wife's Income	1380.08	2067.78	0	18782.90
Religion Dummy (Catholic = 1)	.23	.42	0	1
Race Dummy (Non-White = 1)	.19	.40	0	1
Migration Dummy (Moved = 1)	.18	.38	0	1
Urban Population Index (Smallest = 6)	2.85	1.81	1	6
# Previous Divorces	.20	.41	0	2
Age at Marriage	26.98	10.32	12	83
Marriage Duration	22.52	12.09	1	63
Education of Husband	4.28	1.85	0	8
Education of Wife	4.11	1.59	0	8
Divorce Law Duration	4.33	3.45	0	12
U.S. Divorce Rate	19.16	3.00	13.4	22.8
Assets	117064	63300.2	6411	630573

TABLE A-3  
BENCHMARK REGRESSION RESULTS

Dependent Variable: Divorce Dummy Variable (Divorce = 1)

Variable	(1)	(2)	(3)
Intercept	-1.70 (2.33) <sup>b</sup>	-1.72 (2.26) <sup>b</sup>	-1.76 (2.30) <sup>b</sup>
Total Child Expenditures	-.0002 (2.70) <sup>c</sup>	-.00008 (1.87) <sup>a</sup>	-.0002 (2.56) <sup>b</sup>
No-Fault Dummy*	1.24	—	1.35
Relative Child-Wealth	(2.01) <sup>b</sup>		(1.79) <sup>a</sup>
Husband's Income	.000004 (.14)	.000005 (.22)	.000004 (.14)
Wife's Income	.0002 (5.51) <sup>c</sup>	.0002 (5.55) <sup>c</sup>	.0002 (5.49) <sup>c</sup>
Religion Dummy (Catholic = 1)	-.32 (2.04) <sup>b</sup>	-.32 (2.02) <sup>b</sup>	-.32 (2.04) <sup>b</sup>
Race Dummy (Non-White = 1)	.21 (1.46)	.22 (1.54)	.21 (1.46)
Migration Dummy (Moved = 1)	.30 (2.22) <sup>b</sup>	.31 (2.27) <sup>b</sup>	.30 (2.21) <sup>b</sup>
Urban Population Index (Smallest = 6)	-.10 (2.67) <sup>c</sup>	-.10 (2.70) <sup>c</sup>	-.10 (2.66) <sup>c</sup>
# Previous Divorces	.44 (2.56) <sup>b</sup>	.42 (2.45) <sup>b</sup>	.44 (2.57) <sup>b</sup>
Age at Marriage	-.04 (4.71) <sup>c</sup>	-.04 (4.80) <sup>c</sup>	-.04 (4.71) <sup>c</sup>
Marriage Duration	-.04 (6.17) <sup>c</sup>	-.04 (6.46) <sup>c</sup>	-.04 (6.13) <sup>c</sup>
Education of Husband	.04 (1.04)	.04 (.99)	.04 (1.04)
Education of Wife	-.09 (2.10) <sup>b</sup>	-.09 (2.08) <sup>b</sup>	-.09 (2.09) <sup>b</sup>
Divorce Law Duration	.0001 (.00)	-.0003 (.00)	.0002 (.00)
U.S. Divorce Rate	.04 (.97)	.04 (.93)	.05 (.99)
Assets	-.000008 (3.53) <sup>c</sup>	-.00001 (4.29) <sup>c</sup>	-.000008 (3.42) <sup>c</sup>
No-Fault Dummy Variable	—	.23 (.99)	-.07 (.24)
N	12599	12599	12599
-2(log L*)	2680.97	2684.07	2680.90

Note: Numbers in parentheses are asymptotic t-statistics. "a" implies significance at 10 percent level; "b" implies significance at 5 percent level; "c" implies significance at 1 percent level. "N" indicates number of observations; -2(log L\*) is an indicator of the goodness-of-fit of the regression.

