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A Consideration of Alternatives to Divorce Litigation

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I. INTRODUCTION

Adversarial adjudication, according to popular and some professional[1] perceptions, makes the process of divorce excessively expensive,

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1. The advocacy of remedial innovation represents a growing ferment that challenges the traditional status of the court system as the chief vehicle for dispensing justice. "The obligation of our profession is . . . to serve as healers of human conflicts." Address by Chief Justice Burger, ABA Midyear Meeting (Jan. 24, 1982), *reprinted in* 68 A.B.A. J. 274, 274 (1982). *See also* State of the Judiciary Address by Chief Justice Burger, *reprinted in* 109 N.J.L.J., Feb. 4, 1984, at 1, col. 4. Envisaging dispute resolution from the perspective of conflict management, proponents of substitute processes generally see the histrionics of litigation and lawyering as an impediment to the effective brokering of disputes. *See* M. DEUTSCH, THE RESOLUTION OF CONFLICT (1973); R. FISHER & W. URY, GETTING TO YES (1981); J. HIMES, CONFLICT AND CONFLICT MANAGEMENT (1980); Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741 (1982); Eisenberg, *Private Ordering Through Negotiation: Dispute Settlement and Rulemaking*, 89 HARV. L. REV. 637 (1976); Mnookin & Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979); Thensted, *Litigation and Less: The Negotiation Alternative*, 59 TUL. L. REV. 76 (1984).

The current literature on alternative dispute resolution has, quite literally, exploded to unmanageable proportions. "[T]he search for alternative methods of resolving disputes has burgeoned to 'a movement.' " Davidson & Ray, *Preface* to ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION (H. Davidson, L. Ray & R. Horowitz eds. 1982). Given the veritable explosion of writing in this area, the following list of sources is not exhaustive, but rather illustrative of the major references in the area. The sources are organized according to subject matter headings. The literature is of uneven quality.

The following sources contain general discussions of alternative dispute resolution. *The Growing Field of Alternative Dispute Resolution*, 7 AM. ARB. ASSOC. LAW. ARB. LETTER 4-7 (No. 4 Dec. 1983); J. FOLBERG & A. TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 4, 4-7 (1984), *reviewed in* 84 MICH. L. REV. 1036 (1986); Sander, *Family Mediation: Problems and Prospects*, 2 MEDIATION Q. 3, 3-5 (1983); POLITICS OF INFORMAL JUSTICE (2 vols.) (R. Abel ed. 1981); ARBITRATION AND THE LAW (Arb. Assoc. 1982) (General Counsel's Annual Report); L. FREEDMAN, LEGISLATION ON DISPUTE RESOLUTION (1984) (A.B.A. Spec. Comm. on Dispute Resolution Monograph No. 2 1984); Kritzer & Anderson, *The Arbitration Alternative: A Comparative Analysis of Case Processing Time, Disposition Mode, and Cost in the*

painstaking, and difficult.[2] The volume of cases before the courts, along with the attention paid to cumbersome procedural matters, often engen-

American Arbitration Association and the Courts, 8 JUST. SYS. J. 6 (1983); NAT'L INST. JUST./NAT'L CRIM. JUST. REFERENCE SERV., U.S. DEP'T OF JUSTICE, CUSTOM SEARCH, APPLICATIONS OF DISPUTE RESOLUTION (Medical, Consumer, Labor, Commercial, Family) (1984) (206 documents available on JURIS SEARCH) (on file with author); Snow & Abramson, *Alternative to Litigation: Court Annexed Arbitrations*, 20 CAL. W.L. REV. 43 (1983); D. THOMAS, DISPUTE RESOLUTION FROM AN ANTHROPOLOGICAL PERSPECTIVE, SOCIETY OF PROFESSIONALS IN DISPUTE RESOLUTION, Occasional Paper No. 84-1, Mar. 1984; *Trends in Alternative Dispute Resolution*, 14 N.Y.U. REV. L. & SOC. CHANGE 739 (1986).

The following sources contain discussions of alternate dispute resolution mechanisms in specific areas other than family law:

In commerce: Green, *Growth of the Mini-Trial*, 9 LITIGATION 12 (1982); Goldstein, *Alternatives for Resolving Business Transaction Disputes*, 58 ST. JOHN'S L. REV. 69 (1983); Hoellering, *The Mini-Trial*, 37 ARB. J. 48 (1982); Solove, *Alternative Means to Resolve Corporate Disputes: A Survey*, 91 COM. L.J. 133 (1986); *Trial Alternatives: Alternative Dispute Resolution*, 54 U.S.L.W. 2060 (July 23, 1985).

In consumer matters: CONSUMER DISPUTE RESOLUTION: EXPLORING THE ALTERNATIVES (L. Ray & D. Smolover eds. 1983) (Conference Materials for the American Bar Association Special Committee on Alternative Dispute Resolution, First National Conference on Alternative Consumer Dispute Resolution, Jan. 17-18, 1983).

In education: J. FOLBERG & A. TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION 196, 196-203 (1984).

In environmental matters: J. FOLBERG & A. TAYLOR, *supra*, at 217-32; Watson & Danielson, *Environmental Mediation*, 15 NAT. RESOURCES LAW. 687 (1983).

In housing/landlord-tenant disputes: J. FOLBERG & A. TAYLOR, *supra*, at 191-96; Salsich & Fitzgerald, *Mediation of Landlord-Tenant Disputes: New Hope for the Implied Warranty of Habitability*, 19 CREIGHTON L. REV. 791 (1986).

In medical malpractice: Aslanian-Bedikian, *Arbitrating a Medical Malpractice Claim*, 62 MICH. B.J. 788 (1983); Heintz, *Medical Malpractice Arbitration: A Viable Alternative*, 34 ARB. J. 12 (1979); Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655 (1976); Comment, *Alternatives to the Medical Malpractice Phenomenon: Damage Limitations, Malpractice Review Panels and Countersuits*, 34 WASH. & LEE L. REV. 1179 (1977); Note, *The Michigan Malpractice Act's Requirement of a Physician on the Panel Violates the Due Process Right to a Fair and Impartial Tribunal*, 28 WAYNE L. REV. 1843 (1982); Note, *Medical Malpractice Arbitration: Time for a Model Act*, 33 RUTGERS L. REV. 454 (1981); Note, *Medical Malpractice Arbitration, A Comparative Analysis*, 62 VA. L. REV. 1285 (1976); Note, *Medical Malpractice Arbitration: A Patient's Perspective*, 61 WASH. U.L.Q. 123 (1983).

In minority relations: J. FOLBERG & A. TAYLOR, *supra*, at 214-17.

In neighborhood/community justice: *Community Mediation*, 5 MEDIATION Q. 1-90 (J. Lemmon ed. 1984); NAT'L INST. JUST./NAT'L CRIM. JUST. REFERENCE SERV., U.S. DEP'T OF JUSTICE, CUSTOM SEARCH, NEIGHBORHOOD JUSTICE CENTERS (1984) (256 documents available on JURIS SEARCH) (on file with author).

For patent disputes: Goldstein, *Arbitration of Disputes Relating to Patent Validity or Infringement*, 72 ILL. B.J. 350 (1984).

In real estate matters: Levy, *Resolving Real Estate Valuation Disputes Through Arbitration*, 14 REAL ESTATE REV. 61 (1984).

In torts generally: Hoellering, *Remedies in Arbitration*, 20 FORUM 516 (1985); *Symposium: Alternative Compensation Schemes and Tort Theory*, 73 CALIF. L. REV. 548-1002 (1985); Comment, *The Asbestos Claims Facility—An Alternative to Litigation*, 24 DUQ. L. REV. 833 (1986). *But see* Phillips, *In Defense of the Tort System*, 27 ARIZ. L. REV. 603 (1985).

2. Criticism of the adversarial process—centering upon its expense, delay, and negative effect upon litigants—is not confined to domestic relations disputes. According to Lieberman, such criticism applies to the process in most, if not all, areas of litigation:

> Important and as effective as the adversary system can be, it is not without a deleterious side. It can be a hugely inefficient means of uncovering facts; its relentless formalities and ceaseless opportunities for splitting hairs are time consuming and expensive. It is not available therefore to everyone, and if it is the only system for obtaining redress then justice cannot be done. For that reason, it may mislead us as a society into supposing that its availability is a

guarantee of safety. Litigation is not a panacea; social policies are not necessarily carried out merely because there is an avenue open to some. . . .

Moreover, like every other human system, litigation is subject to regular abuse. The limitations of semantics, the fallibility of memory, the will to prevaricate, all contribute to unpredictability. The outcome is never certain, and litigation is therefore frequently an exercise in anguish and futility. As a mechanism to instill in people a fiduciary regard for others, it can be effective. But for all that it does not often treat well those who are ensnared in it. Litigation, and especially the trial itself, can be unremittingly harsh. Lawyers are often adversaries not only of each other but of their clients; some kinds of litigation are prolonged (and even initiated) solely to ensure the lawyers sufficient billable hours to earn a decent or even a handsome living. The process can be psychologically harmful, hurting self-esteem as well as pocketbook. Other modes of resolving disputes and solving problems bear scrutiny.

J. LIEBERMAN, THE LITIGIOUS SOCIETY 171 (1983). *See generally* J. AUERBACH, UNEQUAL JUSTICE (1976). For a discussion of the origins and development of the adversarial process, see Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713 (1983). For an assessment of the adversarial model of adjudication, see Landsman, *The Decline of the Adversary System: How the Rhetoric of Swift and Certain Justice Has Affected Adjudication in American Courts*, 29 BUFFALO L. REV. 487 (1980).

Vituperative accounts, however, are particularly pronounced when the process is evaluated for its operation upon family matters:

[I]f one were to set out to design a system poorly adapted to the resolution of family conflict or for safeguarding the children, one would, with a little luck, invent the adversarial system presided over by a perplexed, frustrated judge whose background in law and politics have no conceivable bearing on the issues before him or her.

Keynote Speech by Frank Sander, ABA National Conference on Alternate Means of Dispute Resolution (June 1982) (quoting J. Wallerstein) (American Bar Association transcription at 22), *reprinted in* Comment, *The Best Interest of the Divorcing Family—Mediation Not Litigation*, 29 LOY. L. REV. 55, 57 (1983).

The following list of sources pertaining to alternative dispute resolution in family law matters is more illustrative than exhaustive. For the sake of clarity, it organizes the relevant material according to subject matter headings. Given the plethora of writings and the novelty of alternative mechanisms in the family law area, much of the literature is descriptive, sometimes uncritically promotive and self-interested, and generally of uneven quality (although excellent studies do exist). Finally, the bulk of the literature centers upon mediation.

The primary alternative remedies in the area of family law are arbitration, conciliation, and mediation. For a comprehensive discussion of these and other alternative mechanisms in the area of family law, see ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION (H. Davidson, L. Ray & R. Horowitz eds. 1982); Herrman, McKenry & Weber, *Mediation and Arbitration Applied to Family Conflict Resolution: The Divorce Settlement*, 34 ARB. J. 17 (1979); Meroney, *Mediation and Arbitration of Separation and Divorce Agreements*, 15 WAKE FOREST L. REV. 467 (1979); Rigby, *Alternate Dispute Resolution*, 44 LA. L. REV. 1725 (1984); Spencer & Zammit, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911.

Specifically, on arbitration in family law matters: Coulson, *Family Arbitration—An Exercise in Sensitivity*, 3 FAM. L.Q. 22 (1969); Philbrick, *Agreements to Arbitrate Post-Divorce Custody Disputes*, 18 COLUM. J.L. & SOC. PROBS. 419 (1985); Spencer & Zammit, *Reflections on Arbitration Under the Family Dispute Services*, 32 ARB. J. 111 (1977); Comment, *Arbitration—A Viable Alternative?*, 3 FORDHAM URB. L. REV. 53 (1974); Comment, *The Enforceability of Arbitration Clauses in North Carolina Separation Agreements*, 15 WAKE FOREST L. REV. 487 (1979). *See also* N. SHERESKY & M. MANNES, UNCOUPLING: THE ART OF COMING APART 116-17 (1972).

On conciliation: Foster, *Conciliation and Counseling in the Courts in Family Law Cases*, 41 N.Y.U. L. REV. 353 (1966); Lightman & Irving, *Conciliation and Arbitration in Family Disputes*, 14 CONCILIATION CTS. REV. 12 (1976); McIntrye, *Conciliation of Disrupted Marriages by or Through the Judiciary*, 4 J. FAM. L. 117 (1964); McIsaac, *The Family Conciliation Court of Los Angeles County*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 131 (H. Davidson, L. Ray & R. Horowitz eds. 1982); Orlando, *Where and How—Conciliation Courts*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 111 (H. Davidson, L. Ray & R. Horowitz eds. 1982); Parkinson, *Conciliation in Matrimonial Disputes*, 14 BRACTON L.J. 30 (1981); Orlando, *Conciliation Programs: Their Effect on Marriage and Family Life*, 52 FLA. B.J. 218 (1978); Wolff, *Family Conciliation: Draft Rules for the Settlement of Family Disputes*, 21 J. FAM. L. 213 (1982).

Books on mediation: O. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT (1978); R. COULSON, FIGHTING FAIR (1983); J. FOLBERG & A. TAYLOR, MEDIATION: A COMPRE-

der delays, and substantially increase the length of proceedings.[3] The

HENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984); R. GARDNER, FAMILY EVALUATION IN CHILD CUSTODY LITIGATION (1982); J. HAYNES, DIVORCE MEDIATION (1981); H. IRVING, DIVORCE MEDIATION: THE RATIONAL ALTERNATIVE (1980); J. PEARSON & N. THOENNES, DIVORCE MEDIATION: STRENGTHS AND WEAKNESSES OF ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION (1982); D. SAPOSNEK, MEDIATING CHILD CUSTODY DISPUTES (1983).

Compilations on mediation: DIVORCE MEDIATION—THEORY AND PRACTICE (J. Folberg & A. Milne eds. 1981) (Conference Materials for the Association of Family Conciliation Courts, Winter 1981 Conference); *Dimensions and Practice of Divorce Mediation*, 1 MEDIATION Q. 1-100 (J. Lemmon ed. 1983); *Successful Techniques for Mediating Family Breakup*, 2 MEDIATION Q. 1-93 (J. Lemmon ed. 1983); *Reaching Effective Agreements*, 3 MEDIATION Q. 1-112 (J. Lemmon ed. 1984); *Procedures for Guiding the Divorce Mediation Process*, 6 MEDIATION Q. 1-89 (J. Lemmon ed. 1984).

Articles on mediation: Bahr, *Mediation is the Answer*, 3 FAM. ADVOCATE 32 (1981); Coombs, *Noncourt-Connected Mediation and Counseling in Child Custody Disputes*, 17 FAM. L.Q. 469 (1984); Evarts & Goodwin, *The Mediation and Adjudication of Divorce and Custody: From Contrasting Premises to Complementary Processes*, 20 IDAHO L. REV. 277 (1984); Flanders, *Divorce Mediation—A New Alternative*, 29 LA. B.J. 239 (1982); Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305 (1971); Gold, *Mediation in the Dissolution of Marriage*, 36 ARB. J. 9 (1981); Johnson, *Factors Predicting Outcome of Divorce Mediation*, 22 CONCILIATION CTS. REV. 31 (1984); Levy, *Comment on the Pearson-Thoennes Study and on Mediation*, 1 FAM. L.Q. 525 (1984); McLeod, *Summary of the 1982 Friend of the Court Reform Package*, 62 MICH. B.J. 430 (1983); Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longitudinal Evaluation*, 17 FAM. L.Q. 497 (1984); Phear, *Family Mediation: A Choice of Options*, 39 ARB. J. 22 (1984); Phillips & Piazza, *How to Use Mediation*, 10 LITIGATION 31 (1984); Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984); Saposnek, Hamburg, Delano & Michaelsen, *How Has Mandatory Mediation Fared?: Research Findings of the First Year's Follow-Up*, 22 CONCILIATION CTS. REV. 7 (1984); Shaw, *Parent-Child Mediation: An Alternative That Works*, 39 ARB. J. 25 (1984); Shepard, Philbrick & Rabino, *Ground Rules for Custody Mediation and Modification*, 48 ALB. L. REV. 616 (1984); Weissman & Leick, *Mediation and Other Creative Alternatives to Litigating Family Law Issues*, 61 N.D.L. REV. 263 (1985); Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615 (1980-81); Zumeta, *Mediation as an Alternative to Litigation inDivorce*, 62 MICH. B.J. 434 (1983); Comment, *Divorce Mediation: A New Solution to Old Problems*, 16 AKRON L. REV. 665 (1983); Comment, *The Best Interest of the Divorcing Family—Mediation Not Litigation*, 29 LOY. L. REV. 55 (1983).

3. It should be noted, however, that there are critics of the "litigation explosion" theory. *See, e.g., Litigation in America*, 31 U.C.L.A. L. REV. 1, 4, 72 (1983).

One noted author opposing the "hyperplexis" view offers an interesting "contextual view":

> [T]he scholarly foundation of the "litigation explosion" view is the product of a narrow elite of judges (mostly federal), professors and deans at eminent law schools, and practitioners who practice in large firms and deal with big clients about big cases.
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> . . . .
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> The only systematic empirical base that played a role in these formulations was the statistics on the growth of caseloads in the federal courts, including the growth of appeals. Typically, only gross figures on filings were cited. The fact that little of this was full blown adjudication was ignored.

Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 U.C.L.A. L. REV. 4, 61-62. Galanter asserts that "[w]hile federal court filings have risen dramatically, the percentage of cases reaching trial has diminished." *Id.* at 43 (footnote omitted).

Viewing procedural requirements, Galanter states that "[t]he process is more rational in the sense that it is free of antiquated and arbitrary formalities. Concealment is discouraged; litigants have access to more information. It is open to evidence of complicated states of facts and responsive to a wider range of argument." *Id.* at 44. He concedes, however, "for the minority of matters that run the full course, adjudication is more protracted, more elaborate, more exhaustive, and more expensive." *Id.*

See also Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359; Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984). *Accord* Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 HASTINGS L.J. 239 (1987).

gamesmanship of adversarial posturing usually exacerbates rather than attenuates the spouses' conflicts.[4] Moreover, the substantive rules of law that apply in divorce proceedings must intermediate between the demands of the specific dispute and more impersonal systemic considerations pertaining to history and policy. These rules sometimes develop a technical consistency and logic of their own, and risk becoming estranged from the human reality that underpins the controversy.[5]

Adversarial proceedings do have some worthwhile, albeit limited, advantages. Allowing divorcing couples to voice their anger at one an-

4. The more adversarial the posturing on one side, the more the other side will feel obliged to counter with its own attack. This is a phenomenon not limited to divorce; according to Alberti and Emmons, in ordinary human relations, "direct aggressive attack provokes additional aggression, both in the attacker and in the subject." R. ALBERTI & M. EMMONS, YOUR PERFECT RIGHT 110 (6th ed. 1984) (citing Berkowitz, *The Concept of Aggressive Drive: Some Additional Considerations*, in 2 ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY (L. Berkowitz ed. 1965)); L. BERKOWITZ, ROOTS OF AGGRESSION: A RE-EXAMINATION OF THE FRUSTRATION-AGGRESSION HYPOTHESIS (1969). *See also* R. DEWOLFF, THE BONDS OF ACRIMONY 86-95 (1970); R. GARDNER, FAMILY EVALUATION IN CHILD CUSTODY LITIGATION 11-44 (1982); R. KAHN & L. KAHN, THE DIVORCE LAWYER'S CASEBOOK 91-95 (1972); S. ROSENBLATT, THE DIVORCE RACKETT 17-35 (1969); Wolff, *Family Conciliation: Draft Rules for the Settlement of Family Disputes*, 21 J. FAM. L. 213 (1982).

5. Family law litigation abounds with examples of the hiatus that exists between legal rules and the human dilemma of the given litigation—exemplifying the predominance of systemic considerations in judicial adjudication. For example, under a system of fault-based divorce, an appropriate evidentiary standard for proof of "fault" (*e.g.*, adultery or mental cruelty) must be articulated. Given the usually circumstantial nature of the evidence, some courts require a simple preponderance of proof while others require clear and persuasive proof; and yet others require a level of proof approaching that required in criminal cases (*i.e.*, so convincing as to exclude any other reasonable hypothesis). Such a judicial controversy is motivated by historical considerations: adultery was deemed at one time to be at least a quasi-criminal offense, and has been viewed as the gravest breach of matrimonial duties. Debates surrounding the degree of proof required to establish adultery, however, have little to do with the divorcing spouses' personal dilemma or even their legal rights with respect to common assets and liabilities, child support and custody, or spousal support and maintenance. The courts merely afford the parties another opportunity to disagree and to do so at length. For a discussion and illustration of these points, see Grappe v. Grappe, 315 So. 2d 866 (La. App. 3d Cir. 1975); Arbour v. Murray, 222 La. 684, 63 So. 2d 425 (1953); Hermes v. Deacon, 275 So. 2d 416 (La. App. 4th Cir. 1973); Adams v. Adams, 357 So. 2d 881 (La. App. 1st Cir. 1978).

Closely related to the problems of proof are problems of definition. For example, does adultery include both homo- and heterosexual acts with a non-spouse during marriage? What if a spouse during marriage engages in a close relationship going beyond conventional friendship, or a courtship excluding all but sexual intercourse with a third party of the opposite sex? Does artificial insemination, unconsented to by the other spouse, amount to adultery? *See* Orford v. Orford, 49 Ont. L.R. 15 (1921); Maclennan v. Maclennan, Session Cases 105 (1958).

In some fault jurisdictions, a divorce granted on the basis of fault disqualifies the culpable spouse from receiving post-divorce alimony. The rationale for this result is that a spouse whose conduct has contributed to the breakdown of the marriage should be punished, and not be entitled to receive compensation. Such results, however, might be challenged as contrary to economic justice. The rules regarding legal cause in a divorce setting, like the standards applying to the definition of proof of fault, are often artificial. An incidence of physical abuse or infidelity, for example, years before the filing for divorce, may have provoked the breakdown. The doctrine of reconciliation, however, prevents that event from being considered in the calculus of causative culpability. More importantly, the "proximate" cause of the breakdown may have nothing to do with the grounds for divorce (adultery, abandonment, physical or mental cruelty) recognized in fault jurisdictions. From an emotional perspective, legal blameworthiness is an irrelevant consideration in the breakdown of personal relationships. For a discussion of causation in matrimonial breakdown, see, *e.g.*, Hermes v. Deacon, 287 So. 2d 789, 791 (La. 1974) (Barham, J., dissenting). *See also infra* note 66 and accompanying text.

other through legal arguments and the formality of judicial proceedings civilizes their disagreement, and allows them to focus upon the financial and practical implications of their breakup. The judicial pronouncement of divorce is a forceful symbol of final termination. As to the emotional predicament of the spouses, the court cannot undo whatever damage has been done, nor force the couple to develop more positive attitudes about their marriage. Thus, while providing some protection to the essential social interest in marriage and the family, a court proceeding provides the divorcing couple with an official point of reference by which to arrive at some sort of resolution and perhaps initiate a healing process.[6]

Without compromising its essential ordering and stabilizing mission, the legal process for divorce could be supplemented by alternative mechanisms.[7] The human complexity of divorce disputes calls for a choice of

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6. It should be noted, however, that recent psychological research indicates that merely expressing anger (releasing steam) provides minimal relief and impedes the resolution process:

> Recent research has shown the popular concept of anger as a "steam kettle" to be false. Many people have believed that by *expressing* one's anger, the anger would go away and prevent the problems associated with "building up inside." We now know that anger expression is only the beginning.
>
> It has been discovered recently that *emotional relief from anger comes only when expression is accompanied by some resolution of the problem which caused the anger.* Getting the feelings out—even in appropriately assertive ways—only "sets the stage." Working out the conflict with the other person, or sometimes within oneself, is the all-important, follow-up step which makes the difference.
>
> The evidence also shows us that the lack of such coping or resolution action may actually increase anger whether it has been expressed or not . . . .

R. ALBERTI & M. EMMONS, *supra* note 4, at 112 (emphasis in the original). Inasmuch as divorcing spouses avoid "resolution action" when they leave it to a judge to resolve their disputes, it may be that a healing process following divorce occurs despite—and not as a result of—the court system.

7. While criticism of the judicial process may be appropriate, a myopic examination—discerning only drawbacks of the institution, accompanied by a critical view of the lawyerly art and a hyperbolic touting of alternative processes—is as useless as it is intellectually suspect. Touting alternate remedies as panaceas proffers little guidance on essential matters—namely, gauging the expectations and needs of society and of individuals, and demarcating the boundaries of the public interest and individual accountability. One should premise all prophecies as to the utility of alternative mechanisms in any area of human controversy upon a dispassionate and disinterested analysis.

Initially, one must examine the very utility of alternative mechanisms. Does society want to abandon litigation as its principal dispute resolution process—especially where family concerns are involved? What are the real shortcomings of the judicial adjudication of divorce disputes? Why do these deficiencies exist? By what standards and according to what values should the court process be evaluated? Should speed, efficiency, alleged expertise, and financial economy be the key factors of analysis? What about considerations of fairness? Can the troublesome aspect of the adversarial process be readily identified? Does it amount to a significant obstacle to effective dispute resolution? Will the alternative mechanisms respond appropriately to these deficiencies or merely act as barriers to litigation—either deterring or postponing recourse to the judicial process?

For example, with compulsory, non-binding arbitration, the award cannot be enforced unless both parties acquiesce to it. Such an alternative mechanism is meant to act as a deterrent to judicial adjudication; its objective is to reduce recourse to courts and to free court dockets. With compulsory, binding arbitration, the award can be challenged only on narrow grounds. Both types of alternative mechanisms, where successful, can abridge normally-applicable rights to judicial recourse.

Although alternative mechanisms have fared well in specialized fields, generally they have succeeded where applied to well-defined, basically singular disputes. *See generally* G. WILNER, DOMKE ON COMMERCIAL ARBITRATION (1984). *See also* F. KELLOR, AMERICAN ARBITRATION (1972); Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846 (1961).

On labor arbitration, see THE FUTURE OF LABOR ARBITRATION IN AMERICA (J. Correge, V. Hughes & M. Stone eds. 1976); F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS (4th ed.

remedies. The exclusive focus upon a single process often makes divorce synonymous with a quest for emotional retribution, transforming marriage dissolution into a bittersweet means of prolonging a painful relationship. Socio-psychological advantages will result if divorcing parties are given a choice of remedies and some incentive to pursue them. Rather than obliging spouses to deal with the breakdown of their relationship through adversarial contentiousness, alternate processes would permit the parties to face their emotional and practical dilemma squarely, allowing them to assume responsibility for, and a measure of control over, the termination of their matrimonial relationship. The parties should gain a sense of achievement, acceptance, and a more lucid understanding of their former relationship from such an experience. Self-determination in divorce might also enhance the parties' capacity to engage in parenting after divorce, and provide them with insights valuable in future relationships. In addition, non-adversarial proceedings would lessen state intrusion into the private life of each party.[8]

This article argues for the need to inform divorce procedures with a sense of the human reality of matrimonial breakdown. In this area of

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1985); O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION (2d ed. 1983); M. HILL & A. SINICROPI, REMEDIES IN ARBITRATION (1981); S. KAGEL, ANATOMY OF A LABOR ARBITRATION (1st ed. 1978); C. UPDEGRAFF, ARBITRATION AND LABOR RELATIONS (3d ed. 1972); A. ZACK & R. BLOCH, LABOR AGREEMENT IN NEGOTIATION AND ARBITRATION (1983).

The evident limitations of this prior experience generate some rather gnawing questions about how comprehensively alternate processes can be administered. Will established alternative mechanisms respond to divorce disputes with similar effectiveness? If not, can the usual mechanisms be modified to create an appropriate remedial structure?

Contemplating alternative dispute resolution processes also touches on larger systemic concerns. For example, when applied to new areas such as divorce, can traditional or adapted mechanisms properly safeguard the public interest and protect individual legal rights? What influences will public policy considerations have in discussions of alternate dispute procedures? Should alternate processes be binding or non-binding, compulsory or consensual? Would a mandatory and binding alternative mechanism raise due process and equal protection problems? What specific relationship should apply between the alternative mechanisms and the judicial system—should the courts be empowered to supervise the procedure, intervene on matters of substance, or review the outcome in de novo fashion?

Pragmatically identifying the failings of the judicial process in divorce can provide useful insight as to needed reforms or alternatives. Constructive proposals for change must appraise societal needs accurately, and consider matters of basic justice. Such proposals should reflect a studied view of divorce disputes (their origin and genesis, anatomy and content), consider the feasibility of alternative mechanisms, and be mindful of the possible need to modify existing alternative mechanisms.

8. Family mediation furthers the policy of minimum state intervention. The arguments for minimum state intervention in determinations of child care and custody have been widely debated, and they are now quite familiar. Parents should be presumed to have the capacity, authority, and responsibility both to determine and to do what is best for their children as well as what is best for their entire family constellation, regardless of how that constellation might be rearranged by divorce. Psychological theory as well as constitutional considerations argue for parental autonomy and family privacy when there is no direct evidence that the interests of children are jeopardized in the process. Parents, whether married or divorced, should have the opportunity to meet the needs of their children and to maintain family ties without state interference.

Folberg, *A Mediation Overview: History and Dimensions of Practice*, 1 MEDIATION Q. 3, 10 (1983). Given the public interest in marriage and the family, some form of court supervision would be necessary. The benefits of such coordinate organization should yield systemic cooperation rather than competition.

human controversy, the adversarial ethic is antithetical to the effective brokering of disputes and ought to be abandoned. Legislatures should modify existing statutory schemes, curtailing the traditional emphasis upon fixed rules of law. Statutes should either compel or encourage recourse to procedural alternatives, such as arbitration or mediation. Recourse to court proceedings should only be allowed when substitute mechanisms are clearly unworkable in the particular case. Finally, where coercive authority is necessary, judges should sit as arbitrators, thereby minimizing the impact of adversarialism in the divorce dispute resolution process.

Part one assesses the adequacy of the existing adjudicatory approach to divorce by focusing upon the hiatus between the legal approach to divorce and the emotional content of divorce disputes. Divorce cases characteristically involve intense emotions to which legal standards and procedures do not adequately respond; the adversarial ethic only heightens the lack of comprehension and the negative demeanor of the process. Legislatures should enact procedures that recognize the actual causes of divorce and respond to its emotional substratum.

Part two lays the foundation for constructive change, providing a statistical portrait of divorce in contemporary America. The rate of divorce, which until recently rose by continuous yearly increments, appears to be influenced primarily by sociological trends and individual psychological factors. Marriages of relatively brief duration entered into during early adulthood appear to be most vulnerable to divorce. The studies reveal that the decision to terminate a marriage is a profoundly personal choice. The liberalization of the grounds for divorce did not persuade individuals to divorce, nor do adversarial procedures deter them from doing so. Accordingly, the procedures dealing with divorce should respond to the personal needs of individuals, not abstract legal concepts and vague policy concerns.

Although alternative dispute resolution merits considerable interest and study, parts three and four of the article assert that substitute divorce processes should not be espoused uncritically. Alternative resolution mechanisms are not panaceas. These mechanisms may not have universal application and, in divorce matters, may yield only moderate, possibly negligible, improvement. Part three assesses specifically the viability of divorce arbitration as a remedy. A number of commentators and professional associations have recommended recourse to this alternative mechanism. Initial difficulty arises with this alternative because spousal agreement usually would be necessary to trigger the process. Additionally, the fact that divorce actions are fundamentally different from commercial or labor disputes, where arbitration has achieved considerable success, requires at least some modification of the traditional arbitral framework. The proposed system of divorce arbitration, providing a flexible, private, and non-adversarial dispute resolution setting, il-

lustrates that the traditional techniques of arbitral adjudication would be of only limited utility in the divorce context.

Part four discusses mediation, and suggests that it is a more viable alternative mechanism to divorce litigation. The non-adjudicatory character of mediation calls for a redistribution of decision-making authority, and emphasizes individual rationality and responsibility in matrimonial dispute resolution. Despite its numerous advantages, divorce mediation also has a number of significant drawbacks. As with arbitration, some divorcing couples may resist mediation simply because they are not prepared or suited to resolve their marital disputes in a self-determined manner. Mediation appears to apply with particular effectiveness to marital disputes involving middle and upper-middle class couples who are skilled at verbal communication and who are in roughly equal bargaining positions. Ultimately, mediation places a necessary but precarious reliance upon the willingness of disputing individuals to adopt a rational course of conduct amidst conflict.

Part five discusses the implementation of a judicial arbitration structure. Divorcing couples who are unable to arbitrate or mediate, or unwilling even to reach an attorney-negotiated settlement, should not be deprived of their right to a judicial remedy. The available court procedure, however, should be non-adversarial in character. Legislation should mandate that contested divorce cases be brought before domestic relations judges who sit as arbitrators. Having judicial arbitration as the final remedy may cure many of the problems associated with privately-instituted divorce arbitration. Judicial arbitration should also create an incentive for couples to pursue other options. Although such a process would not necessarily remedy the psychological damage inherent in marital breakups, flexible adjudicatory procedures and substantive standards should limit the extent to which divorcing spouses can petition courts and prolong matrimonial unhappiness at the expense of society.

II. DISCORDANT PERCEPTIONS OF MATRIMONIAL PATHOLOGY

A. The Legal View

From a legal perspective, the marriage relationship represents a bundle of rights and duties, akin in many respects to a partnership or joint venture association.[9] The fabric of marriage, however, consists of

9. *See, e.g.*, LA. CIV. CODE ANN. art. 119 (West 1952). Articles 119 and 120 of the Louisiana Civil Code articulate the respective rights and duties of married persons. The parties to the marriage owe each other fidelity, support, assistance, and the obligation of conjugal cohabitation. *Id.* The specific content of these duties has been defined by the courts in the context of particular cases. *See, e.g.*, Smith v. Smith, 382 So. 2d 972 (La. App. 1st Cir. 1980); Hingle v. Hingle, 369 So. 2d 271 (La. App. 4th Cir. 1979); Favrot v. Barnes, 332 So. 2d 873 (La. App. 4th Cir.), *rev'd on other grounds*, 339 So. 2d 843 (La.), *cert. denied*, 431 U.S. 966 (1977). Article 120 was repealed by Acts 1985, No. 271, § 1, leaving the duty of conjugal cohabitation to be implied from the content of article 119.

LA. CIV. CODE ANN. art. 86 (West 1952) provides that the "law considers marriage in no other view than as a civil contract." The express definition of marriage is secular and devoid of religious

more than just disparate strands of contract law interwoven by the thread of party autonomy. Marriage implicates larger social interests, and transcends purely individual concerns.[10] Indeed, the law, through statutes and judicial rulings, defines the nature and content of the essential matrimonial duties that apply to the relationship, and ordinarily provides for the governing of marital property.[11] Society expects, during the existence of the marriage, that the spouses will each cooperate to maintain their association, and allocate responsibilities in the furtherance of common tasks and goals. Society thus defines the emotional and material development and well-being of the family unit and its individual members.[12]

Marriage involves a merger of the individual's contractual prerogatives with social imperatives relating to the family. The grouping of two persons in a matrimonial association, therefore, simultaneously excludes and includes an impersonal state interest. The dynamics of this curious triangular association are particularly evident when the parties are terminating the personal relationship. In the name of public policy, a court of law usually intervenes at this stage to deal with disputes that ensue from the dismantling of the matrimonial association.[13]

The disputes involved in the breakdown of a marriage resist facile legal description, making governing standards as to substance and proce-

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overtones. It functions within a conceptual framework of individual freedom of contract. *See* Carbonneau, *Analytical and Comparative Variations on Selected Provisions of Book One of the Louisiana Civil Code with Special Consideration of the Role of Fault in the Determination of Marital Disputes*, 27 LOY. L. REV. 999, 1013, 1014 (1981); Comment, *The Best Interest of the Divorcing Family—Mediation Not Litigation*, 29 LOY. L. REV. 55, 58 (1983) (Lousiana law). Similarly, common law jurisdictions define marriage as a civil contract by statute. *See* H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 32-118 (1968).

10. Because marriage implicates both personal rights and social policy, it is more than a mere contract. Therefore, the state may nullify provisions of a prenuptial agreement as void against public policy. *See, e.g.*, Holliday v. Holliday, 358 So. 2d 619 (La. 1978) (provision of prenuptial agreement waiving right to temporary alimony declared invalid). *Accord* Monk v. Monk, 376 So. 2d 552 (La. App. 3d Cir. 1979) (post-separation agreement waiving right to permanent alimony in consideration of community property settlement upheld). According to Professor Clark, the position in common law jurisdictions on this issue is virtually identical. "Broadly speaking these agreements are valid and enforceable, and in fact favored by the law, if they meet certain requirements." H. CLARK, *supra* note 9, at 27. *Accord* UNIF. MARITAL PROP. ACT [U.M.P.A.] § 10(g), 9A U.L.A. 35 (Supp. 1983).

11. *See* LA. CIV. CODE art. 119 (West 1987) (stating that the duties of marriage are fidelity, support, and assistance; this is interpreted to include conjugal cohabitation). For an illustration of the court construction of these duties, see cases cited in *supra* note 9. For a statement of the position that applies on this matter in other state jurisdictions, see H. CLARK, *supra* note 9, at 181-87. As to the financial regime that applies to marriage, see LA. CIV. CODE arts. 2336 & 2346 (West 1987); H. CLARK, *supra* note 9, at 449-52.

12. The Lousiana Civil Code provides that "[m]arriage is a contract intended in its origin to endure until the death of one of the contracting parties." LA. CIV. CODE art. 89 (West 1987). According to Professor Clark, the interest of the state "lies in the direction of preserving marriages and ensuring that divorces are only granted where the law, both of statute and case, authorizes them." H. CLARK, *supra* note 9, at 395 (footnote omitted).

13. *See* LA. CIV. CODE art. 140 (1987) (providing that "[s]eparation . . . can not be made the subject of arbitration"). For the position in common law jurisdictions, see H. CLARK, *supra* note 9, at 395.

dure difficult to define. Conflicts between divorcing spouses, in addition to implicating a more general public interest, involve issues in both tort and contract law.[14] For instance, a divorce may involve questions bearing upon marital conduct, the division of property, financial maintenance, and the custody of children—issues governed by distinct areas of substantive law.[15] Moreover, differences that arise between divorcing spouses are often accompanied by volatile emotions, personal antagonisms, and feelings of retribution, making the procedural adjudication of legal issues potentially strident.[16] To achieve effective results, then, judicial rules and procedures should reflect the sui generis aspects of matrimonial disputes as well as the unique and varied features of divorce.

B. The Personal View

From the perspective of individual human ideals, marriage consists at its core of an intimate and pleasurable relationship which, despite the vicissitudes of life, holds physical and emotional benefits for both parties.[17] The sharing marriage contemplates generates not only a sense of mutual commitment, but also a bond of trust between the spouses, making them dependent upon and vulnerable to one another. The marriage relationship can also involve innocent, non-contracting third parties: the children, whose rights and welfare are automatically implicated by the relationship.[18] In the case of divorce, the parties relinquish the ideal aspirations of marriage; the spouses focus instead upon their disappointment, and are often prone to fix personal blame on each other. Children frequently become spousal weapons in the marital struggle. Moreover, the spouses may disagree as to whether the relationship should cease. One spouse, for instance, may decide unilaterally to abandon the other after a period of constant and worsening difficulties.[19]

The factors that give rise to such marriage difficulties are as multifarious as are the human psyche and the variegated mores of contemporary

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14. A breach of matrimonial duty, on the one hand, violates the civil agreement between the spouses and, on the other hand, may invade a corporeal or emotional personality interest protected by the law of tort. For a more detailed discussion of this point, see H. CLARK, *supra* note 9, at 327-49.

15. For instance, the concept of matrimonial fault is usually relevant in some jurisdictions to the grounds for divorce, but does not factor in the custody question or the division of property. For a description of the role of fault in divorce matters in the various state jurisdictions, see *infra* notes 47, 51, and 54 and accompanying text. *See also* Comment, *The Best Interest of the Divorcing Family—Mediation Not Litigation*, *supra* note 2, at 58-68 (describing the role of fault in the Lousiana law of separation and divorce); H. CLARK, *supra* note 9, at 327-78, 420-520, 572-601.

16. For a humorous illustration of this point, see, *e.g.*, Gilberti v. Gilberti, 338 So. 2d 971 (La. App. 4th Cir. 1976). *See also* Trosclair v. Trosclair, 337 So. 2d 1216 (La. App. 1st Cir. 1976); O'Neill v. O'Neill, 196 So. 2d 669 (La. App. 3d Cir. 1967).

17. *See, e.g.*, M. GREEN, MARRIAGE (1984).

18. Children are subject to the authority of their parents. In Lousiana, their biological relationship gives them inheritance rights, known as forced heirship. For a detailed discussion of the legal status of children in the family, see, *e.g.*, H. CLARK, *supra* note 9, at 155-80, 572-601.

19. *See, e.g.*, Adams v. Adams, 408 So. 2d 1322 (La. 1982). For a discussion of unilateral divorce as it applies in American jurisdictions generally, see H. CLARK, *supra* note 9, at 352-53.

society.[20] The couple may have married at an early age and developed emotional maturity at different paces, inducing persistent and increasing tensions. Latent psychological conflicts may have precipitated episodes of domestic violence, infidelity, or abuse of stimulants in response to perceived inattention or a lack of affection.[21] Spouses may have expressed anger in destructive ways. Continuous misunderstanding resulting from unrecognized depression over a period of years may have eroded the interest and will of the spouses to salvage the relationship. In all these circumstances, there may be transference from a psychologically debilitating childhood:[22] negative feelings encountered in one's early family life are expressed against the spouse, and destroy the healthy adult dimension of the marriage relationship.

C. The Lack of Accommodation by the Legal System

The legal system does not openly respond to the emotions experienced by both divorcing spouses. These emotions range from disappointment and anxiety to depression, sadness, grief, and anger—sometimes to the point of rage.[23] In terms of substance and procedure, the legal process attributes only minimal recognition to the emotional trauma that underlies the severance of the marriage relationship.[24] Legal rules and procedures fail to reflect the dichotomous interests in and views of marriage. These rules do not attempt to coalesce the law's objective emphasis on rights with an individual's subjective emotional perception

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20. *See generally The Revolution in Family Law*, 5 FAMILY ADVOCATE 1 (1982).

21. *See* L. BARUTH & C. HUBER, AN INTRODUCTION TO MARITAL THEORY AND THERAPY (1984). *See also* Kaslow, *Divorce and Divorce Therapy*, in HANDBOOK OF FAMILY THERAPY (A. Gurman & D. Kriskern eds. 1981). *Accord* Whitaker & Miller, *A Reevaluation of "Psychiatric Help" When Divorce Impends*, 126 AM. J. PSYCHIATRY 57 (1969).

22. According to Hinsie and Campbell, transference

> [i]n psychoanalytic therapy, [is] the phenomenon of projection of feelings, thoughts, and wishes onto the analyst, who has come to represent an object from the patient's past. The analyst is reacted to as though he were someone from the patient's past; such reactions, while they may have been appropriate to the conditions that prevailed in the patient's previous life, are inappropriate and anachronistic when applied to an object (the analyst) in the present.

L. HINSIE & R. CAMPBELL, PSYCHIATRIC DICTIONARY 751 (4th ed. 1976). *See also* C. JUNG, CONTRIBUTIONS TO ANALYTICAL PSYCHOLOGY (H. Baynes & C. Kegan trans. 1928); H. NUNBERG, PRINCIPLES OF PSYCHOANALYSIS (1955); Winnicott, *Clinical Varieties of Transference*, in D.W. WINNICOTT: COLLECTED PAPERS 295 (1958). Psychological experts claim that transference also takes place in ordinary life situations—between spouses, in professional relationships, in friendships, and in daily impersonal encounters. According to popular psychological literature, transferring childhood feelings and behavior into the present "is fairly common in life, and there are elements of it present in any contact with authority . . . ." T. HARRIS, I'M O.K.—YOU'RE O.K. 229 (1973).

23. For a discussion of the emotional effects of divorce, see O. COOGLER, *supra* note 2, at 11-12.

24. For example, the law in punishing adultery focuses primarily on establishing the fact of intercourse and the possibility of introducing illegitimate offspring into the family line. It does not concentrate upon the tortious nature of the offensive conduct, nor does it attempt to evaluate the motivation underlying such conduct or the emotional impact upon the other spouse. Generally, such determinations are outside the purview of legally cognizable claims.

of the failed relationship.[25] The law practices a policy of simple containment.

In attempting to deal with marital conflict in manageable practical terms, the legal process of divorce focuses primarily on objective spousal conduct and the disposition of financial matters.[26] In some jurisdictions, the law still affords the spouses the additional, though questionable, boon of assessing their respective behavior according to an external standard of fault and legal causation.[27] In most jurisdictions, a spouse has the right to dissolve the marriage either on grounds of the other spouse's specific conduct (matrimonial fault as expressed, for example, through the concepts of infidelity, cruelty, and constructive or actual abandonment); for reasons of incompatibility (a non-fault premise); or on a simple uncontested basis (default).[28] The courts in these jurisdictions are not meant nor equipped to provide relief in the form of therapy or counseling. The courts merely proffer remedies for resolving so-called objectivizable conflicts, and avoid the more fundamental personal grievances of the individuals.

The legal process of divorce is inadequate precisely because the courts focus primarily on objective issues.[29] Courts are basically unable, and perhaps unwilling, to deal with the spouses' personal conflict. Aggravating this problem, the divorcing couple often misunderstands the legal system's assessment of and approach to their problems. The spouses infuse their underlying personal conflicts into the legally-cognizable claims.[30] In the classical unilateral divorce, the abandoned spouse

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25. *See generally* O. COOGLER, *supra* note 2.

26. Namely, the grounds for divorce, child custody and support, alimony, and property division.

27. *See infra* note 47 and accompanying text.

28. *See infra* note 47.

29. *See generally infra* note 47 and accompanying text.

30. Dr. Coogler gives an especially vivid and critical account of the misunderstandings that exist between divorcing couples and the legal system. Coogler argues that in choosing the adversarial system for divorce, parties

> often do not realize they have made the choice until they find themselves caught up in it with apparently no way out. There is little or no explanation in advance of commitment. There is no offer of a choice between it and anything else.
>
> Without their awareness, the choice is made for most couples when either one or both parties decide to consult an attorney. Often their purpose in seeking the consultation was to find an answer to the question, What are my legal rights? This would seem to be a rational beginning for dealing with a matter in which one is without prior experience. Most people do not have information in advance when they are confronted with death or divorce.
>
> Lawyers, like undertakers, are presumed to have the answer to questions in their field, but unlike undertakers, lawyers never answer the questions. They are not answered because there are no answers to what the client wants to know.
>
> There is no other field of law in which the court is given such complete and, for all practical purposes, uncontrolled discretion as in divorce cases. To answer the client's question, the lawyer would have to guess what the judge might do, except that one can never be sure which judge will hear the case. Studies have shown, and observers of the legal process confirm, that different judges may make quite different decisions upon substantially the same factual situation.
>
> This uncertainty does not stop most lawyers from giving what sounds like an answer while qualifying each statement made. The one thing the client is very sure of from the consultation is that it is all very hard to understand. From this follows a decision to leave it up to the lawyer

is embittered and often prone to vindictive retaliation. The abandoning spouse, anxious to conclude and forget the relationship, will resent legal tactics meant to frustrate a smooth and orderly disposition of the divorce proceedings. This spouse may also find in litigation a means of reprisal—a vehicle for communicating disapproval and defensive anger. In actions involving issues of adultery, alimony, or sole custody, the couple may use the litigation as a vehicle for expressing rage and recrimination. The courts, then, confront an emotional tug-of-war, and deal with the struggle only as a set of practical concerns.

The adversarial process does not adequately deal with hostilities that accompany divorce.[31] The courtroom "battleground" devalues rationality, and invites the spouses to adopt a distorted view of their situation and to engage in single-minded advocacy. Legal proceedings, in fact, invite couples to extend their conflictual relationship, and to engage in exercises of personal vindication. Spouses see adversarial proceedings as a means by which to portray conflicts, dramatize their victimization, and unravel personal dilemmas arising out of marriage. A spouse may actually encourage protracted court actions in the hope that a court will approve of past conduct, and require the culprit to admit past insensitivity, beseech forgiveness, and accept punishment. The usual result is further acrimony—eliminating all but a forcible determination of disputes by a court of law.[32] Judicial procedures for divorce, then, appear to op-

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who then compliments the client for having made a very wise choice as a check for the retainer fee is written.

. . . .

What they do not know about the adversarial system is that the lawyer, as an advocate, is required to represent, or advocate, *solely* the interest of his client. *He cannot represent both parties*, as is commonly supposed. The lawyer represents his client within the "light of his professional judgment." But the client's interest is always perceived as being in opposition to the interests of the other party. The lawyer cannot and does not regard the parties as having a common problem which he or she will help resolve.

The represented party, feeling that there is a knowledgeable person "on my side," experiences considerable relief after all the feelings of fear and helplessness that have gone before. At this point there is little awareness of being postured against the other party—"What should he/she have to fear from me?" The heightened feelings of fear and helplessness the other party experiences by not having anybody on his/her side are not anticipated.

It is rare that the employment of one attorney does not lead to the employment of a second, unless the parties simply do not have the financial resources. The need for a second attorney usually comes into focus when the parties realize that many areas of agreement are needed which they had not previously considered. The possible implications of an attorney's routine demands for financial disclosure can be so threatening as to send an unrepresented party to another attorney in a near panic.

Once a second attorney is employed, the only factor limiting escalation of the competitive struggle between husband and wife is the financial resources of the family. In some cases, the struggle may continue not just through the divorce, but for the lifetime of the parties.

O. COOGLER, *supra* note 2, at 6-8 (emphasis in the original). This criticism may indicate nothing more than clients' dissatisfaction with the lack of predictability of outcome. Arguably, if more answers were available in the form of fixed substantive rules, clients would be more satisfied with the legal process of divorce. For more discussion of this point, see *infra* note 186 and accompanying text.

31. *See supra* note 6 and accompanying text.

32. Indeed, while the couple may not anticipate this situation, they may gradually enmesh themselves in it. *See* O. COOGLER, *supra* note 2, at 11-12.

erate on the basis of fundamental incomprehension among the parties, the adjudicatory mechanism, and the subject matter of the proceeding. Despite the practical ordering function of such a structure for marital dispute resolution, the system is unresponsive to humanistic priorities.

III. A PORTRAIT OF CONTEMPORARY DIVORCE IN AMERICAN SOCIETY

A. Prolegomena

One cannot appraise existing judicial procedures for divorce nor elaborate proposals for change without referring to statistics which provide a quantifiable perspective of divorce in American society. Surprisingly, comprehensive statistical portraits are not readily available. The statistics that are available from general sources[33] and more specific studies of limited scope[34] yield only vague descriptions of the reality to which current regulatory schemes and adjudicatory processes are meant to apply. The limitations in the methodology and content of the available compilations provide only a very general view of divorce in the United States. The studies do not shed much, if any, light on the intricate composites that underlie the phenomenon. Because divorce is such a complex phenomenon, one should view statistical compilations carefully. Although researchers might isolate patterns and types, the particular dispositions of individual spouses are so central to the reality of divorce that statistical quantifications and generalizations should be used with great caution.

B. Etching an Outline

Recent media reports[35] that the national divorce rate declined briefly during this decade are difficult to gauge—at least when compared to the latest information from the National Center for Health Statistics (NCHS). NCHS figures reveal that the absolute number of divorces per

33. Other than media reports, *see infra* note 35, the statistics in this section were taken from the *National Center for Health Statistics: Advance Report of Final Divorce Statistics* (1981), in 32 MONTHLY VITAL STATISTICS REPORT Table 2 (No. 9, Supp. 2) [hereinafter cited as NCHS 1981]; *National Center for Health Statistics: Annual Summary of Births, Deaths, Marriages, and Divorces: U.S. 1983*, in 32 MONTHLY VITAL STATISTICS REPORT Table 3 (No. 13) [hereinafter cited as NCHS 1983]; *National Center for Health Statistics: Births, Marriages, Divorces, and Deaths for 1984*, in 33 MONTHLY VITAL STATISTICS REPORT Table 3 (No. 12) [hereinafter cited as NCHS 1984]. The statistical analyses (Analyses of Variance, Chi-Square) were performed by Marjorie Esman (Ph.D., Anthropology, Tulane University; J.D., Tulane University) and Michael D. Chafetz (Ph.D., Psychology, Texas Christian University; Statistical Consultant, New Orleans).

34. *See, e.g.*, Booth & White, *Thinking About Divorce*, 42 J. MARRIAGE & FAM. 605 (1980) [hereinafter cited as Nebraska Study]; Levinger, *A Social Psychological Perspective on Marital Dissolution*, 32 J. SOC. ISSUES 21 (1976).

35. According to reports issued on CBS Morning News (Jan. 13, 1984 & Mar. 6, 1985), the national divorce rate has declined (transcripts of the reports were obtained from the CBS/Broadcast Group and are on file with the author). On March 27, 1986, the CBS Evening News indicated that the rate of divorce increased 2% in 1985. More recent reports, published in 1987, now indicate a slight decline.

year did indeed decrease nationwide in the first four years of this decade.[36] This numerical decline, however, was so slight as to be statistically inconclusive; and, indeed, the trend reversed in 1985.[37] On the one hand, these figures may indicate a permanent leveling off of the divorce rate. The brief decline, on the other hand, may simply reflect a temporary downward swing of a trend that has redressed itself and continues relatively unabated.

According to 1981 NCHS statistics, divorce affects primarily younger couples, and often ends marriages of brief duration that were entered into at an early age. The median age of divorcing persons in 1981 was 32.1 for men and 30.6 for women; the median length of a marriage ending in divorce was seven years, with 65% of the divorces occurring within nine years of marriage.[38] Of the divorces granted in 1981, most went to persons who had married at a relatively young age: 61% of the 1981 divorces were granted to men who had married before the age of twenty-five, and 74.2% to women who had married before reaching that age.[39] These figures do not indicate how many persons in the percentage group experienced multiple short marriages—a factor that may be indispensable to arriving at an accurate assessment of the stability of youthful marriages. Also, the fact that a large majority of divorces were granted to persons who were married before the age of twenty-five may simply point to a predominance of youthful marriages in the United

36. The absolute number of divorces decreased from 1,189,000 in 1980 to 975,000 in 1984. *See* NCHS 1981 and NCHS 1984, *supra* note 33. The rate per thousand population also appears to be decreasing, from 5.2% in 1980 to 5.0% in 1983. *See* NCHS 1981 and NCHS 1983, *supra* note 33.

Although the overall nationwide picture indicates no statistically significant change since 1980, regional differences do emerge. These differences may indicate shifts in divorce patterns in some parts of the country. Of the four regions defined by the National Center for Health Statistics, significant changes have occurred in two. In the North Central region, there was a significant decrease from 1980-83 ($F(1, 10) = 5.85$, $p < .05$). A similar decrease occurred in the West ($F(1, 12) = 6.59$, $p < .05$). These differences suggest greater changes in some areas than in others. They may herald a future decline in the other two regions, though such speculation is premature.

The four NCHS regions consist in the following breakdown of states:

Northeast: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania.

North Central: Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, Kansas.

South: Delaware, Maryland, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, Alabama, Mississippi, Arkansas, Lousiana, Oklahoma, Texas.

West: Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, California, Alaska, Hawaii.

37. NCHS 1981, *supra* note 33.

38. *Id.* at Table 7.

39. *Id.* at Table 9. The four NCHS regions differ significantly in duration of marriage ($F(3, 27) = 13.83$, $p < .01$). Marriages in the Northeast are of considerably longer duration than those in the nation as a whole (8.3 years to 7.0 years nationwide in 1981). Marriages in the West are of shortest duration: 5.5 years. Corollary to this is the difference in divorce rates for marriages nine years old or younger. The Northeast has the fewest such divorces (58.4% to 65% nationwide) while the West has the most (73.2%) ($F(3, 27) = 13.88$, $p < .01$). In NCHS's 31-state divorce registration area, Wyoming had both the shortest marriages (5.0 years) and the most divorces under 9 years (75.1%). Pennsylvania, at 8.5 years, had the highest duration to divorce; and Missouri, at 51.9%, had the fewest divorces before 9 years. *See id.* at Tables 6 & 7.

States rather than to a disproportionately high incidence of divorce among younger couples.

As to the effect of divorce on children, the average 1981 divorce involved .97 children under age eighteen.[40] That is, although most 1981 divorces did implicate minor children, almost half of them (45%) did not; and another 46% involved two or fewer minor children.[41] Data re-

40. *Id.* at Table 5. Although conventional wisdom holds that children from a divorced family fare better than children from an unhappy, but intact, family, the data are unclear and contradictory. Many children do not anticipate their parents' divorce and have a difficult time adjusting to it. Less than 10% of the children in the Wallerstein-Kelly Children of Divorce study were relieved by the parents' divorce. Children fear abandonment by both parents and possible rejection; they are often torn by conflicting loyalties. Five years after the divorce, the psychological health of the children in this study had not substantially improved. In fact, one-third of them remained unhappy and unresolved with their divorced family. This does not necessarily mean that the children were psychologically maladjusted, but simply that they had lingering and unresolved conflicts. *See* J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP 10, 35, 306 (1980). The Wallerstein-Kelly study, although insightful and well-designed, is limited to 60 California families of which 88% were white, 3% black, and 9% white/Asian interracial marriages. The study examined a range of social class and educational levels, although only five husbands and two wives had less than high school educations. Participants volunteered for research and therapy related to their divorces. The sample is not, therefore, representative of the divorcing population in the United States. The extent to which this bias may have influenced the findings is not clear.

Children's responses to divorce depend heavily on such factors as the child's age, the nature of the parents' relationship both before and after the separation, and the way both parents treat the child. Longfellow, *Divorce in Context*, in G. LEVINGER & O. MOLES, DIVORCE AND SEPARATION 287-306 (1979). In a review of the literature, Longfellow notes that children from single-parent homes may be emotionally healthier than children from conflict-ridden, intact homes, especially if the parents do not continue their battles after they separate. *Id.* at 294. Younger children suffer more than older children, often blaming themselves and fearing subsequent rejection by the custodial parent. Older children blame themselves less and tend more towards anger than fear. Not surprisingly, adolescents adjust best to divorce, and remain better adjusted a few years later. *Id.* at 303-04.

41. NCHS 1981, *supra* note 33, at Table 4. The presence of children under 18 in divorcing families varies regionally ($F(3, 27) = 3.63$, $p < .05$). Significantly more divorces in the North Central region involve children than in the nation as a whole (58.2%). In the South, significantly fewer divorces involve children under 18 (53.9%). The Northeast has the fewest children per thousand under 18 affected by divorce (16.11 compared to 18.14 nationwide, $F(3, 27) = 4.13$, $p < .01$). Divorcing couples in Georgia are the least likely to have children under 18 involved (49.5% of divorces did not affect children), while Nebraska the most likely (36.2% did not involve children). Utah divorces affected the most children per decree (1.21); while Georgia, at .84, had the fewest children affected per decree. The highest ratio of children under 18 affected by divorce is found in the West (21.14 per thousand)—despite the fact that the West has the shortest marriages in the nation. Wyoming, at 27.7 per thousand, had the most children affected by divorce; at 12.0, Pennsylvania had the fewest. *Id.* at Tables 4 & 5.

There are no significant regional differences in numbers of children per divorce decree. Large families (3 or more children under 18), however, are significantly less likely to divorce in the South than elsewhere ($F(3, 27) = 5.99$, $p < .01$). In the South, 7.6% of divorces occur in large families as compared with 9.7% nationwide. Divorces in large families are most common in the North Central region (10.7%). For families with one or two children, the divorce rates are statistically equivalent across the four regions. *Id.* at Table 4.

That fewer large families are touched by divorce nationwide may not indicate that these marriages are more stable than others. Such families are less common in the United States today than are smaller families; fewer divorces among large families may merely reflect their numerical infrequency. In the South, where large families experience fewer divorces, these marriages may indeed be more stable—or at least, less prone to break up. However, it is important to note that the figures available represent the proportion of large families to all divorcing families, and do not indicate the likelihood of divorce within any given family size. Data are not available to support general conclusions with respect to the relative stability of different size families.

garding other significant factors, such as race, income, and education, are either unavailable or inadequate to support any meaningful conclusion. For example, 1983 figures indicate that, proportionately, more blacks than whites are currently divorced; the rate of divorce for persons of Spanish origin (who may be of any race) falls between that for whites and blacks.[42] These differences according to race may reveal nothing more than that divorced whites are more likely to remarry than divorced blacks, or that the rate of divorce is higher among the poor. In short, the superficiality of the data prevents a true accounting of the "typical" divorce in the United States today.[43]

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42. U.S. CENSUS BUREAU POPULATION REPORT Table C (Mar. 1983). The actual figures are as follows: 230 per 1000 married blacks, 106 per 1000 married whites, and 114 per 1000 for persons of Spanish origin. These numbers represent persons already divorced in 1983; and, therefore, do not reflect any changes that may be occurring in the divorce rates of the separate racial groups. The ratios are computed by comparing currently divorced with currently married persons—discounting the divorces of persons currently in subsequent marriages. Because there is no information on the incomes of divorcing couples, it is impossible to determine the extent to which race differences may reflect larger class differences. Some studies suggest an inverse relation between income and divorce. *See* Levinger, *supra* note 34, at 21-29. Others suggest the opposite. *See* Nebraska Study, *supra* note 34, at 605-16. Because of the inadequacy of the data and the conflicting results of other studies, conclusions based on the relative divorce rates of the different races are unwarranted.

43. Lacking detailed information on race, income, or education, and with only partial information on family size, any portrait will be superficial.

A family living in the Northeast is the least likely to divorce, will have the fewest children affected by a divorce decree, and the marriage will have lasted longer than marriages in other regions of the country. In the North Central region, more divorces involve large families, but there has been a significant decline in the divorce rate from 1980 to 1983. In the West, the divorce rate is the highest; the most divorces occur for very young marriages (under 1 year) and generally the shortest marriages. Also, proportionately more children are affected by divorce in the West than in the United States as a whole. Although there has been a significant decline in the West's divorce rate in the 1980's, a divorcing couple in 1983 was still most likely to live in that region ($F(3, 44) = 9.42$, $p < .01$). Even excluding Nevada, with its inflated divorce statistics, the rate in the West remains significantly higher than in the other regions ($F(3, 43) = 12.97$, $p < .01$). Fewer divorces involve large families in the South than elsewhere.

Divorcing parties in the United States most probably married young. They have one or two children under the age of 18 or, just as likely, they have no children at all. The marriage is from one to nine years old, with both spouses under 35. The family is probably white; if black, the family may be more likely to divorce. Little scientific investigation has focused on the psychological profile of divorcing adults. Given the current divorce rates in the United States, such a profile would reflect virtually the entire population and, by explaining everything, would explain nothing. Apart from the suggestion that those whose parents were divorced are themselves more likely to divorce, *see infra* note 64, there is little valid psychological information.

At least one transactional analyst suggests that persons who marry for reasons of fantasy are likely to divorce when they discover that reality does not conform to their expectations. *See* I. TANNER, LONELINESS: THE FEAR OF LOVE (1973). Tanner implies that people who deliberately choose spouses who resemble (or who differ from) parents are likely to divorce upon realizing that a spouse cannot cure unresolved conflicts with parents. "Our fantasies, based upon what we have been taught and observed since childhood, are sometimes so much a part of us that rather than give them up or modify them, we will end a relationship." *Id.* at 93. This observation derives from an anecdotal account of one individual's therapy practice, with no attempt at scientific generalization. It reflects the view of a single advocate of a particular brand of psychotherapy. Although there might be a high incidence of divorce among persons who marry for fantasy, this cannot explain more than a small number of divorce cases.

In sum, there is no adequate psychological profile of divorcing adults in the United States.

C. *The Effect on and Influence of the Legal System*

As to the impact of divorce on the legal system, one recent study estimates that nearly 60% of the litigation undertaken in the United States relates to non-status divorce disputes—alimony, child custody and support, visitation, and division of property.[44] While some of this litigation may simply have involved court action to ratify an agreement reached by the parties,[45] the estimate indicates that non-status divorce disputes may not be as susceptible to settlement as other types of controversies. The study also suggests that courts expend a disproportionate amount of adjudicatory resources to resolve these disputes.

By contrast, the nature of the legal system appears to have little effect on divorce. Over the last fifteen years, states have substantially liberalized the grounds for divorce. Current divorce statutes range from hybrid regimes based on fault, physical separation, or irretrievable breakdown, to schemes recognizing irretrievable breakdown[46] as the sole ground for divorce.[47] In effect, forty states (or 80% of all jurisdictions in the United States) recognize irretrievable breakdown of marriage, the premier no-fault concept, as a basis for terminating matrimonial status. Statistical analyses of NCHS data concerning the rate of divorce and the

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Certain personality disorders and personality types may be more prone to divorce than others. However, some shared psychology that leads those who possess it to the divorce courts does not exist.

Most of the research on psychological issues involved in divorce deals with the effects on children and the aftereffects on the spouses. *See generally* J. WALLERSTEIN & J. KELLY, *supra* note 40; Bohannan, *The Six Stations of Divorce*, in DIVORCE AND AFTER (P. Bohannan ed. 1970). *See also* Kaslow, *Stages of Divorce*, 25 PA. FAM. L. 718 (1980).

44. *Litigation in America*, *supra* note 3, at 87 (stated with the caveat that "[t]his rate in part reflects the fact that many times even consensual arrangements must be ratified by the court"). In a similar vein, Lieberman states that "[i]n virtually every state, more than half the incoming civil cases are divorce actions or concern child custody or other family matters." J. LIEBERMAN, *supra* note 2, at ix.

Although these and other statements are difficult to decipher, the various statistical statements indicate that more than half of the cases filed before state trial courts are divorce cases. Of those, very few (one out of ten) are contested and involve protracted litigation. Given the congestion of court dockets, even uncontested divorce actions take nearly a year to process; contested cases must wait a year or two to be scheduled for trial. *See* Pearson & Thoennes, *Mediating and Litigating Custody Disputes: A Longtudinal Evaluation*, 17 FAM. L.Q. 497, 497 (1984). An uncontested change in status, however, does not necessarily imply agreement as to the financial and other incidents of the status change. The statement that "[e]ven before no-fault divorce became the norm, over ninety percent of all American divorces were uncontested" says little as to the litigious potential of alimony, custody, and division of property matters. *See* Winks, *Divorce Mediation: A Nonadversary Procedure for the No-Fault Divorce*, 19 J. FAM. L. 615, 620 (1980-81). *See also* Kaslow, *Stages of Divorce: A Psychological Perspective*, 25 VILL. L. REV. 718, 723 n.27 (1980) (stating that "divorce litigation is itself infrequent").

While a great number of divorce suits are filed every year, few requests for a change of status are contested. There is a greater likelihood of conflict as to the practical implications of a divorce; the litigation can become extremely hostile and protracted. The real problem with the current system may be that a mere handful of divorce cases can use up a vastly disproportionate amount of judicial dispute-resolution resources.

45. *See Litigation in America*, *supra* note 3, at 87.

46. For purposes of this article, irreconcilable differences and irretrievable breakdown are not distinguished.

47. The following table shows, for each of the 50 states, the grounds upon which a divorce may be obtained.

duration of marriage reveal, however, that the substantive state divorce laws have no significant effect upon the rate of divorce or duration of marriage. These findings are consistent with studies establishing that enactment of no-fault divorce legislation has had no measurable impact on

GROUNDS FOR DIVORCE IN THE 50 STATES

STATE	IRRETRIEVABLE BREAKDOWN	PHYSICAL SEPARATION	FAULT
Alabama	X	X	X
Alaska	X		X
Arizona	X		
Arkansas		X	X
California	X		
Colorado	X		
Connecticut	X	X	X
Delaware	X		
Florida	X		
Georgia	X		
Hawaii	X	X	X
Idaho	X	X	
Illinois	X	X	X
Indiana	X		
Iowa	X		
Kansas	X		
Kentucky	X		
Louisiana	X	X	X
Maine	X		X
Maryland		X	X
Mass.	X		X
Michigan	X		
Minnesota	X		
Missouri	X		
Mississippi	X		X
Montana	X	X	
Nebraska	X		
Nevada	X	X	
New Hamp.	X		X
New Jersey		X	X
New Mexico	X		X
New York		X	X
N. Carolina		X	
N. Dakota	X		X
Ohio		X	X
Oklahoma	X		X
Oregon	X		
Pennsylvania	X	X	X
Rhode Island	X	X	X
S. Carolina		X	X
S. Dakota	X		X
Tennessee	X		X
Texas	X	X	X
Utah		X	X
Vermont		X	X
Virginia		X	X
Washington	X		
W. Virginia	X	X	X
Wisconsin	X	X	X
Wyoming	X		X

For an explanation of the statistical analyses, see *supra* note 33.

the rate of divorce or the duration of marriage.[48]

The adoption of no-fault divorce statutes, however, has prompted corresponding changes in state statutes providing for the attribution of post-divorce alimony. Most states have disassociated eligibility for alimony, formerly grounded in a punitive rationale,[49] from considerations of matrimonial fault. States now determine issues of alimony according to spousal need, ability to pay, and several other objective factors such as duration of the marriage, age of the parties and their earning capacity, services contributed to the marriage, and presence of young children.[50]

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48. *See* Sepler, *Measuring The Effects of No-Fault Divorce Laws Across Fifty States: Quantifying A Zeitgeist*, 15 FAM. L.Q. 65, 89 (1982). *See also* McGraw, Sterlin & Davis, *Case Study In Divorce Law Reform and Its Aftermath*, 20 J. FAM. L. 443 (1982).

49. Under the traditional fault-based divorce system, alimony was allowed only to innocent wives. The purpose was not simply to provide an innocent (and presumptively unemployed) wife with financial support, but also to punish her guilty husband. The punishment aspect was most important; even a needy wife was ineligible for alimony if her conduct had caused the divorce. This may be part of the reason why, under fault-based divorce systems, wives are usually the plaintiffs. *See* Weitzman & Dixon, *The Alimony Myth: Does No-Fault Divorce Make A Difference?*, 14 FAM. L.Q. 141, 146 (1980). *See also* Note, *Does No-Fault Divorce Portend No-Fault Alimony?*, 34 U. PITT. L. REV. 486 (1973). The shift from a fault-based to a need-based standard for alimony coincides with the increased participation of women in the workforce; this has diminished the need and the societal expectation for a woman to be supported by her ex-husband's earnings.

50. *See, e.g.*, Note, *supra* 49. In the best empirical study of alimony awards and attitudes, Weitzman and Dixon found that both men and women view no-fault alimony as fairer than fault-based alimony. Weitzman & Dixon, *supra* note 49. Popular opinion supports the idea of rehabilitative alimony, as well as alimony for older housewives who may not be retrainable. In both cases, a majority of respondents supported alimony with significantly greater support from women than from men. Both sexes rejected the notions that a wife deserves alimony because her husband owed her support or repayment for years of work as a homemaker.

It is often assumed that alimony is awarded to most divorcing wives. *Id.* In fact, this is not the case. Under no-fault alimony systems, only a small proportion of divorcing spouses receive alimony awards. In the few years after California's adoption of no-fault alimony, fewer than 20% of divorcing wives received alimony; only a third of these were granted permanent, as opposed to short-term, rehabilitative awards. Women with marriages of 15 years or longer were three times more likely to receive alimony than those with marriages of less than five years—confirming the notion that alimony is security for long-term housewives with few job skills. However, even long-term housewives could not count on guaranteed alimony unless their husbands had high incomes: 80% of those with 18-year marriages and husbands with 1978 incomes of $30,000 or more received alimony; those whose husbands earned less had only a 50% chance. This indicates that, even with the emphasis on retraining and self-sufficiency, long-term housewives might not be provided for unless they are viewed as untrainable, and their husbands can afford it. *Id.*

Unfortunately, there are no studies of alimony in states other than California. The consequences of the fixed-term awards are particularly important in light of the employment problems older women may face; but no data exist on this subject. Studies of the speed with which divorced women actually become self-sufficient, or approach their pre-divorce household incomes, would also be useful.

The evidence from California indicates that women bear a much heavier economic burden after divorce than do men. *Id.* No-fault alimony may be a partial consequence of women's increased participation in the workforce. The ideal of the self-supporting ex-wife, however, does not match the reality of women's relatively low incomes. Women with independent pre-divorce incomes of more than $10,000 in 1978 were half as likely to receive alimony as those with lesser incomes. The award also depends on the husband's income which, if under $20,000, may totally preclude alimony. Although a decree of financial independence may make it easier for a woman to divorce, her income may not be enough to support her beyond a subsistence level. If she has any job skills or employment potential, she may have to support herself at a modest level regardless of her ex-husband's higher income. The consequences are worst for young women with short marriages, few job skills, and non-wealthy husbands. In 1977, only 8% of California housewives in marriages of less than 10

In twenty-four states,[51] a finding of matrimonial fault will not necessarily preclude entitlement to post-divorce alimony, but the court may limit the amount of alimony. In these jurisdictions, judicial discretion determines the impact of fault on alimony awards. While eight states still disqualify a spouse at fault from receiving alimony, fourteen other states completely

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years were awarded alimony. Housewives with no independent earning power may have to retrain themselves for jobs unless they have been married for a long time. Because of the time pressures put on them to complete job training (2-3 years is considered a reasonable time for rehabilitative alimony), their subsequent incomes are likely to be low. *Id.*

In fact, the relative standards of living of ex-spouses after the divorce markedly differ, with ex-husbands living at much higher levels than ex-wives. Weitzman and Dixon noted that "when the total post-divorce resources are divided between the two new households of the former spouses, the husband's post-divorce household retains two-thirds to three-quarters of the total, while the wife is left with no more than one-third." *Id.* at 178. This occurs regardless of the amount of the alimony award and child support payments. This result, of course, is due to the husband's higher earning power, and his greater likelihood of remarrying (acquiring another wage-earner in his household).

The fairness of this arrangement is a matter of opinion: whether an ex-wife should retain access to the higher earnings of her former spouse depends on whether she contributed to his earning power and has a right to share it. Although men often emerge the financial victors in divorce, one can argue that their incomes, especially post-divorce, are their own and need not be shared. However, in states that deny alimony to a guilty party, a long-time housewife at fault will receive no support—even though she may have minimal job skills and will have a difficult time supporting herself in the absence of alimony. The question of fairness may be supplanted by one of financial reality: a sufficient means of support must be found for such a woman; in the absence of alimony she may have no alternative but welfare. *See* Hauserman, *Homemakers and Divorce: Problems of the Invisible Occupation*, 17 FAM. L.Q. 41 (1983). In any case, the financial disparity existing between ex-husbands and ex-wives indicates that the ideal of rehabilitative alimony may not be fully equitable at the present time.

See also L. WEITZMAN, THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA (1985), *reviewed in* 20 FAM. L.Q. 129 (1986) (M. Inker) & 84 MICH. L. REV. 900 (1986) (M. Minow).

51. The following table shows alimony regimes for each of the 50 states.

discard the factor of fault in alimony determinations.[52] Texas is cur-

	ALIMONY STATUTES			
	REHAB., WITH TIME LIMIT	FAULT PRECLUDES ALIMONY	NEED BASED, FAULT MAY BE CONSIDERED	REHAB., FAULT NOT CONSIDERED
Alabama				X
Alaska				X
Arizona				X
Arkansas			X	
California				X
Colorado				X
Connecticut			X	
Delaware	2 years[a]			
Florida		X		
Georgia		X		
Hawaii			X	
Idaho		X		
Illinois				X
Indiana				X[b]
Iowa			X	
Kansas	121 mos.			
Kentucky				X
Louisiana		X		
Maine			X	
Maryland				X
Mass.			X	
Michigan				X
Minnesota				X
Mississippi			X	
Missouri			X	
Montana				X
Nebraska			X	
Nevada			X	
New Hamp.	3 years[c]			
New Jersey			X	
New Mexico			X	
New York			X	
N. Carolina		X		
N. Dakota			X	
Ohio			X	
Oklahoma			X	
Oregon			X	
Pennsylvania			X	
Rhode Island			X	
S. Carolina		X		
S. Dakota			X	
Tennessee			X	
Utah			X	
Vermont				X
Virginia		X		
Washington				X
W. Virginia		X		
Wisconsin			X	
Wyoming			X	

a = unless marriage is older than 20 years
b = only for cases of incapacity
c = longer if small children involved

For an explanation of the statistical analyses, see *supra* note 33.

52. Chi-square analysis reveals significant regional differences in alimony statutes ($x^2 = 19.86$, $p < .05$). The South is by far the most likely to prohibit alimony based on fault: seven of the eight states which do so are in the South, comprising almost half (7 out of 15 alimony-awarding states) of

rently the only jurisdiction that does not have alimony. In Texas, the financial position of the spouses following divorce is regulated by the division of both the separate assets and the common marital assets and liabilities. Finally, the three states (Delaware, Kansas, and New Hampshire) that award post-divorce alimony based on considerations of need have established statutory time limits. The objective of alimony in these schemes is to foster rehabilitation—to allow the recipient spouse to achieve economic self-sufficiency within a reasonable period of time.

One study suggests that the availability of alimony may influence women's decisions to marry.[53] Other statistical analyses, however, indicate that the financial implications of divorce—the type of alimony and property division provisions—have had little impact on the rate of divorce or the duration of marriage.[54] Moreover, comparisons of the 1983

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the states in the region. The Northeast is most likely to permit fault to be considered at the court's discretion (7 of 9 states). The West also has a high concentration of states prohibiting the consideration of fault (6 of 14 states which prohibit fault consideration are in the West). *Id.*

53. Landes, *Economics of Alimony*, 7 J. LEGAL STUDIES 35 (1978). In a purely economic view of marriage and divorce, Landes has found that states which do not provide alimony (at the time of her study these were Texas, Delaware, and Pennsylvania) have significantly fewer ever-married women between the ages of 25 and 34—as well as fewer children per married woman in that age range. By means of complicated mathematical equations, she hypothesizes that wives will invest in their husbands' careers only because the wives expect to be compensated. In the absence of alimony provisions, a wife's risk is considerably greater. However, the causal relation between these variables may not be as clear as Landes suggests. Women may invest in their husbands' careers (by not working themselves) out of social pressure, or for reasons unrelated to a calculated economic gain. Nonetheless, the statistical correlations are real and provocative.

54. *See* Sepler, *supra* note 48. With respect to property division, 43 states currently require "equitable" distribution of property after divorce. *See infra* Table on Property Allocation Statutes. Some states provide statutory guidelines for a fair distribution (derived largely from the Uniform Marriage and Divorce Act) which reflect considerations for alimony determinations: duration of marriage, age and work history of both parties, incomes and contributions to the marriage (sometimes including homemaker services). Other states provide no framework, and rely instead on the judiciary's concept of fairness in each case. In practice, judges often construe "equitable" property division to mean "equal." In most equitable division states, however, an equal distribution is neither necessary nor presumed.

The seven states stipulating equal property division are concentrated in the South. Equal division does not have to be applied strictly—four equal division states reserve the right to alter this arrangement in the interest of fairness. While it is not clear under what circumstances fairness might dictate other than equal division, in two of these states marital conduct may be considered. *Id.*

In all of the equal division states, only joint property—that acquired during the marriage—may be divided. More than half of the equitable distribution states (24) restrict divisible property to joint property; the other states may also divide separate property in the interest of a just settlement. In all, 31 states divide only joint property, and 19 also reserve the right to allocate separate property. Southern states are the most unlikely to include separate property in the distribution ($x^2 = 10.69$, $p < .05$), with 14 of 16 southern states restricting division to joint property.

There is not total congruence between states that consider fault for alimony and those that consider it for property settlements. Seventeen states consider fault for both purposes; six, just for property; and thirteen, only for alimony. For purposes of property distribution, there are two kinds of fault which may be considered: marital fault and economic fault (dissipation of funds). Twelve states expressly provide for consideration of economic fault when dividing marital property. Unlike alimony awards, which in eight states are explicitly prohibited to a spouse at fault, no states deny marital property to a spouse at fault. Fault is merely a discretionary factor considered when computing the allocations.

A recent trend towards considering homemaker contributions as assets to the marriage has resulted in larger property awards to housewives—which in some instances may help reduce alimony

divorce rate among the various state jurisdictions do not reveal any significant differences between states that do not consider fault for purposes of alimony and those in which fault cuts off a spouse's opportunity for

payments to older housewives with few job skills. It is not clear which of the two types of distribution, "equal" or "equitable," is better for the older housewife. An equal split, especially if there is not much property to divide, may not provide an adequate source of support in the absence of alimony. An equitable division, which calculates homemaker contributions, may yield a better source of support; but because equitable distributions are by nature subjective, homemaker contributions may be given such little value that the wife is left with practically nothing. *See* Hauserman, *supra* note 50, at 48 n.43. As with alimony, the literature has not addressed the question of fairness to the husband—whose income may have permitted accumulation of property.

In addition to her suggestion that a lack of alimony decreases marriage rates, Landes suggests that the elimination of fault as a consideration in property settlements has a similar effect. Landes, *supra* note 53, at 36. According to Landes, a fault system reduces the emotional cost to the parties of enforcing the marriage; society enforces it for them. When fault is no longer considered, the parties must enforce their own marriages at higher costs to themselves; marriage rates decline. As with alimony, consideration of fault in property distribution has no effect on either duration of marriage or divorce rate. Because considerably less attention has been paid to property distribution than to alimony, other generalizations are currently not possible.

PROPERTY ALLOCATION STATUTES

	TYPE OF PROPERTY			TYPE OF DISTRIBUTION		
	JOINT ONLY	JOINT & SEPARATE	EQUAL	EQUITABLE	MARITAL FAULT AT DISC.	FINANCIAL FAULT AT DISC.
Alabama	X			X	X	
Alaska	X[a]			X		
Arizona	X			X		
Arkansas	X[a]		X[b]			
California	X		X[d]			X
Colorado	X			X		
Connecticut		X		X	X	
Delaware	X			X		
Florida		X		X[c]	X	X
Georgia	X			X	X	
Hawaii		X		X	X	
Idaho	X		X[b]		X	
Illinois	X			X		
Indiana	X			X		
Iowa		X		X		
Kansas		X		X	X	X
Kentucky	X			X		
Louisiana	X		X			
Maine	X			X		
Maryland	X			X	X	X
Mass.		X		X	X	
Michigan	X			X	X	
Minnesota	X[a]			X		
Mississippi		X		X[c]		
Missouri	X			X	X	
Montana		X		X		
Nebraska	X			X		
Nevada		X		X	X	
New Hamp.	X			X	X	
New Jersey	X			X		
New Mexico		X		X		
New York		X		X	X	X
N. Carolina	X		X[b]		X	X
N. Dakota		X		X		
Ohio	X			X		
Oklahoma	X			X		
Oregon		X		X	X	X
Pennsylvania	X			X		X
Rhode Island		X		X	X	
S. Carolina	X			X[c]		
S. Dakota		X		X		
Tennessee	X			X		X
Texas		X		X		
Utah		X		X		
Vermont		X		X	X	X
Virginia	X			X	X	
Washington		X		X		
W. Virginia	X		X			X
Wisconsin	X		X			
Wyoming		X		X	X	X

a = separate property may be reallocated as fairness requires
b = equal division preferred but may be altered as fairness requires
c = by court decision, not by statute
d = California is a specific exception to the equal division of community property
For an explanation of the statistical analyses, see *supra* note 33.

alimony.[55]

D. The Influence of Social Ethics

More than the change in divorce laws, contemporary social ethics may explain more plausibly the current rate of divorce and the duration of marriage. In addition, social mores may provide some understanding of the legal system's lack of influence on these matters. The debate surrounding gender equality, for instance, has already had a visible impact upon substantive domestic relations law. Joint custody statutes reflect a legislative reassessment of the man's role in parenthood—a re-evaluation advocated by an emerging fathers' rights movement.[56] The economic integration of women into the work force, and their increasing financial self-sufficiency, have contributed to the transformation of alimony statutes from fault-based provisions (allegedly protective of helpless, innocent wives and punitive as to overbearing, culpable husbands) to a gender-neutral and need-determined standard that facilitates economic rehabilitation.[57] Such changes in social thinking about men and women will likely affect one's decision to enter into or terminate a marriage.

Another gender-related factor which may influence the current rate of divorce is the contrasting attitudes of men and women toward interpersonal relationships. Because of different cultural, sociological, and psychological assumptions that underlie individuals' upbringing and integration into society, men and women traditionally bring disparate expectations and dispositions into the marriage relationship. By social custom, men characteristically restrict the expression of their emotions and gain identity from external accomplishments. Consequently, men tend to interpret marriage in terms of, and perhaps subordinate it to, attainment of more objective career goals. Although useful and productive in business and professional relationships, male "tunnel" vision—implying a clear and unswerving focus upon objectives and the means for achieving them—reduces the importance and complexity of personal relationships. For men, conflicts between job objectives and a marital life-style may well compromise the stability of marriage. By contrast, society teaches women to have a larger view and appreciation of personal relationships. Their "global" vision implies a willingness to deviate from a goal, either temporarily or permanently, in order to preserve relationships.[58] Unless spouses understand their respective perceptions of intimate relationships,

55. These conclusions were reached through a chi-square analysis of the table appearing at *supra* note 51.

56. *See, e.g.*, Krebs, *Joint Custody: Is It Really In The Best Interest?*, in T. CARBONNEAU, THE FAMILY AND THE CIVIL CODE 499 (1983). *See also* C. VETTER, CHILD CUSTODY: A NEW DIRECTION (1982); M. WHEELER, DIVIDED CHILDREN (1980). For a critical judicial assessment of the concept of joint custody, see Turner v. Turner, 455 So. 2d 1374 (La. 1984).

57. *See supra* notes 51-53 and accompanying text.

58. For a general discussion of these concepts, see, *e.g.*, R. BARNHOUSE, IDENTITY (1984); C. GILLIGAN, IN A DIFFERENT VOICE (1984); A. ULANOV, THE FEMININE IN JUNGIAN PSYCHOLOGY AND IN CHRISTIAN THEOLOGY (1971).

the inevitable misunderstandings and frustrations may become overwhelming and prove fatal to the marriage.

While comprehensive empirical studies are lacking, existing studies[59] corroborate the influence of social ethics and socially-induced attitudes in the divorce context. Not unexpectedly, one of the primary findings relates to the changing social and economic position of women, and the corresponding influence upon both male and female perceptions of marriage. For example, the financial autonomy that many women have attained reduces their financial dependance upon husbands and lessens their feeling of immobility in the face of marital difficulties.[60] At the same time, some men find this revamping of traditional roles insupportable.[61] These feelings lead to hostility, and can eventually cause a breakup of the marriage. Also, the sheer volume of divorces[62] has effectively destigmatized divorce. The resulting peer acceptance facilitates the deci-

59. *See* S. ALBRECHT, H. BAHR & K. GOODMAN, DIVORCE AND REMARRIAGE (1983) [hereinafter cited as Intermountain Study]; Cleek & Pearson, *Perceived Causes of Divorce*, 47 J. MARRIAGE & FAM. 179 (1985) [hereinafter cited as Wisconsin County Study]; Thurnher, Fenn, Melichar & Chiriboga, *Sociodemographic Perspectives on Reasons for Divorce*, 6 J. DIVORCE 25 (1983) [hereinafter cited as the San Francisco Study].

The Intermountain Study asked respondents to list the causes of their divorces. Spouse's infidelity and "loss of love" emerged as the two most important reasons. The Wisconsin County Study reports that communication problems, basic unhappiness, and incompatibility were the top three causes for separation. The San Francisco Study treated motives for separation among a sample of persons who had filed for (but not necessarily received) divorces. In an open-ended questionnaire, respondents listed as many reasons as they wanted to explain the cause of their separation. The most common reasons for separating were: conflicting life-styles, 19.8% of respondents; spouse involved with another, 12.3%; and money problems, 12.4%. All of these factors are highly general, and provide little insight into ultimate causes for the decay of the marriage.

The San Francisco Study analyzed causes by the characteristics of the respondents, and revealed a few significant differences. Highly educated (more than high school) respondents were more likely than lower educated respondents to list conflicting life-styles—especially highly educated women. Women were generally more likely than men to state that the spouse had another person; lower educated women were more likely to list that as a cause. Women were also more likely than men to cite money problems—and lower income people (under $10,000 annual income) more likely than higher income people. Men were statistically more likely to cite "spouse wants freedom;" and women more likely to report such causes as "spouse domineering," "spouse violent," "spouse runs around," "spouse drinking," and "sexual problems." These results resemble responses in the Wisconsin County Study, where women were more likely to cite unhappiness, incompatibility, abuse, and spouse's infidelity, and men more likely to cite alcohol abuse and "women's lib."

With the exception of variables reflecting traditional male "macho" behavior (domination, violence, promiscuity, drinking), men and women tend to share stated causes for divorce. However, when men say their marriages broke up because their wives wanted "freedom," and women cite their husbands' "running around," are these different phenomena? They may simply be two sides of the same coin: the "liberated" wife and the promiscuous husband may simply be trying to escape their respective spouses' unpleasant behavior.

The San Francisco and Wisconsin Studies are limited by problems with their samples. Both studies involved people separated, but not yet divorced; both were heavily biased towards women; and each was drawn from a single county. Since the studies examined stated motives of persons already separated, rather than the differences between persons who separate and those who do not, one cannot generalize about actual reasons for marital breakdown. If a significant number of couples with similar problems remain together, the predictive value of the marital traits cited would be quite limited.

60. *See, e.g.*, San Francisco Study, *supra* note 59, at 26.

61. *Id.* at 27; Wisconsin County Study, *supra* note 59, at 180.

62. *See supra* note 36 and accompanying text.

sion to terminate marriage.[63] In addition, spouses with divorced parents are more likely to divorce than peers raised in stable marriages.[64] While these social circumstances would tend to lead to divorces, such factors as the presence of children, strong religious affiliation, and financial stability tend to retard divorce.[65]

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63. Social pressure from divorced peers, or at least approval from others, appears to influence decisions to divorce. The Intermountain Study found that 59% of divorcees had the approval of 75% or more of their friends or family—with women having more outside support than men. Intermountain Study, *supra* note 59, at 109. In addition, most respondents had at least a few friends who were divorced. *See* J. WALLERSTEIN & J. KELLY, SURVIVING THE BREAKUP 21-22 (1980). Social psychological views of divorce admit that, when social pressure encourages it, divorce will increase. *See* Levinger, *supra* note 34, at 39. As friends divorce, individuals who may have married young find themselves left out of their old social circles, and see friends enjoying freedoms they never had. Simple envy of the new lives of old friends can be a powerful impetus to divorce when a marriage is less than ideal. *See id.*

64. This holds more for whites than for blacks—although the results for blacks are inconclusive. *See* Pope & Miller, *The Intergenerational Transmission of Marital Instability*, 32 J. SOC. ISSUES 49, 52 (1976). It is not clear why this occurs. Children raised in one-parent families, in which the other parent died, for example, are less prone to divorce than are those from families broken by divorce. These results suggest that marital breakdown is not due simply to the absence of one parent. A classic "role model" hypothesis, that children of divorced parents fail to learn adequate marital roles, and hence are unable to perform appropriately in their own marriages, is not fully supported by the data. *Id.* at 57. The answer may be that children of divorced parents are less likely to view marriage as permanent; no study appears to have tested this hypothesis. In any event, a full assessment of the reasons for the breakdown of a marriage involving a spouse with divorced parents must account for the confluence of factors (including upbringing) that make up that person's psyche.

65. *See* Nebraska Study, *supra* note 34, at 609-11. In this study, married respondents were asked questions pertaining to thoughts about divorce. Results indicate that those persons in longer marriages are less likely to contemplate divorce—as are those who perceive their family incomes as above average (this is independent of the actual dollar amount of the income). For men, the presence of pre-school children increases thoughts of divorce; full-time employment increases thoughts of divorce among women. Strong religious affiliation with any denomination tends to reduce thinking about divorce—especially among women. This study also revealed that "respondents with unhappy marriages are more apt to consider divorce than those with happy marriages." *Id.* at 614. Although 4% of respondents who rated their marriages as "very happy" had considered divorce, only 21% of those who rated their marriages lower on the happiness scale were considering it. *Id.* at 613. This suggests that some persons in less than happy marriages might be otherwise prevented from divorcing.

The study concludes with a discussion of religious and economic barriers to divorce, suggesting that "[r]eligious values on the one hand tend to keep people in marriages; financial independence and financial dissatisfaction, on the other, tend to encourage thinking about divorce." *Id.* at 614. Although religious and economic factors may deter divorce in some cases, it is not clear whether they actually prevent it. It may be that persons with strong religious affiliations and economic difficulties merely take longer than others to make the final break; thoughts of divorce may reflect their deliberations.

Like the San Francisco Study, the Nebraska Study examined demographic variables with respect to thoughts of divorce, and not the ultimate causes leading up to those thoughts. The study fails to compare persons thinking of divorce with those actually divorced as a way to discern possible differences between those who contemplate, but do not actually divorce, and those who follow through on their thoughts. Lacking information on the average time a person contemplates divorce before taking action, it is impossible to tell from the Nebraska Study how many respondents will eventually file for divorce and how many will not. For all of these reasons, the predictive value of this study is very limited.

Because the Nebraska, San Francisco, Wisconsin, and Intermountain Studies used separate survey instruments and sampling techniques, they are not directly comparable. It does appear that low incomes and financial dissatisfaction (which may or may not be correlated with one another) encourage thinking about divorce and separation. Independence among women also appears to be a factor: employed women in Nebraska are more likely than non-employed women to contemplate

In some of the studies, separating and divorcing couples gave personalized evaluations of the reasons for their marital problems. Couples cited general factors such as communication problems, basic unhappiness, and incompatibility; and more particularized factors such as infidelity, loss of love, conflicting life-styles, and financial difficulties. These personal evaluations neither confirm nor deny the relevance of sociological factors; they simply add another dimension to the growing number of explanations for marital difficulties.

Conjecturally, one might further claim that the redefinition of social morality (seen in the prevalence of spouse-equivalent relationships, the availability and use of birth control, and the legalization of abortion) should have some bearing on how people perceive marriage and divorce. Also, the decline or resurgence of religious beliefs, the popularity of psychological counseling, and purely economic pressures all provide insight into the underlying motives for divorce in contemporary American society.[66]

In the final analysis, however, the social factors and personal reasons that disrupt matrimonial relationships are virtually indistinguishable. For example, disagreement between spouses as to gender roles in the family and society not only exemplifies the influence of contemporary mores on the marriage relationship, but also indicates that the couple is experiencing communication difficulties. Spousal disagreement may well

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divorce. Independence of one kind or another also emerged as an important cause for separation among the women in the San Francisco Study. This is confirmed by the Intermountain Study, which found that financial problems were the major barrier to divorce, especially for women. Nonetheless, it remains difficult to generalize about explicit reasons for divorce because of the varied methods employed by researchers.

66. Two types of models have been developed to explain marital success and failure: a social psychological model focusing on barriers and attractions, and an economic model emphasizing costs and benefits. The social psychological model predicts marital success as a function of the interplay between attractions (factors encouraging marriage) and barriers (factors discouraging divorce). When attractions and barriers are both strong, divorce is unlikely; as both decline, so does the stability of the marriage. *See* Levinger, *supra* note 34. Economic models predict marital success according to the costs and benefits, emotional as well as financial, of maintaining the marriage. Variables include financial success, attachment to the spouse, attachment to another, presence of children, education, church membership, expectations of the marital relationship, and attitudes of the surrounding community regarding divorce. If these variables combine in a way to make it more costly to sustain than to terminate the marriage, the marriage is more likely to fail. *See* Becker, *A Theory of Marriage Pt. 1*, 81 J. POL. ECON. 813 (1973); Becker, *A Theory of Marriage Pt. 2*, 82 J. POL. ECON. S 11 (1974).

Economic and social psychological models generally produce similar conclusions that one can also predict by demographic trends. Women are more likely to divorce when they are financially independent: possibly due to economic benefits or to the removal of a psychological barrier. Presence of children contributes to marital stress but inhibits divorce. This may be due to the added financial and emotional costs of children, or it may be explained by a sense of duty towards children. The explanary and predictive values of the two approaches are roughly comparable.

Social and demographic trends, together with psychological and economic analyses, may explain part of the increase in the divorce; but they are not sufficient. Not all independent women divorce; even women with less than happy marriages may not choose divorce. Nebraska Study, *supra* note 34. Strong religious affiliation and divorced parents may explain some of the variance, but certainly not all of it. These approaches analyze trends, but not the ultimate causes behind those trends. Truly explanatory models do not yet exist.

reflect an inability to achieve a basic consensus on so-called life-styles. Such conflicts eventually erode marital bonds and engender feelings of "loss of love" and incompatibility—perhaps leading the spouses to find needed affection with someone else. Infidelity during times of marital dissatisfaction is also a particularly poignant, albeit brutal, way to communicate basic unhappiness about the marriage relationship.

Despite ascertainable characteristics in the pool of divorcing couples, the decision to enter into or terminate a marriage emerges as a profoundly personal choice. The view that marriage has significant social policy implications, and therefore warrants the assertion of a strong state regulatory interest, becomes more of a rhetorical pronouncement than a meaningful statement as to the authority of the state over married individuals. Even the prospect of lengthy, distasteful, and hurtful divorce proceedings will do little to bring about a reparation of shattered matrimonial expectations, or undo the conviction that the emotional investment in a marriage has culminated in irremediable loss. In fact, rather than deterring the parties, the occasion for legal haggling may satisfy the spouses' need to make the pain of their matrimonial failure felt. The law, in effect, is powerless to abrogate or amend spousal disaffection. There is an irreducible human element to marriage and divorce that the legal system must take into account and which it cannot abridge by its abstract concept of matrimony.

E. Factoring in Common Perceptions and Expectations

Before recommending alternatives to the current system of divorce adjudication, one must account for popular perceptions of the judicial process for divorce. Again, few statistical studies exist; those that do exist[67] reflect the attitudes and perceptions of geographically-isolated populations. These studies generally concentrate on attorneys rather than divorcing spouses. Despite these limitations, the available data indicate that divorce lawyers expect, and are expected by their clients, to do more than simply process a divorce petition through the legal system and obtain a favorable financial settlement. Surveys of divorce lawyers illustrate that both parties in the attorney-client relationship anticipate that the client will receive interpersonal assistance—including basic counseling and assistance in understanding the complexity of the legal system.[68]

67. *See* Herrman, McKenry & Weber, *Attorneys' Perception of Their Role in Divorce*, 25 J. DIVORCE 313 (1979) [hereinafter cited as the Georgia Study]; Felner, Primavera, Farber & Bishop, *Attorneys as Caregivers During Divorce*, 52 AM. J. ORTHOSPY 323 (1982) [hereinafter cited as the Connecticut Study]; W. Pachter, An Investigation of Variables Related to Client Evaluation of the Lawyer—Client Relationship in Divorce Cases (1984) (Ph.D. dissertation, Univ. of Vermont) [hereinafter cited as the Vermont Study].

68. Georgia Study, *supra* note 67, at 319-20; Connecticut Study, *supra* note 67, at 330, 335; Vermont Study, *supra* note 67, at 30, 48, 50, 65. In light of these results, some might advocate a change in the code of ethics for domestic relations attorneys, and require them to tell clients that they are in the wrong when that applies—rather than just doing battle for clients. This, combined with changes in the substantive law that would allow judges less discretion, might reduce litigation

While some attorneys expressed misgivings about their ability to respond to their clients' personal problems, nearly all of the attorneys in these samples voiced an interest in having some formal training in counseling—viewing it as a necessary part of the process. Of those clients seeking additional assistance, significantly more were women. Spouses leaving marriages of long duration also tended to expect more than purely legal services from their attorneys.[69]

The latter findings may indicate that women, especially those who have participated in a longstanding marriage, simply transfer their sense of learned helplessness from their husbands to their typically male attorneys. The findings also may further illustrate the difference in perspective associated with gender. Women take a more global view of the legal process of divorce, asking it to address the multifarious aspects of the problem. Men, on the other hand, are more focused, interested primarily in the likely result that the process will yield.[70]

The results in the studies also indicate that a fairly high number of clients are dissatisfied with the legal process of divorce. Georgia attorneys, for example, report that 45% of their divorce clients are dissatisfied with their legal services; Vermont clients report only "moderate satisfaction" with their attorneys.[71] Although these results do not support a definite conclusion as to client dissatisfaction, it appears that divorce lawyers and the judicial process for divorce do not satisfy some of the basic needs of divorcing couples. To some extent, these results may reflect client unhappiness with their personal situation, and the essentially "no-win" circumstances of divorce. It is equally likely, however, that the relative dissatisfaction expressed by divorce clients makes a statement about the adversarial character of divorce. Ordinarily, the divorce process demands the assumption of a litigious posture in order to protect basic rights; contentious attitudes tend to make for difficult dispute resolution. The current state of client dissatisfaction with divorce, then, at least supports the view that process alternatives should be entertained.

F. Some Observations

Despite the paucity of comprehensive and rigorous scientific data regarding divorce in America, one can draw some conclusions about the emerging composite. The current rate of divorce is quite high, with estimates ranging from 45% to 60% of marriages per year. Although the

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and make the process more workable. For further discussion of this point, see *infra* note 186 and accompanying text.

69. Georgia Study, *supra* note 67, at 315-16; Connecticut Study, *supra* note 67, at 332-35; Vermont Study, *supra* note 67, at 56, 58, 62, 67.

70. *See supra* note 58 and accompanying text. To some extent the results may also indicate that more men than women initiate or want divorce. In addition, the results show that mediation would be more responsive to women's needs. The movement toward alternate dispute resolution mechanisms may reflect the growing influence of women in the law.

71. Georgia Study, *supra* note 67, at 319-20; Connecticut Study, *supra* note 67, at 326; Vermont Study, *supra* note 67, at 71-78.

vast majority of divorce actions are uncontested, state courts are literally bombarded by divorce petitions. Even the isolated, protracted proceedings over post-divorce disputes weigh down a system already struggling with many abbreviated court battles and pro forma proceedings. Undeniably, divorcing couples are undergoing an emotional trauma. The adversarial process, once invoked, heightens emotions and further distorts the conflicts which separate the spouses. Legal combat affirms the unfortunate truth of marital failure. Any wrongs committed are personal and not legal in nature—non-justiciable grievances inherent in personal relationships. In procedural, personal, and financial terms, adversarial litigation in the divorce process can be wasteful, inappropriate, and counterproductive.

An alternative framework should attempt to respond to the human element in divorce disputes and balance the various competing interests implicated in divorce: the somewhat questionable state interest in the permanency of marriage—perhaps more accurately described as an interest in a well-established and defined personal status for all citizens; the spouses' individual interest in their marriage and the corresponding rights; the welfare of the children; and the financial and property considerations usually associated with divorce. Such a framework should also be neutral as to considerations of legal culpability. Judicial determination of spousal guilt or innocence in marriage breakdown is impossible in most cases; legal standards do not really reflect the root causes of marital failure. Finally, given the inevitable variety of individual circumstances in divorce, the alternative framework should provide for a great number of remedial options.

IV. REPLACING JUDICIAL PROCEEDINGS WITH AN ARBITRAL ALTERNATIVE

A number of commentators[72] advocate the recourse to arbitration as a remedy in the area of divorce. The commentators emphasize the dispatch, economy, and non-adversarial attributes of arbitration. Specifically, commentators recommend including arbitral clauses in separation agreements as a means of restoring consensus among couples who initially reached an accommodation.[73] The Philadelphia Bar Association recently endorsed recourse to divorce arbitration, and elaborated a set of rules to initiate and implement the procedure.[74] Additionally, the American Arbitration Association has devised a model framework for submitting divorce disputes to arbitration.[75] In light of its success as an alternative mechanism to court litigation in the context of labor and

72. *See* sources cited on arbitration in family law matters, *supra* note 2.

73. *See id.*

74. PHILA. BAR ASS'N, DIVORCE ARBITRATION: A NEW ALTERNATIVE (1982).

75. AM. ARB. ASS'N, FAMILY DISPUTE RESOLUTION PROCEDURE (1982).

commercial dispute resolution,[76] arbitration certainly deserves consideration as a possible alternative to traditional divorce proceedings. The history of arbitration, however, reveals that its adjudicatory characteristics are particularly well-suited to the specific features of labor and commercial controversies.[77]

Proposals for divorce arbitration usually are part of a wider consideration of alternative mechanisms. While these proposals focus primarily on the need to replace the adversarial process with non-contentious proceedings, they fail to pay sufficient attention to the sui generis nature of arbitral adjudication. Recommendations that arbitral techniques be applied to issues of marital dissolution should be anchored in thorough analyses of the specific character of the arbitral remedy. Such analysis will facilitate efforts to evaluate whether arbitration can adequately respond to the intensely personal issues in divorce disputes and eliminate the deficiencies of the present process. Since arbitration traditionally requires consensus and is an adjudicatory (rather than conciliatory) mechanism, it may have limited applicability as an extra-judicial means of resolving divorce disputes.

A. Arbitral Adjudication Generally Defined

A private consensual agreement between contracting parties as to dispute resolution is the hallmark of arbitral adjudication.[78] Parties to a transaction, at the time they enter into an agreement or when an actual dispute materializes in their dealings,[79] agree to submit their differences to a privately-appointed third party. A valid arbitral clause or agreement, once entered into, is binding on the contracting parties.[80] Subject to public policy concerns, the parties have the right not only to engage in arbitration, but also to define the basic content of the private adjudicatory process they have established. The parties may stipulate the means of designating the arbitrators, the procedures to be followed in the proceedings, and the law governing the merits of the dispute.[81] Provided the parties deem it appropriate, or if institutional rules apply and so state, the arbitral tribunal has wide discretion in the conduct of the proceeding.[82] The tribunal renders a binding award[83] (customarily without giv-

76. *See supra* note 7.

77. *See id.*

78. For a general list of sources on arbitration, see *supra* note 7 and accompanying text. The most distinguished treatment of the subject is Professor Wilner's work, *supra* note 7.

79. For a discussion of the distinction between the submission and the arbitral clause or agreement, see, *e.g.*, G. WILNER, *supra* note 7, §§ 5:00-:05.

80. *See, e.g.*, Associated Metals & Minerals Corp. v. The S.S. Mihalis Angelos, 234 F. Supp. 236 (S.D.N.Y. 1964); United States Fidelity & Guaranty Co. v. Bangor Area Joint School Auth., 355 F. Supp. 913 (E.D. Pa. 1973); Tennessee River Pulp & Paper Co. v. Eichleay, 637 S.W.2d 853 (Tenn. 1982). *See also* G. WILNER, *supra* note 7, § 4:03.

81. For a discussion of the contractual character of arbitration, see G. WILNER, *supra* note 7, § 1:01.

82. *Id.* §§ 20:00-21:04.

83. *Id.* §§ 28:00-29:06.

ing reasons to substantiate the determination)[84] which a party can challenge in court, but only on such narrow and circumscribed grounds as excess of arbitral authority or fundamental procedural unfairness.[85] Arbitration provides adjudicatory flexibility as to both procedure and substance, expertly-qualified adjudicators, and arguably a more rapid and economical disposition of the case.[86]

Despite early judicial hostility toward arbitration,[87] most legal systems now recognize arbitration as a fully autonomous adjudicatory process—paralleling and no longer rivaling the court system. In light of increases in the volume and complexity of litigation and statutory directives recognizing arbitration as a valid process of adjudication, courts have reconsidered their prior positions that the privately-conferred adjudicatory mandate of arbitrators violated public policy guarantees and infringed upon their public jurisdictional authority.[88] Under the terms of the Federal Arbitration Act, an agreement to arbitrate is "valid, enforceable, and irrevocable,"[89] and divests the courts' authority to entertain an action involving an arbitrable dispute.

The arbitral resolution of disputes achieved its preeminence in the commercial field; commercial considerations, in effect, dictated the coming-of-age of arbitral adjudication.[90] The characteristics of arbitral adjudication mesh with the basic philosophy of a cohesive and interdependent commercial community. Merchants do not share lawyerly concerns with the litigation process. Adversarial wrestling for truth weakens the commercial ideals of good faith and arms' length dealings, and might undermine the present or future basis for commercial relationships. The legal resolution of disputes involves disruptive proceedings that are insensitive to commercial concerns of transactional costs, time, the value of opportunities, and the need to reach expedient accommodations. Also, the possibility always exists that, despite laws favorable toward commercial interests, judges might misconstrue the guiding commercial norms that should govern the outcome of the dispute. Moreover, the expertise, flexibility, and efficiency of arbitral adjudication can clearly favor the special interests of commerce.

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84. *Id.* § 29:06.

85. *Id.* § 33:02.

86. For discussions of the advantages traditionally associated with arbitration, see, *e.g.*, Mentschikoff, *supra* note 7. *See also* de Vries, *International Commercial Arbitration: A Contractual Substitute for National Courts*, 57 TUL. L. REV. 42 (1982); Kerr, *International Arbitration v. Litigation*, 1980 J. BUS. L. 164.

87. *See, e.g.*, Carbonneau, *Arbitral Adjudication: A Comparative Assessment of Its Remedial and Substantive Status in Transnational Commerce*, 19 TEX. INT'L L.J. 33, 39-56 (1984).

88. *Id.*

89. United States Arbitration Act, ch. 213, § 2, 43 Stat. 883-86 (codified at 9 U.S.C. § 2 (1982)).

90. *See* Carbonneau, *Rendering Arbitral Awards with Reasons*, 23 COLUM. J. TRANSNAT'L L. 579, 581-86 (1985).

B. The Contrast Between Commercial and Divorce Disputes

In light of arbitration's applicability to commercial disputes, the present inquiry focuses on whether arbitration could be an adjudicatory alternative in divorce matters.[91] Does the viability of arbitration in commercial disputes have any paradigmatic significance? To a considerable degree, one can attribute the success of arbitration in the commercial field to the special setting in which commercial disputes arise, and to the unique character and level of integration of the commercial community. Indeed, the special circumstances and content of commercial disputes are indispensable to the implementation and operation of the process.

Despite some superficial similarities, the context and content of domestic relations disputes stand in stark contrast to their commercial analogues. In the commercial setting, parties engage in transactions for profit; society's interests are served by the pursuit and acquisition of wealth. When a dispute disrupts the commercial venture, the resulting damage can be measured and the object of the dispute defined in terms of money—the initial and principal aim of the transaction. The conflict is predominantly, if not exclusively, pecuniary in character, and the ultimate consideration is financial in nature. The question becomes which party will absorb the cost of the economically ill-fated venture. However aggressively merchants pursue their self-interest, they realize that they must continue to operate in the commercial community and pay allegiance to its pragmatic code of conduct.[92]

In the circumstances of divorce, there is no such code of conduct, and little possibility of continued conjugal association. Moreover, marriage is not usually a venture entered into for profit; the losses that accompany divorce are emotional, not monetary. Marriage and divorce entail significant financial consequences. Society has a legitimate interest in seeking to protect the welfare of a divorcing couple's offspring, to effect an equitable division of the common marital assets and liabilities, and to provide a disadvantaged spouse with the means to attain economic viability or provide maintenance where economic rehabilitation is no longer feasible. Society's treatment of the divorcing couple as a business entity, however, is merely an artificial way of measuring emotional loss in financial terms.[93] Whereas money is the real object of disputes between merchants, it is a mistaken symbol for divorcing spouses, manifesting their pain, humiliation, anger, and latent psychological conflicts.[94]

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91. *See supra* note 2 and accompanying text.

92. *See* Carbonneau, *supra* note 90, at 581-86.

93. *See* Bezou v. Bezou, No. 81-11606 (CDC-Orleans June 3, 1983) (illustrating the type of frustration that can arise in attempts to apply legal rules and concepts to divorce litigation).

94. In personal injury cases, money also stands as a symbol for the victim's loss—corporeal and emotional. In the case of tortious injury, however, there is usually an identifiable aggrieved party and a tortfeasor; damages can also be identified fairly clearly. The law of tort, despite its recognized mission of providing compensation, still hesitates to provide recovery for purely emotional loss. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 436A (1976). In marriage, the loss is

Even in parenting circumstances, divorcing couples are a deteriorating partnership no longer inspired by a consensus view born of mutual self-interest. Finally, commercial arbitrators are usually merchant peers whose expertise comes from experience. In a divorce situation, it would be difficult to find such peers for adjudicatory purposes. One questions, then, whether arbitration can provide a viable adjudicatory alternative in these circumstances.

C. Structuring an Arbitral Mechanism for Divorce

As an alternative mechanism for resolving domestic relations disputes,[95] arbitration would comprise an adjudicatory structure with most of the advantages of court adjudication, while lacking the principal disadvantages. A viable substitute process should, therefore, provide procedures that meet basic standards of fairness, including predictability of result, and promote finality in determinations. By reducing the parties' potential contentiousness, the arbitration alternative may be more economical and expeditious than its judicial counterpart while still allowing for a fair and equitable resolution of differences.

Using the traditional stages of commercial arbitration as a model,[96] a divorcing couple seeking to arbitrate their divorce disputes would, with the assistance of legal counsel, first enter into an arbitration agreement, known as a submission. Given the novelty of arbitration in divorce proceedings and the relative infrequency of marriage contracts, it is unlikely that couples would typically incorporate an arbitral clause (providing for the arbitral adjudication of future disputes) in a pre-nuptial agreement. Presumably, the spouses would either be participating in or have acquiesced to the initiation of an uncontested judicial action for divorce. By invoking arbitration, the spouses evince their intent to resolve expeditiously any practical matters that accompany the formal dissolution of their marriage. The submission should expressly provide that the parties agree to arbitration in order to determine specifically-enumerated non-status differences. This part of the agreement is critical since it both establishes and defines the jurisdictional authority of the arbitrators (usually referred to as their terms of reference).

The submission should also state whether the spouses intend to engage in ad hoc arbitration, in which case they must devise a procedural system for conducting the arbitration, or refer to and be governed by the rules of an arbitral institution. Additionally, the arbitration agreement should provide for the anticipated costs of the proceeding (deposits, fees, and incidental expenses). Moreover, in light of the importance of the

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usually purely one of a personal relationship; money should only factor in the adjustment of the respective economic positions of the parties following dissolution.

95. *See supra* notes 74-75 and accompanying text.

96. For a thorough discussion of the various stages of the commercial arbitration process, see G. WILNER, *supra* note 7.

matter, the parties may wish to provide for the number and selection of the arbitrators: whether a single arbitrator or a panel of three arbitrators should sit on the case; who is to be nominated and in what manner; and what qualifications should be required (mental health, legal training, religious affiliation, and/or community involvement). Finally, the submission may contain stipulations as to the governing law.

Pursuant to the applicable rules, the spouses—with or without the assistance of legal counsel—would appear before the arbitral tribunal, and present their arguments and positions. A time limit (ordinarily modifiable if circumstances dictate) for rendering the award should toll from the date of the arbitrators' investiture—the time at which the arbitrators accepted their terms of reference. Although it is the customary practice, the tribunal does not need to hold hearings. The parties could choose to have a completely written procedure, submit documents in support of their allegations, and respond in writing to requests from the tribunal for further development of the record. After reviewing the pleadings and evidence, the tribunal would convene to deliberate and render an award. If hearings are held, they would be conducted informally, and according to a flexible and liberal procedure. In accordance with the parties' or the tribunal's discretion, witnesses and experts could testify. The principles governing the arbitral procedure should conform to essential fairness (give each party a fair and equal opportunity to present its case), and should promote the objective of reaching an efficient and equitable resolution.

After hearing the parties and examining the evidence, the tribunal would deliberate and render an award. Ordinarily, the award would consist of rulings that resolve the disputes defined in the terms of reference. Although the parties could so provide, it is not standard practice to have reasons for the ruling or dissenting opinions accompany the award. The parties can comply with the terms of the award and introduce it in the divorce action for purposes of judicial approval and integration into the divorce decree. Upon a motion to quash or deny enforcement, a party could also oppose the award before the same court.

Despite its rudimentary character, this outline of a possible divorce arbitration structure, based upon party agreement and cooperation, suggests that the success of an arbitral remedy in divorce is largely, if not entirely, dependent upon the disposition and motivation of the couple. On the one hand, an agreement to arbitrate non-status disputes is not likely to be forthcoming from spouses whose relationship remains emotionally tense and dominated by disagreement. On the other hand, spouses who are capable of collaborating on the selection of such an adjudicatory mechanism probably do not need it; they could probably reach an agreeable out-of-court settlement through pre-trial negotiations. Thus, an initial consideration suggests that arbitration, at least in its consensual form, might be a token remedy, and might not respond to any actual needs of divorcing couples.

Skepticism as to ultimate utility aside, implementing a divorce arbitration process will likely generate a number of problems. The salient difficulties that might arise include determining: (1) whether the arbitral mechanism should be compulsory or consensual; (2) whether domestic relations disputes are arbitrable; (3) whether or to what extent the arbitral tribunal should rule according to substantive legal rules; and (4) what role the courts should play regarding the supervision of the divorce arbitration process and its determinations.

1. Compulsory or Consensual Arbitration

Although conceived primarily as a consensual form of adjudication, arbitration can become mandatory through legislative fiat. In labor law, for example, statutes concerning public employees usually contain compulsory arbitration provisions as to the terms of the contract and sometimes regarding the rights under the contract.[97] Also, the idea of compulsory arbitration is now a popular legislative response to the would-be medical malpractice crisis.[98]

Legislative adoption of compulsory divorce arbitration, presumably for non-status disputes, would necessitate a determination in the enabling statute as to whether resulting awards are binding or non-binding. An award that contains a non-binding determination should not need to undergo rigorous judicial scrutiny for purposes of enforcement; in order to achieve any sort of adjudicatory effect, both parties must concur in the result. As a matter of practicality, this compulsory alternate remedy would act as a disincentive to court litigation—testing the parties' mettle against a first barrier.

Compulsory binding arbitration would constitute a more efficient and effective remedial process for divorce dispute resolution. Under this system, courts would scrutinize awards at the enforcement stage simply because the awards contain a final disposition of the parties' rights and obligations. The critical question centers upon the magnitude of judicial scrutiny courts would exercise. Excessive review would jeopardize the viability and autonomy of the arbitral process, making its determinations completely vulnerable to judicial second-guessing. Laxity of review, however, may well trigger constitutional challenges on due process grounds.[99] In drafting a standard of review, legislatures must accommo-

97. *See, e.g.*, Koretz & Rabin, *Arbitration and Individual Rights*, in THE FUTURE OF LABOR ARBITRATION IN AMERICA 113 (B. Aaron ed. 1976); Aaron, *The Impact of Public Employment Grievance Settlement on the Labor Arbitration Process*, in THE FUTURE OF LABOR ARBITRATION IN AMERICA 1 (B. Aaron ed. 1976).

98. *See generally* Berkman, *Alternatives to Medical Malpractice Litigation*, 12 FORUM 479 (1977).

99. In the area of medical malpractice, for example, an increasing number of state legislatures have imposed alternative dispute resolution mechanisms—largely to avoid huge jury awards for personal injury. For a critical discussion of arbitration in this context, see Terry, *The Technical and Conceptual Flaws of Medical Malpractice Arbitration*, 30 ST. LOUIS U.L.J. 571 (1986). Such legislation has been attacked as unconstitutional, essentially on the ground that it denies a plaintiff the

date these competing considerations. Currently, choices as to the form of judicial scrutiny include de novo review, review limited to manifest errors of law, and a form of review based on technical excesses of arbitral authority and procedural due process violations.[100] The latter standard applies to commercial arbitral awards, and is most commonly espoused in statutes regulating arbitration.[101] This standard would be workable in non-status divorce matters except child custody, where third-party interests may warrant an intermediate (and perhaps higher) level of judicial scrutiny.

Because of the difficulty in determining the proper degree of judicial review, compulsory arbitration may not be functional in the context of domestic relations disputes. Moreover, compulsory arbitration does not adequately respond to the driving force behind the alternative dispute resolution movement in divorce matters: a general humanitarian concern for the plight of divorcing parties. Society, acting through the legislative will, cannot dictate rationality and order through compulsory arbitration where parties are determined and have a right to act irrationally.[102] The experience in other areas of dispute resolution illustrates

right to have judicial recourse for compensation. This denial, it is claimed, abridges the plaintiff's right to enjoy the equal protection of the law, amounts to a deprivation without due process of law, and constitutes an improper delegation of judicial authority. It is also alleged that the denial of the usual judicial remedy violates the individual's right—where conferred by the federal or state constitutions—to have a trial by jury. For the most part, these constitutional attacks have not succeeded. *See* Everett v. Goldman, 359 So. 2d 1256 (La. 1978); State *ex rel.* Strykowski v. Wilkie, 81 Wis. 2d 491, 261 N.W.2d 434 (1978); Eastin v. Broomfield, 116 Ariz. 576, 570 P.2d 744 (1977); Prendergast v. Nelson, 199 Neb. 97, 256 N.W.2d 657 (1977). Some alternate mechanisms, however, have been struck down as unconstitutional. *See* Boucher v. Sayeed, 459 A.2d 87 (R.I. 1983); American Bank & Trust Co. v. Community Hosp. of Los Gatos-Saratoga, 190 Cal. Rptr. 371, 660 P.2d 829 (1983); Graley v. Satayatham, 74 Ohio Op. 2d 316, 343 N.E.2d 832 (1976); Johnson v. St. Vincent Hosp., 404 N.E.2d 585 (Ind. 1980); Arneson v. Olson, 270 N.W.2d 125 (N.D. 1978); Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980).

For discussions of these constitutional issues, see generally Redish, *Legislative Responses to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEX. L. REV. 759 (1975); Saunders, *The Quest for Balance: Public Policy and Due Process in Medical Malpractice Arbitration Agreements*, 23 HARV. J. ON LEGIS. 267 (1986); Sayakan, *Arbitration and Screening Panels: Recent Experience and Trends*, 17 FORUM 682 (1981-82); Comment, *Legislative Response to the Medical Malpractice Crisis*, 39 OHIO ST. L.J. 855 (1978); Comment, *Testing the Constitutionality of Medical Malpractice Legislation: The Wisconsin Medical Malpractice Act of 1975*, 1977 WIS. L. REV. 838; Comment, *Recent Medical Malpractice Legislation—A First Checkup*, 50 TUL. L. REV. 655 (1976); Comment, *An Analysis of State Legislative Responses to the Medical Malpractice Crisis*, 1975 DUKE L.J. 1417; Comment, *The Medical Malpractice Reform Act of 1985: Legislative Surgery Prescribed to Save Illinois Review Panels*, 19 J. MAR. L. REV. 637 (1986); Comment, *The Illinois Medical Malpractice Reform Act of 1985: Illinois Operates Unconstitutionally on Medical Malpractice Victims*, 19 J. MAR. L. REV. 677 (1986); Note, *Constitutional Law—Lousiana Medical Malpractice Review Panel Upheld Under Equal Protection Scrutiny*, 53 TUL. L. REV. 640 (1979); Note, *Comparative Approaches to Liability for Medical Maloccurrences*, 84 YALE L.J. 1141 (1975).

100. For a discussion of the standard of review that usually applies to arbitral awards, see G. WILNER, *supra* note 7, §§ 34:00-:02.

101. *Id.*

102. In contradistinction to medical malpractice where compulsory arbitration does sometimes apply, lobby groups supporting professional interests are absent in domestic relations. In this regard, the American Bar Association reported that the medical community actively lobbied for and was perceived to be the beneficiary of medical malpractice panels. Physicians were also reported to be the one group generally satisfied with the panels. *See* Thomas, *Practicing Before Medical Malprac-*

that the *successful* arbitration of conflicts can be achieved when recourse to the alternate remedial framework is voluntary, agreed-upon, and founded upon a group consensus that supports the process. The traditionally consensual form of arbitration, therefore, is a more appropriate remedial framework for divorce. It at least avoids the complications that may arise from public policy considerations and references to constitutional due process rights.

2. *Arbitrability*

According to the classical concept of arbitration, an arbitrator receives adjudicatory authority from the parties' voluntary agreement to engage in arbitration. These circumstances give both the dispute and the process a truly ad hoc character, and may place arbitral determinations outside the reach of otherwise applicable non-public policy provisions.[103] The parties' contractual prerogatives and the arbitrator's jurisdictional authority are circumscribed, in part, by the doctrine of arbitrability:[104] if the subject matter of the dispute implicates matters of public policy, it is not pliant to the contractual will of the parties and, therefore, cannot be submitted to arbitration. Consequently, a couple seeking a divorce could not empower an arbitrator to render an award declaring that they are divorced; matters of status and capacity have always been deemed to be within the ambit of public policy.[105] Arbitration, however, could resolve the incidental disputes that arise and over which the parties retain contractual control[106]—namely, financial claims relating to alimony, and the division of the spouses' common assets and liabilities.

Delimiting the impact of arbitrability even as to these so-called incidental disputes is not entirely unambiguous. To illustrate this point, the majority view among courts is that parties may waive by contract any entitlement to post-divorce alimony.[107] Accordingly, claims pertaining

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tice Panels, 66 A.B.A. J. 980, 983 (1980). There is lively debate as to whether a medical malpractice "crisis" exists. *See, e.g.*, W. PABST, AN AMERICAN HOSPITAL ASSOCIATION PROFESSIONAL LIABILITY INSURANCE SURVEY (1981); ASS'N TRIAL LAW. AM., THE AMERICAN MEDICAL ASSOCIATION IS WRONG—THERE IS NO MEDICAL MALPRACTICE INSURANCE CRISIS (Pub. Aff. Dep't) (1982). *See also supra* note 99 and accompanying text.

103. *See* G. WILNER, *supra* note 7, §§ 12:00-:02. For example, matters of status and capacity are deemed to be "non-arbitrable" because they involve the state's public policy, and are within the exclusive jurisdiction of the courts of law. For an extensive discussion of the term, see G. WILNER, *supra* note 7, ch. 12, at 151-59; J. ROBERT & T. CARBONNEAU, THE FRENCH LAW OF ARBITRATION Pt. I, § 1:03, at 1-13 to -22.

104. *See supra* notes 78-86 and accompanying text.

105. *See* G. WILNER, *supra* note 7, § 12:02. *See also* LA. CIV. CODE art. 140 (1987); J. ROBERT & T. CARBONNEAU, *supra* note 103, § 1:03.

106. The *Tardits* case, Feb. 15, 1966, Cour d'appel, Orleans, 1966 Dalloz-Sirey, *Jurisprudence* [D.S. Jur.] 340, is an illustration of this distinction between non-arbitrable public policy disputes and arbitrable incidental disputes attaching to a larger controversy implicating public policy. *See* Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study in Liberal Civilian Judicial Creativity*, 55 TUL. L. REV. 1, 36-38 (1980).

107. *See, e.g.*, Monk v. Monk, 376 So. 2d 552 (La. App. 3d Cir. 1979). *Accord* Holiday v. Holiday, 358 So. 2d 618 (La. 1978); H. CLARK, *supra* note 9, at 28-30.

to this right fall within the purview of contractual privilege and, therefore, can be the proper subject of arbitration.[108] As noted in the foregoing section, the legal system likely will limit considerably the authority of arbitral tribunals in regard to child custody matters[109] because the welfare of a minor third party is directly at issue. Assuming parental cooperation and rationality are preferable and more supportive of social policy than the state's exercise of parens patriae authority through the courts, mediation or conciliation would be a wise alternative. Nonadjudicatory in character, these processes enable the divorcing couple to discuss and agree on sensitive issues with only the assistance of a third party.[110] In effect, then, the scope of a divorce arbitration process—in terms of arbitrability—may be quite restricted, making it a remedy with limited utility.

3. *A Ruling in Accordance with Law?*

The contractual character of the arbitral tribunal's jurisdictional mandate and the scope of its authority leave unresolved the essential question of whether divorce arbitration can or should achieve substantive predictability as to results.[111] The predictability associated with the stare decisis rule of decisional law complicates the comparison of court proceedings with the arbitral alternative. Courts ruling on divorce matters are required to apply applicable statutory and decisional law, covering both status and non-status matters. Although bound by the same controlling rules, judges sometimes arrive at results inconsistent with, if not contradictory to, prior determinations.[112] Given the relaxed form of scrutiny that usually applies to domestic relations cases[113] at the appellate level, substantive predictability may be an illusory attribute of decisional law. Principled and cohesive adjudication may well be the exception, with subjective and ad hoc determinations more clearly reflecting the governing rule of law.

In fact, the predictability of results on the basis of law may not be

108. The settlement of community property matters may or may not be arbitrable when it involves the inheritance rights of offspring and the rights of creditors. *See* W. REPPY, JR. & C. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES (2d ed. 1982).

109. *See, e.g.*, Rigby, *supra* note 2, at 1751. *Contra* Winks, *supra* note 44, at 631 n.76.

110. *See supra* note 8 and accompanying text.

111. For an extensive discussion of this point, see Carbonneau, *supra* note 90, at 603-10.

112. The decisional law regarding whether common law marriages exist in Louisiana illustrates this inconsistency in judicial adjudication. *See* Liberty Mut. Ins. Co. v. Caesar, 345 So. 2d 64 (La. App. 3d Cir.), *cert. denied*, 347 So. 2d 1118 (La. 1977); Henderson v. Travelers Ins. Co., 354 So. 2d 1031 (La. 1978). *See also* the provision for "open concubinage" in article 160 of the Louisiana Civil Code (recognizing statutorily, as it were, the concept of common law marriage only for purposes of terminating post-divorce alimony). LA. CIV. CODE art. 160 (West 1985). For a discussion of common law marriage in other state jurisdictions, see H. CLARK, *supra* note 9, at 45-58.

113. In Louisiana, the no-review-without-manifest-error standard does apply in domestic relations and other cases. *See, e.g.*, Hardy, *Forum Juridicum: The Manifest Error Rule*, 21 LA. L. REV. 749 (1962); Tate, *Forum Judicum "Manifest Error": Further Observations on Appellate Review of Facts in Louisiana Civil Cases*, 22 LA L. REV. 605 (1962). For a discussion of this topic in other state jurisdictions, see H. CLARK, *supra* note 9, at 379-419.

possible or even desirable in the context of divorce arbitration. Under one possible variant, the divorcing couple could always require the arbitrator to reach a determination according to the usually applicable rules of law. The couple would, in effect, place some restriction on the arbitrator, guaranteeing to some extent that the resulting award would not be completely whimsical. Such an approach, however, presents a number of evident problems. First, it reduces the incentive to pursue arbitration; a couple is unlikely to invoke arbitration instead of filing a court action if the only advantage is procedural flexibility. If the couple seeks only this advantage or wishes simply to have a traditional court proceeding in all but name, then their motivation for engaging in arbitration is ill-conceived. Second, divorce arbitrators may not be trained jurists. An effective arbitral process, for instance, would have mental health professionals, as well as attorneys, serve as arbitrators. Obliging psychologists or family therapists to render an award according to law may riddle the process with problems and eventually reveal itself to be unrealistic and unsatisfactory. Third, a ruling on the basis of law would compel the issuance of a written legal opinion to accompany the award. Otherwise, no ascertainable basis would exist for the ruling; the attempt to create a standard of accountability and substantive objectivity would fail.

In all likelihood, such a variation in the arbitral approach would invite court supervision of the merits. If arbitral tribunals ostensibly were to apply the relevant state law in conformity with judicial standards, the courts of that jurisdiction might feel obligated, for reasons of public policy, to supervise the arbitral determination. Judicially confirming reasoned awards might lead to a system of persuasive or binding precedents for subsequent divorce arbitrations. In effect, divorce arbitration could become nearly equivalent to judicial adjudication—robbing the arbitration alternative of its *raison d'être*. Parties, then, still would face the possibility that the law might command a result that conflicts with an equitable appraisement of their circumstances.

Since arbitral tribunals receive their authority from private and not public sources, they are not bound to apply the governing law unless the parties so provide. In commercial arbitration, for example, arbitral tribunals usually rule on the basis of a flexible substantive predicate—taking commercial usage and trade practices into account. Rarely, if ever, do the tribunals render legally reasoned opinions to support their award.[114] In the context of domestic relations disputes, a more appropriate substantive predicate for arbitral adjudication may be a basic respect

114. Ordinarily, in commercial and other forms of arbitration, arbitral awards are subject to appeal on limited grounds for essentially procedural violations. *See* G. WILNER, *supra* note 7, at pt. XI, §§ 32:00-35:03. Historically, judicial review of the merits of arbitral awards was allowed and even required. This was especially true in England. *See* Carbonneau, *supra* note 87, at 39-61. Eventually, a review of the merits was precluded, attesting to the adjudicatory autonomy of arbitration. *See* Carbonneau, *supra* note 90, at 581-86.

for law.[115] Under this general standard, arbitrators would seek basic guidance from the law. In cases in which a conflict arises between the law and basic interests of justice, arbitrators could, as appropriate, modify or disregard the law.[116]

Undoubtedly, arbitrators would have a significant amount of authority to decide disputes for divorcing parties seeking a malleable substantive adjudicatory predicate. Paradoxically, arbitrators ruling according to a general substantive standard that merges legal and equitable considerations might increase the necessity for rendering awards with written reasons and for judicial supervision. Potential abuse, however, could be avoided through the careful selection of the arbitrators. This choice may be left to the parties or to the arbitral institution under which the proceeding is organized.[117] If the parties choose the arbitrators, some form of legislative regulation of the institution or certification of arbitrators might be necessary. The need for court supervision, therefore, could be eliminated or restricted to basic procedural concerns.

4. Other Problems

In the interest of efficient adjudication, the rules of traditional arbitral institutions ordinarily give arbitral tribunals fairly wide discretion to make procedural and substantive decisions during hearings.[118] American Arbitration Association (AAA) arbitrators, for example, have the authority to select the time, date, and place of the hearing. The arbitrators also determine which evidentiary or substantive standards apply, and have subpoena powers over third parties possessing necessary evidence.[119] The strong institutional rules that apply to these proceedings represent a trade-off between equally important, albeit competing, views: the general view that the parties' contractual discretion must be preserved, and the pragmatic view that unfettered party autonomy in the midst of a dispute results in chaotic and protracted proceedings.[120] An efficient and effective alternative adjudicatory process must limit opportunities for the exercise of dilatory tactics.

In keeping with the experience of commercial arbitration, rules relating to divorce arbitration should allow divorcing couples to benefit

115. *See* Carbonneau, *supra* note 90, at 608-10.

116. This equitable adjudicatory authority is expressed by the concept of *amiable composition*, defined as allowing arbitrators to rule according to their basic sense of fairness and justice; and to disregard, where they think appropriate, the rules of law. *See* Carbonneau, *supra* note 106, at 2 n.2.

117. For a detailed discussion of institutional arbitration, court supervision, and arbitral adjudicatory standards, see G. WILNER, *supra* note 7, § 5:03. As noted earlier, if arbitrators are allowed to rule on child custody questions, the usually flexible standard of review may have to yield to a more stringent form of judicial scrutiny—possibly in the form of de novo review. Arbitrators would also be obliged to apply governing legal rules. *See supra* notes 101-02 and accompanying text.

118. *See* G. WILNER, *supra* note 7, §§ 24:00-25:06.

119. *See* AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES (as amended and in effect Feb. 1, 1984).

120. *See* W. CRAIG, W. PARK & J. PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION (1984).

from arbitrator guidance on procedural matters. The rules should also place some restraints on parties' ability to undermine the proceeding, such as limiting exceptions to such incidental issues as the time and place of hearings. Otherwise, the benefits derived from the distinguishing features of arbitral adjudication could be further reduced. To comply with fairness requirements, parties should be allowed an initial opportunity to decide these matters. If the parties are unable or unwilling to do so, the arbitrator could then decide on their behalf. Actions for immediate injunctive relief or later judicial sanctions at the enforcement stage could effectively thwart possible abuses of the process by arbitrators.[121]

Integrating lawyers into the divorce arbitration process also could present difficulties. An adjudicatory mechanism which excludes the right to legal representation, however, may be inadequate to dispense even a private form of justice, and could well be constitutionally suspect. The participation of attorneys might increase the quality of the adjudication and better protect parties' rights. At the same time, attorneys might resort to the customary tactics of adversarial litigation, transforming divorce arbitration into a privately-instituted court proceeding. Lawyers would need to modify their adversarial dispositions and pursue the issues of divorce through equitable accommodation in order to facilitate arbitral dispositions. In time, lawyers' inherent litigiousness might be tempered by such an alternative mechanism. Eventually, a divorce arbitration bar might emerge, lessening the tension between adversarial doggedness and arbitral flexibility.

More pragmatic issues pertaining to the arbitrators, such as their number, fees, qualifications, and immunity, must also be addressed. Employing the services of a sole arbitrator would be a particularly efficient and inexpensive alternative in domestic relations disputes. The proposal, however, would leave unlimited discretion in the hands of a single adjudicator. A two-member arbitration panel raises the possibility of deadlock. In such a case, the parties would then have to seek a judicial resolution, institute a new arbitral proceeding, or appoint a tie-breaking arbitrator. The three-member arbitral panel model avoids these difficulties. Although less streamlined and more costly, the three-member panel increases the quality of adjudication, and provides significant procedural and substantive safeguards.

The quality of the designated arbitrators is critical to the viability of the process. In cases in which the parties forego institutional arbitration, agree to an ad hoc proceeding,[122] and decide upon a three-member panel, each party might name one arbitrator; the two designated arbitrators would agree upon a third. The arbitrators could be selected from different, but related, areas of professional expertise. A three-member arbitral tribunal, for instance, might consist of a family law lawyer or judge, a

121. *See* G. WILNER, *supra* note 7, §§ 33:00-34:02.
122. For a discussion of ad hoc arbitration, see *id.* § 5:02.

child psychiatrist or mental health professional specializing in family therapy, and a lay third party who has the respect of the couple. In an atmosphere of collegiality, the lawyer can structure the content of the award, the family specialist can guide discussions on family issues, and the non-specialist can maintain a general sense of fairness and, if necessary, cast the tie-breaking vote. Because selecting qualified arbitrators and devising appropriate rules of procedure requires time and information, parties should agree to arbitrate under the rules of a well-recognized and established arbitral institution such as the American Arbitration Association. Subject to party approval or modification, the institution could nominate arbitrators from a list of experts and provide rules that create an appropriate procedural format for the proceeding. Whichever form of arbitration is adopted, steps should be taken to guarantee the impartiality of the arbitrators. The rules, for example, might impose a duty of full disclosure on each arbitrator prior to the commencement of the proceeding.

Arbitrator fees and associated costs loom as significant disincentives to divorce arbitration in its ad hoc or institutional form. In a court proceeding, parties are responsible only for the fees and expenses of their attorneys, expert witnesses, and stenographer. Except for modest filing fees, the state absorbs such basic expenses as the salaries of judicial personnel and courtroom maintenance. In arbitration, the parties are responsible for paying the fees of the arbitrators, building rental fees, administrative costs, and an institutional fee. Although parties must bear the costs of arbitration, these costs may, in fact, be less than a publicly-funded court proceeding in circumstances in which the parties can not only avoid a lengthy trial, but also resolve their disputes in a single private proceeding with expert adjudicators.

Another practical concern surrounding arbitration involves whether divorce arbitrators merit immunity from suit regarding their adjudicatory functions. In cases in which parties retain an arbitrator for a fee or an arbitral institution appoints an arbitrator to a case as part of its administration function, a contractual situation arises involving duties—and possible breaches. As in any profession, the arbitrator's services must conform to an acknowledged general standard. A divorcing party who sues an arbitrator or arbitral institution for malpractice is merely exercising a contractual right. However, unlike a lawyer or doctor, the arbitrator renders adjudicatory services. As a matter of private employment, the arbitrator performs the task of a judge who is traditionally immune from suit in the performance of adjudicatory duties.[123] The usual practice in commercial arbitration affords arbitrators the same jurisdictional immunity that applies to judges.[124] Given the strength of emotion that underlies domestic relations disputes, failing to confer im-

123. *See id.* § 23:01.
124. *Id.*

munity on divorce arbitrators would make the arbitrators the ultimate target of a losing party's dissatisfaction.

Attributing adjudicatory immunity to arbitrators would leave the parties without a remedy in the event that a court deems an award unenforceable due to arbitrator abuse of authority, procedural unfairness in the conduct of the proceeding, or violation of public policy. Especially in circumstances in which a court invalidates a nonseverable award, arbitrator incompetence can result in a substantial loss of time and money for the parties, requiring the parties to reinstitute a new proceeding or engage in a court action. Such a result, of course, is not what the parties sought at the outset. Each party, however, accepted the risk of an unfavorable outcome in the divorce arbitration. Although the absence of immunity would pose too great a threat to the adjudicatory autonomy of the divorce arbitration process, the possibility of fundamental arbitrator error or incompetence underscores the vital importance of the selection of arbitrators.

D. Assessing Potential in Light of Problems

One primary misgiving about an alternate dispute mechanism in the domestic relations area is that implementation requires, at threshold, a minimum level of agreement between the divorcing couple.[125] The question remains whether spouses experiencing a matrimonial breakdown can cooperate sufficiently to agree upon an alternate adjudicatory process. The temptation to act on emotions and simply to resort to what is known and accepted, to trust the courts, may well be irresistible. Compulsory divorce arbitration would not resolve the problem. Such a scheme would be susceptible to substantial constitutional objections. Additionally, spouses coerced to arbitrate could undermine the process through dilatory tactics and other disruptive maneuvers. Thus, despite its inherent fragility, consensual arbitration may be the only legitimate arbitral alternative to traditional divorce litigation.[126]

One must balance the strengths and weaknesses of divorce arbitration in order to gauge the suitability of the process as an alternative mechanism. Divorcing couples might be attracted to arbitration for a number of reasons. Procedural and substantive flexibility and privacy should lessen overt animosity, allowing for a quicker and less costly reso-

125. *See, e.g., supra* notes 95-97 and accompanying text.

126. In order to implement a consensual arbitral process in divorce, domestic relations attorneys could perhaps be required to make their clients aware of the possibility that some of their matrimonial disputes could be submitted to arbitration. Such information could be offered during the initial interview as part of the usual description of what is available, or could be communicated at the discretion of the attorney if he or she deems that the client's circumstances are appropriate. The problems with such a suggestion, however, are clear and numerous. In order to be effective, this procedure would mandate agreement and consensus not only between parties who have chosen to see separate lawyers, but also among lawyers. Given their adversarial roles and ethical responsibilities, attorneys are not disposed to the simultaneous representation of two distinct interests, or to suggesting remedies in which they may not play a key role.

lution of the disputes. Parties could also benefit from the psychological training of certain arbitrators whose determinations would reflect substantial professional expertise.[127] Nor would administrative imperatives press the arbitral tribunal to hear other cases or haphazardly dispose of a crowded docket.

The arbitral alternative does have real drawbacks. Depending on the legislative definition of divorce, the doctrine of arbitrability may substantially restrict the scope of arbitral jurisdiction. The limited arbitrability of divorce disputes could then result in an inelaborate and economical framework just to maintain the attractiveness of the alternative mechanism. These circumstances would increase the likelihood that rights might be compromised, making the mechanism further suspect. The modest utility of the mechanism would increase the pressure on arbitrators to simply accommodate both parties, rather than adjudicate the dispute.[128] In this scenario, arbitral adjudication of a divorce dispute offers little more than the prospect of achieving an out-of-court settlement. If such a settlement is the initial objective, divorcing couples would be ill-advised to agree to arbitration and subject themselves to the systemic and procedural complications of a novel process.[129]

In the final analysis, the chief attribute of divorce arbitration would be the flexible, private, non-adversarial setting for dispute resolution. The complexity and difficulties inherent in such a remedial framework, together with the problem of establishing a coordinate relationship with the court system, may outweigh the principal advantages of divorce arbitration. If the objectives are to promote rationality among divorcing couples, avoid public proceedings, and limit the formalities of law, it would be preferable to eliminate all adjudicatory characteristics from the alternative process. Arguably, divorce arbitration should remain available as an option for couples who want to dispense with adversarial histrionics, but are unable or unwilling to communicate effectively enough to reach a settlement. However, to engage in an all-or-nothing evaluation of judicial and arbitral adjudication without giving some consideration to merging the two remedies would be unwise. Transforming

127. Although domestic relations judges usually develop a substantial expertise in the legal process of divorce, they presumably do not have a professional grounding in its emotional implications. Moreover, dockets that include as many as 25 to 30 cases daily simply do not allow judges time for considered comprehensive determinations.

128. This is a common criticism of arbitration by practicing attorneys.

129. Parties would need to introduce awards pertaining to arbitrable financial matters into the judicial proceeding in order to achieve a uniform result and enforce the award. Presumably, parties who agree to arbitrate part of their divorce controversies will seek to obtain a divorce on the basis of uncontentious non-fault grounds. This might avoid possible conflicts, for example, between a finding of fault for status matters and an award of alimony by an arbitral tribunal. A challenge to the enforceability of the award would require the court to supervise the award either on the basis of the limited traditional grounds, or grounds which are specially created to deal with arbitral awards pertaining to divorce. The availability of divorce arbitration, therefore, would add some complexity to the existing court procedures.

existing divorce court procedures into a hybrid arbitral mechanism may, in fact, achieve humanistic dispute resolution ends.

V. MEDIATION: A NON-ADJUDICATORY ALTERNATIVE MECHANISM

A. Its Potential and Basic Character

When the breakdown of a marriage is at issue, traditional adjudicatory processes, whether judicial or arbitral in character, generally fail to address fully the emotional dimension of matrimonial dissolution. A more appropriate remedial mechanism would be a non-adjudicatory process that redistributes decision-making authority in divorce—emphasizing individual rationality and responsibility and reducing state regulation.

Divorce mediation can function as an appendage to the legal system, providing divorcing couples with a structured opportunity to reach a consensual agreement on the financial and parenting consequences of their divorce.[130] Since matters of status and capacity fall in the domain of public policy,[131] the formal pronouncement of divorce remains in the jurisdictional province of the courts. Mediation, however, provides a humane framework for resolving difficulties that attend the formal dissolution of marriage.

Mediation bears some resemblance to arbitration.[132] For example, sessions are conducted by a neutral third party in a private, non-adversarial setting. Mediation, however, has a number of characteristics that clearly distinguish it from arbitration and other forms of matrimonial dispute resolution.

Mediation is neither an adjudicatory nor a therapeutic process.[133] Evolving from an extensive, cross-cultural history as a dispute resolution mechanism,[134] mediation endeavors to achieve the pragmatic end of adjudication—the finality of determinations—by simultaneously addressing the practical and emotional dimensions of marital conflict. Whereas arbitrators reach a binding disposition of disputes, and possess the authority to do so from the inception of the proceeding,[135] mediation produces

130. For an extensive listing of the literature on divorce mediation, see *supra* note 2. *See generally* O. COOGLER, STRUCTURED MEDIATION IN DIVORCE SETTLEMENT (1978); J. FOLBERG & A. TAYLOR, MEDIATION: A COMPREHENSIVE GUIDE TO RESOLVING CONFLICTS WITHOUT LITIGATION (1984); N. PEARSON & R. THOENNES, DIVORCE MEDIATION: STRENGTHS AND WEAKNESSES OF ALTERNATIVE MEANS OF FAMILY DISPUTES RESOLUTION (1982).

131. *See supra* notes 10-13 and accompanying text.

132. *See, e.g.*, Herrman, McKenry & Weber, *Mediation and Arbitration Applied to Family Conflict Resolution: The Divorce Settlement*, 34 ARB. J. 17 (1979); Spencer & Zammit, *Mediation-Arbitration: A Proposal for Private Resolution of Disputes Between Divorced or Separated Parents*, 1976 DUKE L.J. 911.

133. *See* Kelley, *Mediation and Psychotherapy: Distinguishing the Differences*, 1 MEDIATION Q. 33 (1983). *See also* Yahm, *Divorce Mediation: A Psychoanalytic Perspective*, 6 MEDIATION Q. 59 (1984).

134. *See, e.g.*, J. FOLBERG & A. TAYLOR, *supra* note 130, at 1-7; Rigby, *supra* note 2, at 1729-33, 1740-43.

135. G. WILNER, *supra* note 7, §§ 24:00-:07.

a binding result only when the spouses themselves have arrived at a written agreement.

The various divorce mediation models[136] have a number of advantages over judicial (or even arbitral) divorce proceedings. The time and cost of the mediation process is reasonably predictable and quantifiable. Mediators charge fees based on a fixed hourly rate, and the participants usually can reach an agreement within seven to ten one-hour sessions that take place over the course of two to three months.[137] Since the pro-

136. Although there are many mediation styles, the literature suggests two fundamental models of which the diverse styles are variations. Coogler's structured mediation model is formal and, true to its name, highly structured. It requires the participants to sign agreements stipulating interim settlements, and a commitment to mediation. All mediation sessions must be joint, and an advisory attorney appointed as consultant. *See* O. COOGLER, *supra* note 130. *See also* Coombs, *Mediation and Counselling In Child Disputes*, 17 FAM. L.Q. 469, 471 (1984). Advocates of this approach maintain that the formalities lend a sense of predictability to the procedure, and help ensure that the parties will cooperate. Disadvantages include a lack of flexibility, and the possibility of preventing participants from consulting with private attorneys. *See* J. FOLBERG & A. TAYLOR, *supra* note 130, at 137. There is also the possibility that participants may not understand the full implications of the agreements they sign at the outset of the process.

"Comprehensive mediation" contrasts with "structured mediation" in that it does not involve a consulting attorney nor require the participants to sign agreements to participate, and permits individual sessions. Each party may have private counsel. *See* Coombs, *supra*, at 472. Although more flexible, comprehensive mediation can resemble the traditional adversarial system by permitting each party to have legal counsel, and allowing individual mediation sessions.

Structured mediation has been criticized as potentially unfair to a weaker party in a relationship who might feel pressured to agree in a joint session. *See* Rifkin, *Mediation From a Feminist Perspective: Promises and Problems*, 2 LAW & INEQUALITY 21 (1984). *See also* Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute*, 7 HARV. WOMEN'S L.J. 57 (1984). For such situations, comprehensive mediation might be the more appropriate approach.

Many mediation programs combine features of both structured and comprehensive mediation. For example, one mediation program in New York provides advisory counsel at an intake session, but permits each party to have private counsel who may attend mediation sessions. Moreover, although both parties are invited to attend all sessions, joint attendance is not required, nor is an interim agreement necessary. CENTER FOR DISPUTE SETTLEMENTS (Rochester, N.Y.), FAMILY AND DIVORCE MEDIATION PROGRAM (n.d. brochure). This is only one of many varieties of mediation currently in effect. Ultimately, the ideal types of structured and comprehensive mediation may be of greater interest to writers and advocates than to practitioners. *See generally* Blades, *Mediation: An Old Art Revitalized*, 3 MEDIATION Q. 59 (1984). For a critical appraisal of mediation's potential, see *infra* notes 180 & 194 and accompanying text.

137. Though proposed as a cost-efficient alternative to lengthy litigation, mediation may not always be more economical. If each party must attend four to six mediation sessions that cost $100 per hour, and have private counsel to approve the mediated agreement, there may be little monetary savings. If structured mediation is used (requiring only a single attorney as consultant to both parties), the cost may be lower but the parties may not be adequately represented. *See* Crouch, *The Dark Side of Mediation*, in ALTERNATIVE MEANS OF FAMILY DISPUTE RESOLUTION 339 (Am. Bar Ass'n 1982). Although a complete response to the statement of these potential deficiencies can only be gained from actual experience, conjectural reflection suggests that either these deficiencies can be remedied or their impact minimized. For instance, when compared to adversarial litigation, team mediation is unlikely to result in a greater expenditure of time and money. A single mediator advised by a consulting attorney may constitute the most economical format, but it has the possible negative consequence of placing the participating couple at a real or perceived disadvantage in relation to the mediator who is advised. This contributes to feelings of helplessness and distrust that might impinge strongly upon the viability of the process. While single, psychologically-oriented mediation with ancillary legal services for the couple may, in theory, present the possibility of less expense and fewer sessions, outside attorneys' disagreement with the procedure or outcome could generate substantial additional costs, and might undermine the entire mediation. The latter prospect clearly would be wasteful of resources culminating perhaps in a contested divorce action, and a

cedure is non-adversarial, it eliminates such obtrusive legalistic considerations as procedure, precedent, and choice of law. While limited, court supervision of the mediated agreement requires the document to identify relevant issues, track the basic contours of the forum's domestic relations law, and conform with public policy imperatives;[138] the spouses' final agreement as to what is fair and just in their particular situation is the controlling standard.

Divorcing couples with minor children should be especially attracted to mediation since it shields their offspring from the trauma of litigation, and allows the parents—not the court—to determine what is in the best interests of their children.[139] Mediation can teach parents to communicate on more business-like terms, and to compromise. Mediation also accommodates well the regime for joint custody of children—the substantive standard that applies in an increasing number of jurisdictions.[140] Mediation also complements statutory provisions for no-fault divorce that exist in a majority of states.[141] Divorce mediation has the considerable advantage of addressing each case on an ad hoc basis according to a private and structured format. In every case, the general form and structure of the process are molded to the specificity of the individual situation. Although the mediator provides pace and guidance, the spouses retain ultimate control over the process. The fact that the final result is the product of personal involvement, and largely self-determined, facilitates initial and continuing compliance with the mediated agreement. These circumstances, in turn, lessen the possibility of reconsideration or litigation.[142]

This humanistic design explains mediation's appeal, and its potential

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breach of contract or malpractice suit between the couple and the mediator. In the interest of procedural integrity, even the dual-mediator model should require the spouses to retain separate counsel to review the mediated agreement prior to signature. However, the presence of an attorney on the mediation team, together with the spouses' participation in the agreement process should minimize the potentially disruptive effect of outside legal advice.

In Denver, the difference in average legal fees between those who successfully mediated and those who chose not to mediate was minimal: $1630 for those who successfully mediated, $1800 for those who refused mediation, and $2360 for a control group. *See infra* note 181 and accompanying text. With a maximum saving of $730, and an estimated average saving of under $200, mediation does not appear to represent a major cost advantage. Again reflecting mediation's upper and middle class focus, it works best for people with significant amounts of property at stake for whom litigation might be more costly. *See* Winks, *supra* note 44.

138. For an example of a mediated agreement, see Roskind, *Divorce Mediation*, in T. CARBONNEAU, *supra* note 56, at 805-11.

139. *See, e.g.*, Rosanova, *Mediation: Professional Dynamics*, 1 MEDIATION Q. 63 (1983). *See, e.g.*, R. GARDNER, FAMILY EVALUATION IN CHILD CUSTODY LITIGATION (1982); D. SAPOSNEK, MEDIATING CHILD CUSTODY DISPUTES (1983); Waldron, Roth, Fair, Mann & McDermott, *A Therapeutic Mediation Model for Child Custody Dispute Resolution*, 3 MEDIATION Q. 5 (1984); Patrician, *Child Custody Terms: Potential Contributors to Custody Dissatisfaction and Conflict*, 3 MEDIATION Q. 41 (1984).

140. *See, e.g.*, Milne, *Divorce Mediation: The State of the Art*, 1 MEDIATION Q. 15 (1983). For a discussion of joint custody, see Cox & Cease, *Joint Custody*, 1 FAM. ADVOCATE 10 (1978); Schulman, *Who's Looking After the Children?*, 5 FAM. ADVOCATE 31 (1982).

141. *See* Milne, *supra* note 140; *supra* note 47 and accompanying text.

142. *See generally* J. FOLBERG & A. TAYLOR, *supra* note 130, at 1-15.

for achieving justice in divorce matters. Mediation's central attribute is its comprehensive response to the dispute resolution needs of divorcing couples. Rather than ignoring the emotional element in a marriage breakdown, the mediation process addresses it head-on. In mediation, the spouses have an opportunity to lessen their feelings of unbounded emotional upheaval, and avoid a warring solution. Through mediation, divorcing couples can gain control over the termination of their relationships and become the architects of their own destiny.

B. Notes of Dissonance

1. Forsaking the Old Creed

The significant advantages of divorce mediation also represent its principal frailties. The implementation of a non-judicial, non-adjudicatory mechanism for dealing with matrimonial breakdown would compel a basic reassessment of society's conception of divorce.[143] A dispute resolution process that operates almost exclusively on an ad hoc, personal standard of justice and promotes the right of self-determination in family matters significantly reduces the state's regulatory interest.[144] The divorce mediation process would require legislative approbation—in all likelihood, conferred with some initial reluctance.[145] Mediation would also demand that potential participants demystify their thinking about the meaning of the family, the function of the legal system, and the personal implications of marital disharmony.[146]

Divorce mediation requires that society at large share a willingness to learn, accept, and experience therapeutic methods. In the process of mediation, the quest to express feelings of rage and vengeance would succumb to a more poised perception of personal loss. Mediation helps couples through the harsh reality of marital breakup and enables them to address rationally the necessary practical concerns that follow. Under the mediation alternative, divorce need not become a dismantling of the family under the aegis of legal principles and procedures. Rather, divorce could lead to an effective restructuring of the family unit in light of the new personal reality between the spouses.

2. Legislative Compulsion or Personal Volition

In theory, the social benefits of divorce mediation could be so con-

143. *See generally* Milne, *supra* note 140, at 28-31.

144. *See, e.g.*, Lemmon, *Divorce Mediation: Optimal Scope and Practice Issues*, 1 MEDIATION Q. 45, 52 (1983).

145. As noted earlier, some legislatures have already initiated such a process.

146. In other words, divorcing couples would need to defuse their irrational thinking about marriage breakdown. The estranged spouse would not be viewed as a culprit for past emotional wrongs. Nor would the legal system be viewed as a means of redressing parental shortcomings during childhood. Termination should be perceived as a necessary reality in appropriate circumstances. The all-or-nothing, life-or-death interpretation of divorce can only add anxiety and difficulty to an already perplexing and hurtful situation.

siderable that mandatory recourse to it would be warranted in all cases, at least at the outset of each case. In the interests of fairness, and to avoid constitutional challenges, mandatory mediation should not be binding, nor should it require the spouses to reach a mediated agreement.[147] The provision for mandatory mediation would simply oblige the couple to engage in a minimum number of mediation sessions, allowing them to evaluate for themselves the viability of the remedy in their circumstances.

Even with legislative approval, divorce mediation is nonetheless inextricably tied to the willingness of divorcing couples to forego the traditional pattern of litigation. No matter how skillful or resourceful, mediators cannot supply spouses with the necessary motivation. A divorcing spouse unwilling to accept the finality of divorce, who harbors feelings of rage and bitterness, may need an external coercive process to reach a disposition of practical issues. In these circumstances, compelling participation in divorce mediation may well end in failure.[148] Couples may view mandatory divorce mediation as a perfunctory and irksome delay to having their day in court. They may also misperceive the mediator's role as an adjudicatory one and doubt the mediator's ability to deal with concrete legal and financial issues. Finally, regardless of whether the mediation process is mandatory or voluntary, spouses may still desire to have the procedural and substantive guarantees, as well as the eventual finality, of judicial adjudication.

3. Choosing Mediators

Assuming that a social and individual re-evaluation of divorce could be undertaken, and that divorcing couples would choose to become personally accountable for their lives, practical problems with mediation still exist. The selection and certification of mediators, for instance, becomes a critical concern. Like the process they serve, divorce mediators are still in the making. Ideally, their training should mirror the sui generis approach and comprehensive objectives of divorce mediation. Mediators must possess and combine a variety of skills: a thorough awareness of the statutory and judicial disposition of substantive issues, familiarity with brokering practical disputes, and a solid grounding in the therapeutic techniques of communication.[149]

Persons possessing the requisite skills are a rarity in contemporary professional society.[150] Relatively few university students, for example, take the opportunity to pursue interdisciplinary studies. Even fewer stu-

147. In those few states that have adopted a mandatory mediation scheme, constitutional challenges have not yet materialized. *See infra* note 176 and accompanying text. Presumably, such challenges would be similar to the constitutional attacks levied against medical malpractice legislation involving arbitration. *See supra* note 99 and accompanying text.

148. *See infra* notes 179-80 and accompanying text.

149. *See, e.g.*, J. FOLBERG & A. TAYLOR, *supra* note 130, at 73-99, 233-43.

150. *See generally* Milne, *supra* note 140.

dents undertake programs that combine areas with contrastive humanistic orientations. Pending the creation of formal training programs,[151] the divorce mediation process would initially depend on makeshift accommodations and the initiative of interested groups and individuals.[152] Existing means for mediator training are largely experimental and merely a function of an individual's professional interest and experience. Efforts to establish a professional code of ethics for mediators remain fledgling.[153] Society must define a substantive and curricular standard of wide application in order to ensure uniformity in quality and approach.

Currently, the corps of mediators[154] is comprised principally of psychiatric social workers, family therapists, psychologists, psychiatrists, and a few attorneys who presumably specialize in domestic relations law.[155] Techniques of therapy that facilitate communication are central to the divorce mediation process. Consequently, mental health professionals, already certified in that expertise, may be best prepared and disposed to assume the role of mediator. The process, however, also involves family and social interests, and relies on rational decision making to resolve practical marital disputes. It is obvious, therefore, that legal skills are equally vital. Ultimately, the mediation alternative must develop a structure that is consistent with the legal system's ethic of basic fairness as to procedure and substance.[156] The deficiency created by having the predominate group of existing mediators come from the mental health professions might be remedied in a number of ways—most of which call for more substantial attorney participation.

4. *Combining Mental Health and the Law*

Psychologically-oriented mediators could develop a knowledge of the legal framework for addressing matrimonial disputes simply through self-education or by attending the relevant lectures, courses, or seminars. Although expedient, such a measure would not alleviate the imbalance. An understanding of juridical thinking and reasoning cannot be obtained without a systematic exposure to it. A more viable compensatory procedure might be to have mediators retain an attorney for matters of procedure and substance or encourage (perhaps require) participants to employ counsel during or at the end of the sessions. Costs, in terms of

151. *Id.*

152. *See, e.g.*, Moore, *Training Mediators for Family Dispute Resolution*, 2 MEDIATION Q. 79 (1983). Current training seems to consist of a series of lectures lasting up to five days. *Id.* at 87. These campaigns are sometimes modelled on a format of itinerant, episodic, privately-confected blitz programs of instruction. Such a brief training period (even for persons already professionally trained in related areas like family law or social work) seems inadequate to produce a corps of rigorously qualified professionals.

153. *See* J. FOLBERG & A. TAYLOR, *supra* note 130, at 244, 249. *See also Ethics, Standards, and Professional Challenges*, 4 MEDIATION Q. 1-93 (J. Lemmon ed. 1984).

154. *See* Milne, *supra* note 140, at 21.

155. *Id.* at 21-22.

156. The standard of review for arbitral awards presumably would also apply to mediated agreements. *See supra* notes 100-01 and accompanying text.

time and money, are obvious drawbacks to the recommendation, but do not alone constitute insurmountable hurdles to the procedure. The true difficulties are systemic in character.

Attorneys interfacing with the divorce mediation process in their usual adversarial capacity could compromise the viability of the process. Unfamiliar with the dispute resolution values called for in divorce mediation, lawyers are likely to become a dysfunctional element in the process—not only jealous of its intrusion into their domain of competence, but also unable to adapt professionally to a situation of controlled and defused, rather than polarized and contentious, conflict.

At the same time, important personal rights and the interests of society demand some lawyerly presence and participation in the process.[157] Excluding lawyers from the process and expecting psychologically-oriented mediators to deal inexpertly with the legal implications of divorce disputes would place a greater onus upon the courts to supervise mediation procedures and results. Such judicial intervention or rejection, however, could undermine divorce mediation, clouding it in a haze of indeterminacy and incompetency. A dual-mediator model that recognizes mental health professionals and attorneys as mediators would be a more sagacious response to these acknowledged difficulties.

The advantages of the dual-mediator model over the single, psychologically-oriented mediator model are significant. Faithful to the intended interdisciplinary approach of the process, the dual-mediator model provides a greater guarantee of professional competence in both the legal and psychological aspects of mediation. With a team of two mediators, it also becomes possible to achieve a gender balance, thereby eliminating the alienation one spouse might experience with a single mediator of the opposite sex.[158] Once the legal and psychological orientations coalesce directly in practice, one could expect a more rapid and less tentative definition of mediation's professional stature and social purpose. The process may also minimize inter-professional competition, and promote the type of re-education indispensable for a proper integration of the divorce mediation process into society. Finally, the dual-mediator model should facilitate the necessary linkage and rapport with the judicial process.

Team mediation presents its own set of disadvantages. For instance, it may increase the cost of mediation and add to the number of mediation sessions. Moreover, team mediation presumes that individuals collaborating in a mediation can reconcile the tensions between different professional trainings and develop a healthy respect for each other's differing

157. For a discussion of the role of lawyers in divorce mediation, see Berg, *The Attorney as Divorce Mediator*, 2 MEDIATION Q. 21 (1983); Samuels & Shawn, *The Role of the Lawyer Outside the Mediation Process*, 2 MEDIATION Q. 13 (1983).

158. *See* Black & Joffee, *A Lawyer/Therapist Team Approach to Divorce*, 16 CONCILIATION CTS. REV. 1 (1978); Gold, *Interdisciplinary Team Mediation*, 6 MEDIATION Q. 27 (1984). *See also* J. FOLBERG & A. TAYLOR, *supra* note 130, at 141, 143-44.

professional concerns and approaches. Team mediation also assumes that an essential lawyerly component in the process will not disrupt the workability of the process. This may require that participating attorneys gain some formal understanding of the mental health profession.[159]

Whether a suitable pairing of mental health and legal professionals can be achieved depends on the personalities and circumstances of a given case. Professionals in either field should receive the same training in mediation. Fortunately, some legal practitioners believe that adversarial litigation may be inappropriate in some divorce cases. Through their practice, these attorneys have developed an awareness of and sensitivity to the psychological dimension of their clients' disputes.[160] Despite confidence in a rational process of treating matrimonial discord, one cannot ignore that emotional conflicts have serious practical implications affecting legal rights and social interests.[161] Obviously, a competent therapist should not fail to acknowledge and appreciate that aspect of patients' problems. The application of lawyerly skills in a humanistic dispute resolution framework combined with the advantages gained from a therapeutic approach should have nearly universal appeal.

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159. MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 2.2 (1983) provides for lawyers to act as intermediaries between clients. An intermediary role requires the attorney to inform each client of the risks involved, to notify clients of decisions to be made, and to withdraw either at the request of any client, or if the lawyer believes that the intermediary role is no longer in the best interests of the clients. The comments to this rule stipulate that "a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations." MODEL RULES OF PROFESSIONAL RESPONSIBILITY Rule 2.2 (1983). This would seem to preclude intermediating in all but the most amicable divorces. While mediation is listed in the comments as an approved form of intermediation, "[t]he Rule does not apply to a lawyer acting as . . . mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of the parties." This suggests that a lawyer may serve as mediator in a consulting or advisory role without regard to ethical rules, but must be much more careful if performing professional services as an attorney. Some of the potential conflict could be alleviated by requiring each spouse to retain separate counsel to review the mediated agreement prior to signature. In this situation, the mediating lawyer would be acting as consultant rather than legal advisor, and not be affected by the Rule.

For a discussion of professional responsibility issues in divorce mediation, see J. FOLBERG & A. TAYLOR, *supra* note 130, at 244-50. *See also* Bishop, *The Standards of Practice for Family Mediators: An Individual Interpretation and Comments*, 17 FAM. L.Q. 461 (1984); Crouch, *The Dark Side is Still Unexplored*, 4 FAM. ADVOCATE 27 (1982); Gaughan, *Taking a Fresh Look at Divorce Mediation*, 17 TRIAL 39 (1981); *Ethics, Standards and Professional Challenges*, 4 MEDIATION Q. 1-96 (J. Lemmon ed. 1984); Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984); Silberman, *Professional Responsibility Problems of Divorce Mediation*, 16 FAM. L.Q. 107 (1982); *Standards of Practice for Family Mediators*, 17 FAM. L.Q. 455 (1984); Note, *Family Law—Attorney Mediation of Marital Disputes and Conflict of Interest Considerations*, 60 N.C.L. REV. 171 (1981); Note, *Protecting Confidentiality in Mediation*, 98 HARV. L. REV. 441 (1984).

160. *See* Berg, *supra* note 157; *see also* Smart & Salts, *Attorney Attitudes Toward Divorce Mediation*, 6 MEDIATION Q. 65 (1984).

161. *See* Lemmon, *supra* note 144; Milne, *supra* note 140. *See also* Musty & Crago, *Divorce Counseling and Divorce Mediation: A Survey of Mental Health Professionals' Views*, 6 MEDIATION Q. 73 (1984).

C. *Making an Appraisal*

Available documentation[162] demonstrates that divorce mediation remains largely an experimental phenomenon. The mediation process is still too novel for one to draw any telling statistical conclusions about workability or effectiveness. However, potential systemic deficiencies of team mediation specifically, and of divorce mediation generally, could be cured by reference to a set of three factors: legislative approval, court supervision, and party consent.

The ethical issues surrounding attorney participation in divorce mediation may present the most difficult problems. Until appropriate bodies define special standards for mediation practice, full disclosure[163] to participants as to the purpose, goal, and approach of the mediation process[164] may be the most expedient and reasonable device by which to accommodate such various competing interests as the ethical requirements of the legal profession, the rights and expectations of the consuming public, the desirability of promoting alternative mechanisms for resolving divorce disputes, and the developmental needs of the divorce mediation process.

Proposals for divorce mediation do not suffer greatly from accusations of atavism. Despite their emphasis on the individual resolution of personal disputes, proposals for divorce mediation will not entirely displace the existing apparatus for justice in domestic relations controversies. The challenge for those seeking to achieve more humanistic priorities is to admit inadequacies where they exist, mold present professional abilities to suit the task, and devise processes more responsive to the psychological and material realities of divorce. None of this can be achieved without systemic consensus and agreement on the overriding social goal. The sophistication of the current apparatus for handling divorce actions needs to be refined differently, not transformed into a decentralized and rudimentary method of achieving justice.

The most formidable obstacle to divorce mediation, however, is neither systemic, professional, nor conceptual in character. Lawyers and psychologists can learn to live and work with one another; legislatures will ultimately allow individuals to decide their own matrimonial destiny; and courts would rather not deal with the unpleasantries of divorce disputes. In short, the ideas underlying the mediation process will soon become ingrained in the consciousness of the involved professions. The greatest resistance, as with arbitration, will come from divorcing couples unsuited to anything but a litigious resolution of their marital disputes.

The theory and practice of mediation[165] show that it responds pri-

162. *See infra* notes 176-77.
163. *See supra* note 153 and accompanying text.
164. *See id.*
165. *See* Milne, *supra* note 140, at 23-34.

marily to individuals with particular characteristics and propensities: younger, well-educated, usually professional and materially comfortable couples who accept psychological analysis and thinking. As a result, mediation could become a remedial option reserved for middle and upper-middle class divorce[166]—considerably limiting its social utility. Any wider application of mediation may be confined to child custody controversies.[167] While mediation may be most appropriate for the upper and middle classes,[168] it also works best for parties skilled at verbal confrontation. Mediation requires people to say what they feel. People unaccustomed to discussing their problems are not likely to succeed in this process. These people may simply defer to the mediator and ultimately become dissatisfied with the outcome. In general, individuals with less education are more likely to defer to authority, view the court system with respect, and be less adept at talking out their problems. For them, mediation is probably an alien process unlikely to succeed.

Commentators generally recognize that mediation requires that parties enjoy roughly equal bargaining positions. If either party is significantly intimidated by the other, the process cannot work. Many mediation centers, for example, refuse to handle spouse abuse cases because they represent the extreme of unequal power situations.[169] Mediators may recommend counseling or psychotherapy in such cases, but the divorce itself is sent back for traditional adversarial litigation. Another situation unconducive to successful mediation occurs when one spouse (usually the wife) assumes a martyr role in the hope of achieving a reconciliation. In such a case, the conciliatory spouse is likely to accede to all of the other spouse's demands, and end up with an unfavorable settlement.[170] Although accurate statistics are not available, the number of cases in which a spouse is abused or otherwise in an unequal bargaining position suggests that mediation may be far from a panacea.[171]

Even if the mediation process should enjoy comprehensive applica-

166. *Id.*

167. *See supra* note 140 and accompanying text.

168. *See* Winks, *supra* note 44, at 650.

169. *See, e.g.*, Lerman, *supra* note 136; Rifkin, *supra* note 136. *See also* R. GELLES, FAMILY VIOLENCE (1979).

170. *See* Winks, *supra* note 44, at 643.

171. There are a number of other criticisms that one can levy at the mediation process. Some have advanced mediation as a way to relieve some of the pressures on a heavily overburdened court system—thereby speeding up the divorce process. Although courts are clogged with divorce-related issues, not all divorces are contested. One estimate holds that 85% to 90% of divorce cases are settled prior to trial, either by mutual agreement of the parties or through attorney negotiation. *See infra* note 181 and accompanying text. The mediation services in Los Angeles, Denver, Minneapolis, and Connecticut appear to do no better. *See id.* It may be that the people who mediate successfully would also successfully reach agreements without mediation. This question, however, has not been formally investigated.

While successful mediation might relieve some of the pressures on the court, it does not save very much time. In Denver, successful mediators receive final decrees in an average of 9.7 months after initiation of proceedings. This contrasts with 11.9 and 11.1 months respectively for a control group and for those who actively rejected offers to mediate. The difference is statistically significant at the .05 level; but it concerns only two months at most, and does not indicate an overwhelming

bility, the individual dispositions of spouses are still crucial elements. What should mediators do with willing, but particularly obdurate, participants who disagree on some or all matters? Who should decide when mediation has failed? Should the legal system require all divorcing couples, especially those who are parents, to participate in a mandatory number of sessions? Might a central court of mediation be established to address the foregoing questions? What about conflicts that arise regarding the implementation of the mediated agreement—is court action necessary, or should the agreement contain an arbitration or mediation clause to deal with such problems?[172] Although ideally structured to achieve qualitative dispute resolution in divorce matters, mediation places a necessary but precarious reliance on the willingness of individuals to espouse a rational course of conduct in circumstances of disagreement.

VI. PROPOSING AN ALTERNATIVE MECHANISM FOR ACHIEVING JUSTICE IN THE SEVERANCE OF MATRIMONIAL TIES

Current experimentation with alternative divorce mechanisms does not call for immediate and blind recourse to substitute remedies. Certainly, there is mounting dissatisfaction with current divorce procedures. In Georgia, for example, where almost half the clients in a divorce study were dissatisfied, statutory provisions for such alternative remedies as conciliation or mediation do not exist.[173] Operating within this system, over 90% of the Georgia attorneys in the study agreed that divorce mediation could be effective; some 73% favored both mediation and counseling.[174] The strong consensus in Georgia as to the probable effectiveness

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acceleration of the divorce process. In sum, mediation may help unclog the courts and speed up the process, but it does neither to any great extent. *See id.*

The small minority of cases that parties fight in the courtroom may be the ones most in need of mediation, but they may involve couples who will never agree in any proceeding. Indeed, in Denver, the difference in relitigation between successfully mediated settlements and those never referred to mediation is quite small: 11% of the former and 15% of the latter had returned to court 15 months after the settlement. While mediation may be a great improvement over endless litigation, it may not be better than successful negotiation with private counsel. It is not at all certain that the parties who engage in endless litigation are deterred by mediation.

One critic of mediation points out that mediators have a vested interest in settling controversies that might be better solved outside the mediation forum. He notes that mediation's emphasis on compromise might produce settlements that make no objective sense. *See* Crouch, *supra* note 137, at 344-45. Child custody issues, a common subject for mediation, may provide illustrations of irrational, compromised mediation settlements. One mediation text provides examples of ideal settlements, including one in which the parents divide custody of the two children such that the siblings are together in the same home only three days a week. *See* D. SAPOSNEK, *supra* note 139, at 306. Such a settlement may please the parents and it may be a good compromise, but it is not necessarily best for the children, for whom sibling relationships and a degree of continuity can be extremely important.

172. *See* Herrman, McKenry & Weber, *supra* note 132, at 17; Meroney, *Mediation and Arbitration of Separation and Divorce Agreements*, 15 WAKE FOREST L. REV. 467 (1979). *See also* Bernard, *The Neutral Mediator: Value Dilemmas in Divorce Mediation*, 4 MEDIATION Q. 61 (1984); Dibble, *Bargaining in Family Mediation: Ethical Considerations*, 4 MEDIATION Q. 75 (1984).

173. *See* Georgia Study, *supra* note 67, at 319-20.

174. *See id.*

of alternative remedies, however, may be anchored in the fragile basis of inexperience. Studies in other states indicate that alternative remedies are not a cure-all. In Vermont, for example, where clients report "moderate satisfaction" with the existing system, discretionary counseling is available.[175] Superficially at least, the availability of discretionary court-ordered counseling has had little effect on client perceptions of the legal process of divorce. The availability of other alternative remedies may or may not have a similarly negligible impact.

Other data reveal ambivalence and report mixed results.[176] Concili-

175. *See* Vermont Study, *supra* note 67, at 71.

176. At present, 14 states provide for mediation of some or all divorce cases. In seven states, mediation is discretionary at the choice of the parties or the court; in three, it is mandatory for all disputed child custody issues or other issues where children are involved. In four states, mediation is required on a county rather than a state basis. Several other states are now investigating mediation and may enact enabling legislation in the near future. In addition, in many states, attorneys refer clients to private mediation services even in the absence of permissive legislation or court orders. Moreover, a count of states that have formalized the procedure is not necessarily an exhaustive list of states in which it is practiced.

Because of the unevenness with which the laws are applied, it is impossible to ascertain the effects of mediation and conciliation statutes on the divorce rates. Superficial observation suggests that states in which the laws are partially enforced do not differ from the others in divorce rate or in duration of marriage—but this is not conclusive.

ation appears to be an ill-fated remedy in most cases.[177] As an illustra-

STATUTES PROVIDING FOR ALTERNATE DISPUTE RESOLUTION

	MEDIATION			CONCILIATION		
	MANDATORY, CHILDREN INVOLVED	COURT'S DISC.	ONLY CERTAIN COUNTIES	UNDER INVESTIGATION*	MANDATORY	DISC.
Alaska		b				
Arizona			a			e
California	a					e
Colorado	a					f
Connecticut		b				f
Delaware	a					
Florida			a			e
Illinois						f
Indiana				x		f
Iowa						e
Kansas						e
Kentucky						f
Louisiana		a				
Maine	b					
Maryland		c				f
Michigan				x		e
Minnesota		a				
Montana						f
New Hamp.				x		f
New York			b			
N. Dakota						f
Ohio						f
Oregon			d			
Pennsylvania		b				
S. Carolina					f	
Texas				x		f
Utah				x		f
Vermont				x		
Washington			d			
Wisconsin						e

* = not a comprehensive list
a = child custody, support, visitation
b = all issues when children involved, including property
c = property only, no custody issues
d = county option, rules vary
e = statute generally observed
f = statute on books but largely ignored

For an explanation of the statistical analyses, see *supra* note 33.

177. *See* Elkin, *Conciliation Counseling: A Moral and Ethical Responsibility*, 19 CONCILIATION CTS. REV. iii-vi (1981). As of 1985, 21 states have some statutory provisions for conciliation or marriage counseling in divorce cases. *See* table *supra* note 176. These provisions presumably reflect and uphold the state interest in having marriage unions continue for as long as possible. In all states but South Carolina, conciliation is purely discretionary—at the option of the court or either party. These statutes, however, are unevenly applied; in many cases, they are ignored. In South Carolina, a representative of the State Bar Association declared that mandatory conciliation consists of a single question from the judge in a divorce proceeding as to whether the couple thinks they can be reconciled. Information obtained by the author through a telephone interview. In states where conciliation is discretionary, representatives state that it is infrequently invoked, generally only on the recommendation of counsel. The general consensus appears to be that conciliation statutes, enacted mostly in the 1960's, are obsolete. Spouses who have concluded that their marriage is irretrievably flawed cannot be dissuaded from obtaining a dissolution of their union. Conciliation, therefore, is probably not a workable alternative to judicial adjudication.

Although marriage counseling may seem indistinguishable from conciliation, some states provide for counseling instead of or in addition to conciliation. In a study of eight intermountain states

tion, of those couples referred to the Los Angeles Conciliation Court, 50% chose not to take advantage of the service. As to the other half, one-third of them reconciled. Of these, 75% were still together a year later. This means that, of all couples referred, 12.5% were reconciled after a year. With a nationwide rate of one in three couples dismissing divorce petitions after filing, the Los Angeles experience with conciliation is less than remarkable if the goal is to salvage marriages.[178]

Mediation presents possibilities with greater promise. California is in the forefront of the mediation experience, and now has mandatory mediation for divorcing couples unable to agree on child custody matters.[179] Of the couples who have been referred to mandatory mediation, 75% reached a mediated agreement on the custody issues that divided them at the outset. Some 54% of these couples stated that the agreement was still effective one year after the mediation. Only one-third of the mediating couples returned to court. Denver achieved similar results, offering free mediation services to divorce litigants.[180] Although 50% of the couples refused to engage in mediation, 60% of those who did reached a mediated agreement. A total of 80% of the couples eventually reached an out-of-court settlement. In addition, 92% of the Denver couples who successfully used mediation would recommend the process; and 61% of those who were not successful would still recommend it.

(Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming), divorced respondents were asked whether they had received marriage counseling and, if so, whether they thought it had helped. Intermountain Study, *supra* note 59, at 113-14. The overwhelming majority (80%) of those who had received counseling reported that it did not help. The others responded that counseling did not improve the marriage, but did make the divorce process easier. *Id.* It must be noted that these respondents were already divorced and may represent failures of the counseling system; data concerning marriages saved by counseling are not available. Also unclear is whether the respondents (or the surveyors) distinguished among counseling, mediation, and conciliation. Nonetheless, this indicates that counseling, whatever that meant to the respondents, is not perceived as beneficial.

Some confusion exists in the literature and in practice as to the differences between conciliation and mediation. Wolff, in an article devoted to family conciliation, describes conciliation as a process in which the parties create their own agreements with guidance. *See* Wolff, *Family Conciliation: Draft Rules for the Settlement of Family Disputes*, 21 J. FAM. L. 213, 215 (1982). This is usually the definition of mediation. Representatives from Florida, Maryland, and North Dakota stated explicitly that statutory conciliation is practiced as mediation. Information obtained by the author through telephone interviews. This may be a recent development in states with old conciliation statutes—an attempt to modernize the procedure without changing the laws. In other states, where mediation and conciliation are invoked separately, it appears that mediation is supplanting conciliation as the alternative of choice. Conciliation, in sum, is largely ignored in most states that provide for it by statute.

178. Elkin, *supra* note 177, at v.

179. *See* Saposnek, *How Has Mandatory Mediation Fared?*, 22 CONCILIATION CTS. REV. 7 (1984); Pearson & Thoennes, *Mediating and Litigating Custody Disputes*, 17 FAM. L.Q. 497 (1984) [hereinafter cited as Pearson & Thoennes, *Mediating and Litigating*]; Pearson & Thoennes, *A Preliminary Portrait Of Client Reactions To Three Court Mediation Programs*, 3 MEDIATION Q. 21 (1984) [hereinafter cited as Pearson & Thoennes, *Preliminary Portrait*]. The mandatory mediation program is free for the participants, "totally self-supporting through an increase in . . . marriage license fee and . . . the divorce filing fee . . . ." McIsaac, *Court-Connected Mediation*, 21 CONCILIATION CTS. REV. 49, 50 (1983).

180. Pearson & Thoennes, *Mediating and Litigating*, *supra* note 179, at 504-05. The Denver mediation program is not mandatory. *Id.* at 502.

Couples in Los Angeles, Minneapolis, and Connecticut shared the same perceptions.[181]

These statistical fragments of popular opinion confirm what a growing number of family specialists are advocating. Although alternative dispute resolution mechanisms will not preserve marriages, they are useful in achieving other equally important goals. Alternative mechanisms can eliminate litigious confrontations, reduce the costs of dispute resolution, encourage couples to reach their own agreements, foster better relations between ex-spouses, and lessen individual dissatisfaction with the divorce process.

The realities of contemporary divorce[182]—the sheer number of matrimonial breakups, the character of the disputes they generate, and the physical burden they place upon the legal system—and the general dissatisfaction with the adversarial system of divorce adjudication[183] should prompt legislative bodies to make alternative mechanisms available to divorcing couples on a discretionary basis.[184] As noted previously,[185] however, mediation is not for everyone; an appropriate social framework for divorce must address problems at all levels of society. Divorcing couples who are unable to mediate should be guided to other, less adversarial fora.

Certainly, parties should be encouraged to conduct negotiations through party representatives and to reach settlement agreements. Estranged spouses unable to resolve their differences through their respective attorneys should not be thrown into the traditional litigious fray. Although mediation would be the preferred extra-judicial means of resolving divorce disputes in an ideal rational world, a specialized form of judicial adjudication might be useful when the truculent reality of divorce prevails. These specialized divorce courts would merge the coercive element of judicial authority with the procedural and substantive flexibility of arbitral dispute resolution—dispute resolution through "judicial arbitration." In short, even when coercive judicial authority is needed, rationality must predominate. Dissolving a marriage through a non-adversarial judicial procedure better serves the couple, their children, overloaded courts, and society.

Some might argue that the proposed system of judicial arbitration is no different from what an enlightened judge might do under the present process. The proposed scheme merely asks legal players to act as compassionate counselors—not as hired guns and impartial decision makers. Judicial arbitration, therefore, does not represent systemic change; it

181. In Los Angeles, Minneapolis, and Connecticut, 85%, 91%, and 91%, respectively of the successful participants, and 79%, 68%, and 62%, respectively of the unsuccessful participants recommended mediation. Pearson & Thoennes, *Preliminary Portrait*, *supra* note 179, at 34.

182. *See supra* notes 33-45 and accompanying text.

183. *See supra* notes 1, 67-71 and accompanying text.

184. *See supra* notes 176-77.

185. *See supra* notes 165-71 and accompanying text.

merely adds another layer to the already complex social mechanism for addressing divorce disputes.

However, although the present adversarial system may well have enlightened participants, the spirit of adversarialism impedes the full integration of their rational attitude into the dispute resolution process. There are no guarantees that they will share or even apply their enlightened perceptions. Moreover, it is unfair to have the parties' fate depend on whether they fortuitously hire the appropriate attorneys and draw the right judge. The proposed system argues for a clear and unmistakable statement of policy: adversarial litigation is an inapposite means of resolving divorce disputes. The proposed system calls for the adoption of a new dispute resolution ethic in divorce, requiring representatives and participants to assume a new, more humanistic attitude toward divorce.

Arguably, changes in the applicable substantive law might achieve similar results.[186] Fixed rules of law, such as the primary caretaker concept in custody matters,[187] might eliminate such pitfalls as uncertainty of determination and contentious argument. The epistemology of legal training, however, promotes semantic ambiguity as a fundamental truth. Ironclad predicates are, in fact, antithetical to lawyerly dispositions and adversarial adjudication. The irreducible insufficiencies of the current process and the private, emotional character of the conflicts compel recourse to self-determination. Society must advance alternative mechanisms as the primary remedy, and view an arbitral judicial process as a last resort.

A. Non-adjudicatory Options

The first stage of the recommended framework would be triggered when one of the spouses or the couple files a petition with the state trial court, stating an intent to terminate the marriage. After the tolling of a

186. *See* Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165 (1986); Glendon, *Family Law Reform in the 1980's*, 44 LA. L. REV. 1553 (1984). According to Professor Glendon, "[t]he most serious problem with the law currently governing the child-related and economic effects of divorce is not its broad grants of discretion, but its incoherence at the level of principle." Glendon, *supra*, at 1171. *See also* Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477 (1984); Schepard, *Taking Children Seriously: Promoting Cooperative Custody After Divorce*, 64 TEX. L. REV. 687 (1985).

187. *See* Garska v. McCoy, 278 S.E.2d 357, 363 (W. Va. 1981).

statutorily-prescribed time limit (six or twelve months),[188] either spouse could obtain a divorce decree merely by filing a motion to that effect. In the interval, the divorcing spouses could simply wait out the required time for obtaining a divorce. The couples might also pursue counseling in order to reconcile or merely to settle the loose ends of their dissolving union. Although it is unlikely, some jurisdictions might oblige the divorcing spouses to attend a few counseling or conciliation sessions. States could either establish a publicly-funded marriage counseling and conciliation process, designate approved private counselors and conciliators, or have the couple undertake the initiative completely on their own.

If the divorcing spouses are in agreement regarding their matrimonial fate and can cooperate enough to agree on an alternative dispute resolution mechanism, the proposed framework of remedial options should allow them to engage in mediation during the statutorily-imposed waiting period. Some legislative regulation of the mediation process may be in order. The legislature might, for example, establish rules relating to the qualification of court- or privately-appointed mediators in each jurisdiction, define the basic procedural and substantive standards that govern in mediation, and identify whether single or team mediation models

188. Mandatory Time of Separation Before Divorce Granted*

	Mandatory separation	Only for unilateral no-fault divorce[a]
Alabama		x
Arkansas	3 years	
Connecticut		x
Delaware	6 months	
Hawaii	2 years	
Idaho		x
Illinois	6 months[b]	
Louisiana	1 year	
Maryland	1 year[b]	
Mass.	6 months[b]	
Missouri	1 year[b]	
Montana	180 days	
Nevada		x
N. J.	18 months	
N. Y.	1 year	
N. C.		x
Ohio	1 year	
Penn.		x
R. I.		x
S. C.		x
Texas		x
Utah		x
Vermont	6 months	
Virginia	1 year	
W. Va.		x
Wisconsin	1 year	

* - includes only those states with provisions for mandatory separation times
a - see table on unilateral divorce for details (note 198 *infra*)
b - with mutual consent. Different times apply for unilateral divorces (*see* table, note 198 *infra*).
For an explanation of the statistical analyses, see *supra* note 33.

apply. Under general legislative guidance, however, party-generated and mediator-assisted determinations should control in most phases of the process. Because party attitudes are so important in mediation, parties should submit all disputes to mediation only in circumstances where there is clear spousal willingness to explore and experiment with the remedy. Coerced participation is essentially antithetical to the principles underlying mediation.[189] Once the spouses choose mediation, the court's role should be limited to the formal granting of the divorce decree and approval of the mediated agreement.

If one spouse or the couple rejects conciliation, fails to achieve a reconciliation under a mandatory conciliation scheme, and is unwilling to engage in mediation, the divorcing couple could authorize their respective attorneys to negotiate a settlement. To achieve maximum efficiency, attorneys who engage in such divorce negotiations should operate within the time limit established for obtaining a divorce. The use of negotiation through legal representation might be especially beneficial since it allows attorneys to function in their usual capacities, and makes few demands on the court system. Under this approach, a court would simply issue the requested decree, and assure the fairness of the negotiated agreement.

B. Judicial Arbitration

Assuming that conciliation, mediation, and negotiation are unavailing, the couple still needs to resolve practical issues in some forum. Rather than have arbitration function as a consensual and private form of justice initiated by party agreement, legislatures could impose judicial arbitration in all divorce cases that cannot be resolved by other means. Under the requirements, the judge-arbitrator would apply flexible procedural rules, allowing each side an equal and fair opportunity to present its case. Ordinarily, a time limit (three months from the date the divorce is granted) should apply to such arbitral court proceedings. The court, at its own discretion, could extend the time limit to a maximum of six months in cases involving truly exceptional circumstances. In some respects, the judge would still function as a referee between the parties. The flexible procedure, however, should enable judges to control the quantum of discovery and the procedural delaying tactics.

To expedite and simplify dispute resolution and also limit the expenditure of judicial resources, the spouses could be obliged to reach agreement on financial and property issues before a divorce decree is granted. The obligatory resolution of such matters would act as a condition precedent to the granting of a divorce.[190] The divorcing couple by this stage

189. *See supra* note 146 and accompanying text.

190. Currently, seven states require the settlement of child support, custody, alimony, and property issues before any divorce is granted; three more states require such a settlement prior to the issuance of no-fault divorces. Seven more states require courts to rule on these issues in divorce

has had the time and a number of opportunities to achieve consensual agreement. Postponing the resolution of such matters, at the very least, could give rise to problems of proof. The immediate clarification of the estranged spouses' financial and property rights could prevent the unwitting or intentional duping of third-party interests, and stem the litigious morass that usually follows. Moreover, the spouse upon whom a divorce is imposed would probably retaliate by immediately initiating a suit for property division, alimony, and child support and custody. Although consolidation of the actions would delay the possibility of remarriage, the intervening period would only be three or six months. Even in circumstances of truly contentious disagreement, the judge-arbitrator might interpret a spouse's failure to agree as vindictive and dilatory. Rather than determine that exceptional circumstances exist and prolong the proceeding, the court could find a breach of the duty to adjudicate in good faith, and take the party's lack of cooperation into account in its judgment.

Joining the actions, however, may prove to be unduly coercive, excessively compromising rights, and unfairly impairing dispute resolution strategies. In addition to creating an incentive for the abandoned spouse to delay the other spouse's remarriage, consolidation may associate the granting of a divorce so closely with financial issues as to inflame the debate surrounding practical concerns. It would also eliminate the possibility that time and attrition might defuse the situation—a type of default remedy. A better rule should allow courts to grant a divorce once the

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cases, but do not stipulate that this be done prior to granting the decree. The remaining 33 states either have no requirement for settlements in connection with divorce or provide that the court may, at its discretion, make such orders.

States Requiring Completed Settlements with Divorce Decrees
(Custody, Support, Maintenance, Property)

	Prior to all divorces	Prior to no-fault only	At some time, unspecified
Arizona	x		
California		x[a]	
Colorado	x		
Connecticut		x	
Illinois	x		
Indiana			x[b]
Iowa			x
Kentucky	x		
Mass.		x	
Miss.	x		
Missouri	x		
Montana	x		
N. H.			x
Texas			x[c]
Washington			x[b]
W. Va.			x
Wisconsin			x

a - for summary dissolution only, with fixed limit on amount of property involved
b - property only
c - child support and custody only

For an explanation of the statistical analyses, see *supra* note 33.

statutory period has tolled, but require the court at the same proceeding to rule provisionally, setting a hearing date for the judicial arbitral adjudication of outstanding practical differences.

The rules of procedure and evidence for a judicial arbitral proceeding should be general and flexible in character. For example, each party would have a right to representation by legal counsel; a right to call witnesses and engage in cross-examination; an opportunity to present whatever evidence they deem necessary to establish their case; after an initial hearing, the judge could reach a determination exclusively on the basis of a written record (if both parties agree); procedures should also allow the judge to call any witnesses deemed necessary or refer to experts for advice on technical determinations. A judge could also determine that a party's intransigence amounts to a breach of the duty to adjudicate in good faith, and take this into account in the final ruling. The governing rule would be a rather diffuse sense of procedural fairness.

Because the substantive provisions of family law are general in nature, a judicial arbitral tribunal could equitably apply these rules and reach decisions consistent with regular divorce courts. In a child custody dispute, for example, a domestic relations judge sitting as a judicial arbitrator would rule as an ordinary court of law—seeking to determine the best interests of the child. The judge-arbitrator, however, could procedurally minimize the parties' disputatious positions.

Similar reasoning applies to alimony and division of property determinations. In most jurisdictions, alimony is now exclusively or nearly exclusively a purely financial matter—involving considerations of need, ability to pay, and economic rehabilitation. A judge-arbitrator could resolve alimony disputes under the general guidelines of the currently applicable statutes. Allocating and distributing common marital assets and liabilities might present more of a problem. In some jurisdictions, the governing law is quite elaborate regarding marital property division. The most acceptable substantive standards for adjudication by a court sitting in an arbitral capacity would be equity and fairness. Such standards would be consistent with the arbitral adjudicatory standard that applies in most domestic and international arbitrations—a basic respect for law. In other words, domestic relations courts sitting as arbitral tribunals would, in effect, be equivalent to traditional courts of equity.

Given the public jurisdictional authority of courts of law, a court exercising arbitral authority would render a judgment, and not an arbitral award. Although proscribed in ordinary arbitral proceedings, a merits review would apply to the arbitral court judgment. The possibility of appellate review would force the judge-arbitrator to render a reasoned award—unless both parties waive that requirement. A reasoned award should state the judge's conclusions on the merits and briefly articulate the basic reasoning that underlies those conclusions. Appellate courts, also applying arbitral adjudicatory standards, would not disturb the

judgment unless there is a finding of manifest error or basic disregard of law.[191] While it limits considerably the right of appeal, the no-review-without-manifest-error standard promotes the efficient administration of justice. As many jurisdictions, in fact, currently use this standard in domestic relations matters, it is evident that trial courts have the best perspective on the witnesses, the parties, and the overall dispute. Should judicial arbitral courts apply such a standard, they would not compromise the basic rights of the parties.

Concern for substantive rights might dictate that arbitral courts sit as a panel of three judges and reach determinations by majority vote. While dissenting or concurring opinions could be allowed under this model, the precedential value of any such opinion would generally be minimal.[192] Arbitral courts would resolve most substantive issues on an ad hoc basis, according to the particular circumstances of the individual case. Legislatures may also require judges or other professionals sitting on such panels to possess special qualifications.[193] A typical panel of three members might consist of the domestic relations judge in the jurisdiction (sitting as president of the tribunal), an attorney, and a mental health professional. Such procedural complication, however, may prove counter-productive in terms of time and adjudicatory efficiency. Given that the present system functions with a single judge, a three-member panel may be unnecessary.[194]

Integrating legal representation into the judicial arbitral model could be the most difficult obstacle to successful implementation of the recommended framework. The presence of litigators might transform the arbitral proceeding into the usual combative contest. The time limit rule, however, would oblige all parties, including legal representatives, to follow the stated arbitral intent of the proceeding. Some consideration might be given to re-educating the domestic relations bar. Elaborating a new code of ethics for domestic relations practice—emphasizing the acceptability and utility of neutral lawyering and requiring mental health training for lawyers—might be in order.[195] The judge-arbitrator may also need additional professional training to become acquainted with arbitral procedures and principles. Such additional training, however, should not prove unduly burdensome, especially in light of the similarity between arbitration and equitable adjudication.[196]

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191. *See supra* note 113 and accompanying text.

192. *See supra* notes 113-17 and accompanying text.

193. *See, e.g.*, Milne, *supra* note 140, at 21-22; Gold, *supra* note 158, at 27.

194. *See* G. WILNER, *supra* note 7, §§ 20:00-:01.

195. *See* J. FOLBERG & A. TAYLOR, *supra* note 130, at 349. *See also* Bishop, *Mediation Standards: An Ethical Safety Net*, 4 MEDIATION Q. 5 (1984). California has a rather vague provision requiring attorneys in the domestic relations area to have some mental health training. *See* Winks, *supra* note 44, at 645.

196. *See* G. WILNER, *supra* note 7, §§ 25:00-:06.

C. *Enabling Legislation*

A statutory framework attempting to implement the foregoing recommendations must be compatible with a jurisdiction's general policy on matrimonial matters, especially as reflected in divorce and alimony laws. Ideally, state statutes would provide exclusively for no-fault divorce and alimony, or at least contain a clear no-fault preference. Reference to legal fault is unnecessarily inflammatory, focusing on marital wrongs and damage awards rather than achieving a fair and reasonable resolution of disputes.

The flexible character of current state statutes on divorce and alimony should be compatible with the recommended procedure. Many state jurisdictions already have hybrid divorce regimes that combine fault and no-fault, as well as provisions for alimony entitlement that operate primarily on considerations of need.[197] In fact, many state jurisdictions now allow the unilateral termination of marriage after a relatively modest period of physical separation.[198] Even in circumstances in which a spouse in a "mixed" (fault and no-fault) jurisdiction seeks a fault-based divorce, adversarial litigation could still be avoided in the interest of justice. The difficult task remains, however, of integrating the recommended procedural framework into existing statutory schemes for fault-based alimony determinations. The adjudication of financial entitlements and responsibilities according to an all-or-nothing, fault-based statutory provision may require the application of existing court procedures.

Assuming that coordination could be presently or eventually achieved in most state jurisdictions, the following proposal contains the general guidelines for the statutory implementation of the recommended procedural framework:

A Statute Establishing a Procedural Framework for Resolving Divorce Disputes

Preamble

This statute defines the procedures that apply to the granting of divorces and the resolution of divorce disputes. It is not intended to encourage divorce, but rather—once a decision to terminate marriage has been reached—to establish a process that enables divorcing couples and the judicial organs of the state to deal effectively and efficiently with an increasingly commonplace reality. To that end, the present legislation eliminates recourse to adversarial litigation in divorce. The emotional volatility of divorce makes adversarial proceedings, despite their utility in other areas of controversy, inappropriate in the circumstances of matri-

197. *See supra* notes 46-49 and accompanying text.

198. Thirty-nine states have statutory provisions guaranteeing unilateral no-fault divorce. Of the remaining eleven, two (Mississippi and Tennessee) explicitly prohibit this type of divorce; nine states permit it at the court's discretion.

monial dissolution. The statute provides for the judicial arbitration of divorce disputes and makes other dispute resolution mechanisms available to divorcing couples, thereby allowing them whenever possible to resolve their differences through private agreements.

Unilateral No-Fault Divorce Provisions, By State*

	Sep. leads to divorce	Unilateral breakdown	Unilateral divorce at court's discretion
Alabama	2 yrs.		
Alaska			x
Arizona			x
Arkansas	3 yrs.		
California			x
Colorado			x
Connecticut	18 mos.		
Delaware	6 mos.		
Florida			x
Georgia		x	
Hawaii	2 yrs.		
Idaho	5 yrs.	x	
Illinois	2 yrs.		
Indiana		x	
Iowa		x	
Kansas		x	
Kentucky			x
Louisiana	1 year		
Maine		x	
Maryland	2 yrs.		
Mass.	1 year		
Michigan			x
Minnesota		x	
Missouri	2 yrs.		
Montana	180 days		x
Nebraska			x
Nevada	1 year		
N. H.		x	
N. J.	18 mos.		
N. M.		x	
N. Y.	1 year		
N. C.	1 year		
N. D.		x	
Ohio	1 year		
Oklahoma		x	
Oregon		x	
Penn.	3 yrs.		
R. I.	3 yrs.		
S. C.	1 year		
S. D.	no time specified		x
Texas	3 yrs.	x	
Utah	3 yrs.		
Vermont	6 months		
Virginia	1 year		
Washington			x
W. Va.	1 year		
Wisconsin	1 year		
Wyoming		x	

* Does not include the 2 states that prohibit unilateral divorce.
For an explanation of the statistical analyses, see *supra* note 33.

I. The Stages of the Process

Once parties file a petition for divorce, the court—in a preliminary hearing held in chambers—shall urge the parties to seek counseling, either on an individual basis or as a couple, and/or to participate in conciliation with a view to saving their marriage. In doing so, the court shall direct the clerk of court to give the parties information regarding the private resources that are available for counseling and conciliation.

The court shall also instruct the parties that, in the event they choose not to avail themselves of either counseling or conciliation or find these remedies to be ineffectual, they can engage in mediation or direct their respective attorneys to negotiate a settlement on their behalf. The court shall again provide the parties with the necessary information to evaluate the feasibility of these alternative remedies in their circumstances, emphasizing (when applicable) that mediation is especially useful in child custody matters.

Prior to (or during or immediately following) this preliminary hearing in judicial chambers, the parties must reach a temporary agreement regarding maintenance arrangements and, if applicable, on child support and custody. If they are unable to do so, the court shall issue an injunctive order on these matters in light of its understanding of the circumstances of the case. This order shall not be binding upon subsequent determinations and can be modified by the common written agreement of the parties at their discretion. The parties will have six (or twelve) months from the date of the preliminary hearing to avail themselves of alternative remedies to adjudication.

Once the six (or twelve) month period has elapsed and no reconciliation has been achieved, either party may sue for and obtain a judgment of divorce. Matters of child custody and spousal maintenance following divorce must be at least provisionally resolved at the time the judgment of divorce is entered. If the parties have mediated their differences on these matters or otherwise agreed, the court shall review their agreement and determine whether it satisfies basic fairness and considerations of equity. In its discretion, the court may require the parties to modify or reconsider their agreement. The will of the parties, however, shall be presumed to be controlling. Once approved, the agreement shall be incorporated into the divorce judgment.

If the parties have been unable to agree privately on custody and maintenance matters, the court shall grant a divorce and review its initial injunctive order issued at the preliminary hearing to determine whether existing circumstances warrant modification of the order. The court shall also set a date for a subsequent hearing to adjudicate these outstanding matters, including disputes pertaining to the division of marital property. At that hearing, the court shall exercise arbitral adjudicatory authority, enabling it to conduct the proceeding and to rule on the issues with flexibility in the interest of the efficient administration of justice.

II. Procedures For Fault-Based Divorce

When the petition for divorce alleges marital fault, the divorce procedures contained in the preceding section will apply, except that the divorce decree will not be granted until the fault issue has been adjudicated by the court seized of the action and exercising arbitral adjudicatory authority.

III. Rules Regulating The Procedure And Other Matters

When the court exercises arbitral adjudicatory authority, it shall retain its public jurisdictional authority to render binding judgments. It shall, however, apply a flexible procedure; its discretion in this regard shall be limited solely by the principle of allowing the parties a fair and equal opportunity to present their case. The governing provisions of law shall be construed in conformity with equitable considerations.

In all cases, judicial arbitral proceedings shall be subject to a three-month time limit from the date the divorce is rendered. The court may extend the time limit to six months if, in its discretion, it finds truly exceptional circumstances that warrant such an extension. To avoid prolonging such cases, the court, in its discretion or upon the request of the parties, may reconstitute itself as a panel of three judges or other family specialists to hear and rule upon the case. Otherwise, the court may find that one or both parties have breached the duty to participate in the proceeding in good faith, and take that lack of cooperation in the conduct of the proceeding into account in its judgment. Furthermore, the court may appoint, in its discretion and at the expense of the parties, mental health and other experts to assist it in making evaluations and factual determinations. The court shall render brief reasons with its judgments. Appeal shall be allowed to appellate courts only when the judgment contains a manifest error or a basic disregard of law. In exercising its review powers, the higher court shall also apply arbitral adjudicatory standards.

When an alleged change of circumstances requires the modification of a judgment, the parties may agree in writing to such a modification or file suit before the court which will adjudicate the issue expeditiously pursuant to its arbitral powers.

Attorneys who are asked to serve as divorce mediators shall assume such responsibilities in their capacity as officers of the court. Attorneys serving as divorce mediators shall neutrally advise fellow mediators and impartially guide the participants in mediation. Fees and matters relating to the certification of attorneys as divorce mediators, as well as the general rules and procedures for divorce mediation, shall be regulated by the state bar association in conjunction with recognized mediation institutions. The bar association, with the assistance of institutes of higher education in the state, should establish and require its members involved in domestic relations practice to participate in professional programs in

family counseling and therapy as well as the non-adversarial representation of client interests.

VII. CONCLUSION

Judicial arbitration, conjoined with the opportunity to effectuate resolution by private agreement, appears to constitute a remedial process that responds to the full dimensions of divorce disputes. It avoids parent-like juridical intrusions into the private emotional lives of divorcing spouses, and allows the principles of individual accountability and self-determination to have their necessary impact upon matrimonial matters. In effect, the adapted traditional mechanism and the introduction of other techniques of dispute resolution allow society to achieve its civilizing design upon individuals through rationality rather than obsolete rituals.