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## AGREE TO DISAGREE: MOVING TENNESSEE TOWARD PURE NO-FAULT DIVORCE

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### I. INTRODUCTION

“The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society.”<sup>1</sup>

As Justice Kennedy aptly pointed out, the institution of marriage has developed from roots that run deep into human evolution. Divorce emerged as a means for parties to dissolve a legal relationship. For much of our history, domestic relations law reflected religious values that looked unfavorably on

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<sup>a1</sup> J.D. Candidate, May 2017, Lincoln Memorial University. The author would like to thank Professor April James for inspiring this Note. This was just one of the many spirited domestic relations debates that we had over the last two years. Also, Duncan School of Law Dean of Academics Matthew Lyon contributed a great deal of time critiquing this Note. Dean Lyon has, without question, raised the level of my writing over the past three years. Thank you to both of these professors for your time and insight.

<sup>1</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015).

divorce.<sup>2</sup> Remedies required proof that at least one party failed to conform to society's expectations—a fault-based divorce. Time brings change. Divorce law's grip on the reigns of marriage loosened during the twentieth century.<sup>3</sup>

Modern divorce laws have no-fault options firmly entrenched in all fifty states.<sup>4</sup> As discussed in more detail below, the manner and process by which parties use no-fault divorce differs significantly across the country. Some states, including Tennessee, ask litigants to overcome significant hurdles to use no-fault grounds.<sup>5</sup> Other states have diverged from these restrictive requirements, allowing litigants to plead no-fault grounds that allow a court to decide any disputed ancillary issues.<sup>6</sup> Some states moved even further, removing fault grounds completely.<sup>7</sup> Despite some ominous forecast,<sup>8</sup> pure no-fault divorce has proved sufficient to dissolve legal relationships without damaging society as a whole.

No-fault opponents have relied on varying economic and moral arguments to further a religion-based agenda that does not reflect current societal realities.<sup>9</sup> Aggrieved parties already have access to more efficient criminal and tort law remedies. These systems, by design, correct and expel unwanted conduct more efficiently than do equity-focused domestic relations laws. Moreover, significant declines in religious affiliation demonstrate a marked change in societal values.<sup>10</sup> Divorce law should reflect this evolution and provide efficient, equitable dissolution to marital relationships.

Tennessee should progress toward a pure no-fault system. The law currently places an unnecessary burden on no-

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<sup>2</sup> See Deborah H. Bell, *Family Law at the Turn of the Century*, 71 Miss. L.J. 781, 782-85 (2002).

<sup>3</sup> *Id.*

<sup>4</sup> See David P. Horowitz, *Breaking Up Is [Easier] To Do*, 82 N.Y. St. B.J. 18 (2010).

<sup>5</sup> See *e.g.*, *infra* note 11.

<sup>6</sup> See *infra* note 56.

<sup>7</sup> See *infra* note 58.

<sup>8</sup> See *infra* Part IV.

<sup>9</sup> See *id.*; see also *infra* Part V.

<sup>10</sup> See *infra* Part V.

fault divorce that requires both parties to agree on all issues.<sup>11</sup> This requirement escalates contentiousness, increases costs, and unnecessarily complicates future disputes over children and alimony. A pure no-fault system, or a move in that direction that removes the agreement requirement, would increase access to the courts for those who need it most. The steadily decreasing number of people that affiliate with marriage's founding father, religion,<sup>12</sup> should cause lawmakers to reevaluate the current statutory requirements and reconsider Tennessee's restricted access.

This Note will discuss various reasons for Tennessee to move toward a pure no-fault divorce system. Part II will discuss the historical developments leading to the current system; part III categorizes the three types of no-fault divorce used across the fifty states; part IV will address several common themes among fault proponents; part V focuses on the significance of religion in divorce laws; and part VI discusses several reasons for changing Tennessee's no-fault divorce statute.

## II. DIVORCE LAW'S HISTORICAL DEVELOPMENT

Divorce laws have changed over time to coincide with the evolution of marriage. Justice Kennedy's majority opinion in *Obergefell* recognized that marriage was not an unchanging institution but a reflection of societal values effectuated in the law.<sup>13</sup> Divorce laws have followed along this same path.

### A. DEVELOPMENT OF FAULT-BASED GROUNDS FOR DIVORCE

Divorce in the newly formed United States looked to English ecclesiastical courts for guiding precedent.<sup>14</sup> Similar to corporations, many pre-twentieth century divorces came

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<sup>11</sup> See TENN. CODE ANN. § 36-4-103(b) (West, WestlawNext current through end of the 2016 Second Regular and Second Extraordinary Sessions of the 109th Tennessee General Assembly).

<sup>12</sup> See *infra* note 103.

<sup>13</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>14</sup> Adiaen M. Morse Jr., Comment, *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 607 (1996).

through legislative acts.<sup>15</sup> This cumbersome system gave way to a statutorily created fault-based divorce. Courts relied on the concept of full-fault divorce to dissolve a marriage.<sup>16</sup> Full-fault's narrow proposition required an innocent spouse's proof that the other committed some marital misconduct to grant the divorce.<sup>17</sup> This process proved insufficient as time progressed, eventually giving rise to the concept of no-fault divorce.

The progression of fault-based divorce law exhibited a delayed reflection of societal view of morality. Initially, states recognized adultery as the only ground for absolute divorce.<sup>18</sup> States expanded fault-based grounds during the twentieth century to include variations of cruelty and abandonment.<sup>19</sup> Interestingly, New York held on to a narrow, antiquated, adultery-only definition of fault until 1966, causing director Woody Allen to quip, "while the Ten Commandments forbid adultery, New York demands it if you want a divorce."<sup>20</sup> Fault-based grounds for divorce sufficed throughout most of the twentieth century, but America's liberalization in the 1960s proved too much for these aging laws. California became the first state to implement a pure no-fault system.<sup>21</sup>

During the 1960s, the California legislature recognized that the fault-based paradigm failed to address the obvious—most divorces were actually uncontested dissolutions.<sup>22</sup> The pre-1970 system was fraught with divorces based on false claims of cruelty used to comply with the fault requirement.<sup>23</sup> California's current no-fault statute only permits divorce for

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<sup>15</sup> *Id.*

<sup>16</sup> Ira M. Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 722-24 (1997).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> See Bell, *supra* note 2, at 783-84.

<sup>20</sup> See Gabriella L. Zborovsky, Note, *Baby Steps to "Grown-Up" Divorce: The Introduction of the Collaborative Family Law Center and the Continued Need for True No-Fault Divorce in New York*, 10 CARDOZO J. CONFLICT RESOL. 305, 305 (2008).

<sup>21</sup> Family Law Act of 1969, ch. 1608, 1969 Cal. Stat. 3312, 3314-51; see Bell, *supra* note 2, at 784.

<sup>22</sup> Herma Kay, *An Appraisal of California's No-Fault Divorce Law*, 75 CAL. L. REV. 291, 297-98 (1987).

<sup>23</sup> *Id.* at 297.

irreconcilable differences,<sup>24</sup> and developed on the theory that fault-based divorce no longer served the public interest.<sup>25</sup>

## B. NO-FAULT DIVORCE GAINS TRACTION ACROSS THE UNITED STATES

No-fault divorce allowed parties to avoid many undesirable and all-too-common occurrences in full-fault divorce proceedings. Across the country, fault-based grounds caused collusion and deception between parties to provide courts with sufficient proof to meet statutory requirements.<sup>26</sup> Currently, all fifty states have adopted some form of no-fault divorce that avoids this charade.<sup>27</sup>

States have used no-fault divorce to provide a level of homeostasis between societal values and the law. Because values differ from state to state, divorce laws reflect the principle that states can and should differ. Despite some subtle differences, the basic reasoning behind no-fault divorce revolves around the following principles:

[T]o strengthen and preserve the integrity of marriage and safeguard family relationships; to promote the amicable settlement of disputes that have arisen between parties to a marriage; to mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage; to make reasonable provision for the spouse and minor children during and after litigation; and to make the law of legal dissolution of marriage effective for dealing with the realities of matrimonial experience by making irretrievable breakdown

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<sup>24</sup> CAL. FAM. CODE § 2310 (West, WestlawNext current with urgency legislation through Chapter 893 of 2016 Reg.Sess., Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot).

<sup>25</sup> Kay, *supra* note 22, at 299.

<sup>26</sup> Bell, *supra* note 2, at 784.

<sup>27</sup> See *infra* Part III.

of the marriage relationship the sole basis for its dissolution.<sup>28</sup>

Keeping with these principles, Tennessee, for example, now allows parties to plead irreconcilable differences or to claim to have lived apart continuously for a period of two years.<sup>29</sup> States can be placed into three distinct categories based on how the state allows parties to access no-fault grounds.

### III. NO-FAULT DIVORCE STATUTES AND THE CONSEQUENCES

States can experiment with new laws that reflect societal values and address specific needs. As a result, no-fault statutes took on different forms throughout the United States. Predictably, different beliefs emerged within the language of these laws. The following three categories demonstrate how states have diverged from the traditional fault-based paradigm.

#### A. NO-FAULT ALTERNATIVE IN LIMITED CIRCUMSTANCES

Rather than allow unfettered access to no-fault divorce, some states placed significant limitations on those grounds.<sup>30</sup> These limitations come in several different forms.<sup>31</sup> Some states

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<sup>28</sup> 24 GEORGE BLUM ET AL., AMERICAN JURISPRUDENCE § 2 No-fault divorce (2d ed. 2016).

<sup>29</sup> TENN. CODE ANN. §§ 36-4-101(14)-(15) (West, WestlawNext current through end of the 2016 Second Regular and Second Extraordinary Sessions of the 109th Tennessee General Assembly).

<sup>30</sup> See, e.g., GA. CODE ANN. § 19-5-3 (West, WestlawNext current with legislation passed during the 2016 Session of the Georgia General Assembly). Georgia law withholds any divorce on this ground be granted until at least 30 days after serving the respondent. See also HAW. REV. STAT. ANN. § 580-42 (West, WestlawNext current through Act 1 (End) of the 2016 Second Special Session, pending revision by the revisor of statutes).

<sup>31</sup> Compare N.Y. DOM. REL. LAW § 170 (Consol., LexisNexis current through 2016 released chapters 1-396), with GA. CODE ANN. § 19-5-3 (West, WestlawNext current with legislation passed during the 2016 Session of the Georgia General Assembly). Some no-fault statutes require complete agreement between the litigants on all ancillary issues, while other no-fault agreement requirements leverage litigants to avoid unnecessary appearances or time.

require significant waiting periods before entering a no-fault divorce decree.<sup>32</sup> In Arkansas, a couple must live apart for eighteen months to obtain a no-fault divorce.<sup>33</sup> Other states vary the waiting period depending on the no-fault ground.<sup>34</sup> New Jersey allows an agreed divorce based on irreconcilable differences after a six-month wait, while a less agreeable couple must live apart for eighteen months before divorce is granted.<sup>35</sup>

A number of states still require complete agreement as a prerequisite to no-fault grounds.<sup>36</sup> To avoid proving fault in

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<sup>32</sup> ARK. CODE ANN. § 9-12-301(c) (West, WestlawNext current through the end of the 2016 Second Extraordinary, 2016 Fiscal, and 2016 Third Extraordinary Sessions of the 90th Arkansas General Assembly, and include changes made by the Arkansas Code Revision Commission received through May 1, 2016).

<sup>33</sup> *Id.*

<sup>34</sup> See ARK. CODE ANN. § 9-12-301 (West, WestlawNext current through the end of the 2016 Second Extraordinary, 2016 Fiscal, and 2016 Third Extraordinary Sessions of the 90th Arkansas General Assembly, and include changes made by the Arkansas Code Revision Commission received through May 1, 2016); LA. CODE ANN. ART. 103.1 (West, WestlawNext current through the 2016 First Extraordinary, Regular, and Second Extraordinary Sessions, for all laws effective through December 31, 2016); N.J. STAT. ANN. § 2A:34-2 (West, WestlawNext current with laws effective through L.2016, c. 55 and J.R. No. 6); N.C. GEN. STAT. § 50-6 (West, WestlawNext current through Chapters 93, 95 to 101 of the 2016 Regular Session of the General Assembly, pending changes received from the Revisor of Statutes); S.C. CODE ANN. § 20-3-10 (West, WestlawNext current through the 2016 session, subject to technical revisions by the Code Commissioner as authorized by law before official publication); VT. STAT. ANN. tit. 15, § 551 (West, WestlawNext current through the laws of the Adjourned and Special Sessions of the 2015-2016 Vermont General Assembly (2016)); VA. CODE ANN. § 20-91 (West, WestlawNext Current through End of the 2016 Reg. Sess.). Virginia appears under both the waiting period group and the complete agreement group because the Old Dominion shortens the waiting period for those more agreeable litigants.

<sup>35</sup> N.J. Stat. Ann. § 2A:34-2 (West, WestlawNext current with laws effective through L.2016, c. 55 and J.R. No. 6). While New Jersey only requires the parties agree on the grounds to avoid the long wait, this could allow one party to leverage the other into a long wait, leaving child or spousal support issues unaddressed.

<sup>36</sup> See ALA. CODE § 30-2-1 (West, WestlawNext current through the end of the 2016 Regular Session and through Act 2016-485 of the

these states, parties must resolve all ancillary issues in advance.<sup>37</sup> Whether the couple has children, numerous property or business interests, or one party requires the support of the other, everyone must agree to a resolution to avoid having to prove fault. In most cases, including Tennessee, the divorcing couple submits the agreement with the petition for divorce.<sup>38</sup> Some states also subject the agreement to the court's scrutiny.<sup>39</sup>

These statutes limit access to no-fault grounds, increasing the likelihood that a divorce assumes an adversarial posture that will resurrect the historically defective "kangaroo" court procedures just to access the legal system and settle an ancillary issue. Before adopting pure no-fault divorce, it was estimated that at least ninety-five percent of California divorces were uncontested dissolutions where fault was usually unnecessary.<sup>40</sup> Funneling more litigants toward fault preserves many of the issues surrounding the traditional fault-based system.

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2016 First Special Session); ALASKA STAT. § 25-24-200 (West, WestlawNext current with Chapters 2-17, 19-24, 27, 33, 42-43, 52-53 and 55 from the 2016 2nd Reg. Sess. of the 29th Legislature); GA. CODE ANN. § 19-5-3 (West, WestlawNext current with legislation passed during the 2016 Session of the Georgia General Assembly) (requiring complete agreement to avoid an appearance); HAW. REV. STAT. ANN. § 580-42 (West, WestlawNext current through Act 1 (End) of the 2016 Second Special Session, pending revision by the revisor of statutes) (using agreements similarly to Georgia); MD. CODE ANN., FAM. LAW 7-103 (West, WestlawNext Current through all legislation from the 2016 Regular Session of the General Assembly); N.Y. DOM. REL. LAW § 170 (Consol., LexisNexis current through 2016 released chapters 1-396); VA. CODE ANN. § 20-91 (West, WestlawNext Current through End of the 2016 Reg. Sess.).

<sup>37</sup> See *e.g.*, TENN. CODE ANN. § 36-4-102 (West, Westlaw current through end of the 2016 Second Regular and Second Extraordinary Sessions of the 109th Tennessee General Assembly).

<sup>38</sup> *Id.*

<sup>39</sup> See, *e.g.*, ALASKA STAT. § 25-24-200 (West, WestlawNext current with Chapters 2-17, 19-24, 27, 33, 42-43, 52-53 and 55 from the 2016 2nd Reg. Sess. of the 29th Legislature). Alaska requires not only complete agreement but also that the agreement be "fair" as determined by the court.

<sup>40</sup> Kay, *supra* note 22, at 298.



First, the complete agreement requirement needlessly increases the costs involved in situations where the parties are already dividing assets.<sup>41</sup> Moving toward no-fault divorce has decreased costs associated with divorce.<sup>42</sup> The emotional toll affects everyone involved. Why should divorce statutes increase legal fees and other associated costs by requiring fault? These savings could be used to support children or provide mental health counseling, healthcare, and education. Lowering costs and providing more resources at the marriage's end may also avoid other costs associated with future litigation over changes in child or spousal support.

A state-by-state examination of divorce costs indicates that no-fault divorce could decrease divorce costs, even though the no-fault pioneer, California, maintains the highest divorce costs in the nation.<sup>43</sup> States atop the list had much higher hourly attorney fee rates and court filing fees.<sup>44</sup> While the state with the cheapest divorce costs, Wyoming, had the lowest filing fee and the second-lowest average for an attorney's hourly rate.<sup>45</sup> Increased costs were found in states with higher costs of living, such as California, Alaska, and New York.<sup>46</sup> Certainly, a wide range of factors can cause divorce costs to increase, including fault. States that take fault out of the divorce proceeding at least streamline the process, which helps both states with higher and lower hourly rates.

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<sup>41</sup> Erik V. Wicks, Comment, *Fault-Based Divorce "Reforms," Archaic Survivals, and Ancient Lessons*, 46 Wayne L. Rev. 1565, 1582 (2000) (citing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 146 (4th ed. 1992)).

<sup>42</sup> Cf. Twila L. Perry, *No-Fault Divorce and Liability Without Fault: Can Family Law Learn from Torts?*, 52 OHIO ST. L.J. 55, 69-70 (1991). This author posits that no-fault divorce has lowered some litigation costs.

<sup>43</sup> Elyssa Kirkham, *The Best and Worst States to Get a Low-Cost Divorce, Go Banking Rates* (Feb. 3, 2016), <https://www.gobankingrates.com/personal-finance/best-worst-states-low-cost-divorce/>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*; see also *America's Top States for Business 2016*, CNBC, <http://www.cnbc.com/2016/07/12/americas-top-states-for-business-2016-the-list-and-ranking.html> (last visited Dec. 8, 2016) (cost of living ranking).

Second, requiring complete agreement pressures an aggrieved party to compromise legal or economic outcomes to avoid the harsh realities of fault-based divorce. In short, these requirements provide leverage over weaker parties and could force a less desirable outcome.<sup>47</sup> As former President Bill Clinton taught us, human beings will go to great lengths to avoid the embarrassment of publicly airing sordid details of marital impropriety.<sup>48</sup>

Last, burdening the marital dissolution process with these agreements introduces the same danger that no-fault divorce was designed to cure. These onerous requirements force litigants, at least in some cases, to put on a fault-based farce to settle ancillary issues in court.<sup>49</sup> Placing unnecessary hurdles in the divorce gauntlet urges parties to lie and denigrate the entire legal system.

New York provides an excellent example of just how heinous fault-based divorce can become. The Empire State held on to tradition, retaining adultery as the only grounds for divorce until 1966.<sup>50</sup> Because widespread shenanigans were occurring during divorce proceedings, as early as 1945 the Committee on Law Reform of the City of New York advocated for reform in the legislature.<sup>51</sup> The legislature finally conceded in the 1960s and expanded the grounds for fault.<sup>52</sup> However, no-fault grounds were not allowed in New York until 2010.<sup>53</sup>

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<sup>47</sup> See Allen M. Parkman, *Why are Married Women Working So Hard?*, 18 INT'L REV. L. & ECON. 41 (1998). This article discusses how no-fault divorce has affected settlement negotiations by pushing parties toward equitable outcomes that place too little importance on domestic contribution.

<sup>48</sup> See Peter Baker & John F. Harris, *Clinton Admits to Lewinsky Relationship, Challenges Starr to End Personal 'Prying'*, WASHINGTON POST (August 18, 1998), <http://www.washingtonpost.com/wp-srv/politics/special/clinton/stories/clinton081898.htm>.

<sup>49</sup> See Kay, *supra* note 22, at 298; see also Sanford Katz, *Historical Perspective and Current Trends in the Legal Process of Divorce*, 4 FUTURE OF CHILDREN 1 (1994).

<sup>50</sup> Zborovsky, *supra* note 20, at 309.

<sup>51</sup> Katz, *supra* note 49, at 3.

<sup>52</sup> Zborovsky, *supra* note 20, at 309.

<sup>53</sup> Sophia Hollander, *Divorces Drag on Even After Reform*, THE WALL STREET JOURNAL (May 6, 2012), available at <http://www.wsj.com/articles/SB10001424052702304811304577368110112622548>.

Even then, New Yorkers were limited by an agreement requirement.<sup>54</sup> Some states have addressed the realities of fault-based divorce by loosening these restrictions.

#### B. UNRESTRICTED ACCESS TO NO-FAULT ALTERNATIVES

Not all divorces revolve around the elusive concept of identifiable marital misconduct. Even with all fifty states enacting no-fault divorce, some states place significant limitations on the use of those grounds.<sup>55</sup> Although reasonable minds can differ as to what qualifies as a significant limitation, nineteen states have both fault and no-fault grounds for divorce that allow litigants to use no-fault grounds without requiring complete agreement as to ancillary issues.<sup>56</sup> Dissolving a

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<sup>54</sup> See N.Y. DOM. REL. LAW § 170 (Consol., LexisNexis current through 2016 released chapters 1-396).

<sup>55</sup> See *e.g.*, LA. CODE ANN. ART. 103.1 (West, WestlawNext current through the 2016 First Extraordinary, Regular, and Second Extraordinary Sessions, for all laws effective through December 31, 2016). The Pelican State requires a waiting period of 180 days without minor children or 365 days with.

<sup>56</sup> See ARIZ. REV. STAT. ANN. § 25-312 (West, WestlawNext Current through the Second Regular Session of the Fifty-Second Legislature (2016)); CONN. GEN. STAT. § 46b-40 (West, WestlawNext current with enactments of the 2016 February Regular Session, the 2016 May Special Session, and the 2016 September Special Session.); IDAHO CODE § 32-603 (West, WestlawNext current through the 2016 Second Regular Session of the 63rd Idaho Legislature); IND. CODE § 31-15-2-3 (West, WestlawNext current with all legislation of the 2016 Second Regular Session of the 119th General Assembly); KAN. STAT. ANN. § 23-2701 (West, WestlawNext current through laws enacted during the 2016 Regular and Special Sessions of the Kansas Legislature); ME. STAT. TIT. 19-a, § 902 (West, WestlawNext Current with legislation through the 2015 Second Regular Session of the 127th Legislature. The Second Regular Session convened January 6, 2016 and adjourned sine die April 29th, 2016. The general effective date is July 29, 2016); MASS. GEN. LAWS CH. 208, § 1 (West, WestlawNext current through Chapter 298 of the 2016 2nd Annual Session); MISS. CODE ANN. § 93-5-2 (West, WestlawNext current through the End of the 2016 First and Second Extraordinary Sessions and the 2016 Regular Session); N.H. REV. STAT. ANN. § 458:7-a (West, WestlawNext current through Chapter 330 (End) of the 2016 Reg. Sess., not including changes and corrections made by the State of New Hampshire,

marriage in these states requires pleading only the no-fault grounds, complying with statutory requirements, and then, if needed, asking the court to decide unsettled issues inhibiting the final dissolution of the marriage.

States with mixed divorce grounds still retain traditional ideas of divorce, while also recognizing that no-fault grounds produce many advantages. These state statutes represent an intermediate step between the traditional full-fault systems and no-fault systems implemented in states taking a different approach to family law. Introducing no-fault divorce would allow parties to proceed without an understanding that some perjury will take place, permit the court to grant a divorce without contorting the law outside of legislative intent, and avoid committing the legal system to a charade that disrespects the entire litigation process.<sup>57</sup>

### C. PURE NO-FAULT DIVORCE

Unsatisfied with how a fault-based system addressed family law concerns, seventeen states have adopted a pure no-

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Office of Legislative Services); N.M. STAT. ANN. § 40-4-1 (West, WestlawNext current through the end of the Second Regular and Special Sessions of the 52nd Legislature (2016)); N.D. CENT. CODE § 14-04-03 (West, WestlawNext current through the 2016 Special Session of the 64th Legislative Assembly and measures passed in the June 14, 2016 election); OHIO REV. CODE ANN. § 3105.01 (West, WestlawNext current through File 124 of the 131st General Assembly (2015-2016)); OKLA. STAT. TIT. 43, § 101 (West, WestlawNext current through Chapter 395 (End) of the Second Session of the 55th Legislature (2016)); 23 PA. CONS. STAT. § 3301 (West, WestlawNext current through 2016 Regular Session Acts 1 to 109); S.D. CODIFIED LAWS § 25-4-2 (West, WestlawNext current through 2016 Session Laws and Supreme Court Rule 16-67); TEX. FAM. CODE ANN. § 6.001 (West, WestlawNext current through the end of the 2015 Regular Session of the 84th Legislature); UTAH CODE ANN. § 30-1-3 (West, WestlawNext current through 2016 Third Special Session); W. VA. CODE § 48-5-201 (West, WestlawNext current with legislation of the 2016 Regular Session, the 2016 First Extraordinary Session, and the 2016 Second Extraordinary Session).

<sup>57</sup> See Sanford N. Katz, *Historical Perspective and Current Trends in the Legal Process of Divorce*, 4 CHILDREN AND DIVORCE 1 (1994).

fault system.<sup>58</sup> The language may vary, but the statutes contain a consistent theme – divorce does not require proof of fault. As states have progressed toward this model, naysayers have forecast numerous scenarios that will upend society as we know it.<sup>59</sup> But pure no-fault models simply remove an

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<sup>58</sup> See CAL. FAM. CODE § 2310 (West, WestlawNext current with urgency legislation through Chapter 893 of 2016 Reg.Sess., Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot); COLO. REV. STAT. § 14-10-106 (West, WestlawNext current through the Second Regular Session of the 70th General Assembly (2016)); DEL. CODE ANN. TIT. 13, § 1505 (West, WestlawNext current through 80 Laws 2016, ch. 430); FLA. STAT. § 61.052 (West, WestlawNext current through the 2016 Second Regular Session of the Twenty-Fourth Legislature); 750 ILL. COMP. STAT. 5/401 (West, WestlawNext current through P.A. 99-904 of the 2016 Reg. Sess.); IOWA CODE § 598.17 (West, WestlawNext current with legislation from the 2016 Reg.Sess.); KY. REV. STAT. ANN. § 403.140 (West, WestlawNext current through the end of the 2016 regular session); MICH. COMP. LAWS § 552.6 (West, WestlawNext current through P.A.2016, No. 314 of the 2016 Regular Session, 98th Legislature); MINN. STAT. § 518.06 (West, WestlawNext current with legislation through the end of the 2016 Regular Session.); MO. REV. STAT. § 452.305 (West, WestlawNext current through the end of the 2016 Regular Session and Veto Session of the 98th General Assembly, pending changes received from the Revisor of Statutes. Constitution is current through the November 4, 2014 General Election.); MONT. CODE ANN. § 40-4-104 (West, WestlawNext current through the 2015 session); NEB. REV. STAT. § 42-353 (West, WestlawNext current through the end of the 104th 2nd Regular Session (2016)); NEV. REV. STAT. § 125.010 (West, WestlawNext current through the end of the 78th Regular Session (2015) and 29th Special Session (2015) of the Nevada Legislature and all technical corrections received by the Legislative Counsel Bureau); OR. REV. STAT. § 107.025 (West, WestlawNext current with 2016 Reg. Sess. legislation eff. through 7/1/16 and ballot measures on the 11/8/16 ballot, pending classification of undesignated material and text revision by the Oregon Reviser); WASH. REV. CODE § 26.09.030 (West, WestlawNext current with all laws from the 2016 Regular and First Special Sessions of the Washington legislature that take effect on or before July 1, 2016); WIS. STAT. § 767.315 (West, WestlawNext current through 2015 Act 392, published 4/27/2016); WYO. STAT. ANN. § 20-2-104 (West, WestlawNext current through the 2016 Budget Session).

<sup>59</sup> See e.g., Peter Nash Swisher, *Marriage and Some Troubling Issues with No-Fault Divorce*, 17 REGENT U. L. REV. 243 (2004-2005). This article

unnecessarily contentious aspect of divorce law. Most of these states use the terms “irretrievably broken” or “irreconcilable differences” for the legal ground. Parties may then settle a case by agreement or move forward with litigation or mediation to decide ancillary issues.

Pure no-fault does not leave parties without sufficient remedies, even when fault is the predominant factor in the divorce. For example, assume that a couple in a pure no-fault state marries, maintaining that relationship for ten years and has two children. Husband develops a prescription drug habit that eventually leads to the demise of this marriage. Wife decides the children should stay away from husband’s drug habit and files for divorce. No-fault grounds would not cloak the undesirable behavior of the husband. Rather, the court, or a mediator in some cases, would take his behavior into account when addressing child custody, property division, and alimony. A court could then adjudicate ancillary issues using the same equitable principles that the fault-based systems are supposed to be based on.<sup>60</sup>

Many litigants may avoid proof of fault altogether. Determining an equitable distribution is not an exact science. Parties may differ on the accounting methods used to determine business values,<sup>61</sup> or haggle over the type of alimony to be awarded.<sup>62</sup> Why should domestic relations laws force parties to show fault for the court to decide these issues? This appears a puzzling, unnecessary, and counterproductive requirement. Fault advocates have argued that no-fault allows litigants to skirt responsibility.<sup>63</sup> Other fault-based arguments focus on outlier cases with controversial outcomes to disparage the entire system.<sup>64</sup> These arguments against no-fault are

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attributes increased divorce rates to the adoption of no-fault divorce statutes.

<sup>60</sup> See Bell, *supra* note 2, at 793-94.

<sup>61</sup> See *e.g.*, Powell v. Powell, 124 S.W.3d 100 (Tenn. Ct. App. 2003).

<sup>62</sup> See *e.g.*, Gonszewski v. Gonszewski, 350 S.W.3d 99 (Tenn. 2011).

<sup>63</sup> Ellman, *supra* note 16, at 733. The author describes no-fault divorce as reflecting “amoral thinking.”

<sup>64</sup> See Swisher, *supra* note 59, at 254. The author uses *In re Koch*, 648 P.2d 406 (Or. Ct. App. 1982), as an example of no-fault removing needed remedies for injured parties. In *Koch*, the court held that a wife could not use her injuries from a physical altercation for the basis of a spousal support claim. The wife’s tort case against the

treated with more depth below. This back-and-forth does emphasize that in each system individual judges and attorneys will determine how efficiently and effectively the system works. No perfect system exists, but no-fault systems reflect reality and provide access to the judicial system that the fault-based system does not.

#### IV. NO-FAULT OPPONENTS BLAME THE SYSTEM FOR UNRELATED SOCIETAL TRENDS

The beauty and utility of American democracy lies in the struggle between liberal and conservative ideologies. Middle ground has moved this country forward at a pace that both respects our history and recognizes societal changes. Certainly this system has its faults,<sup>65</sup> and divorce laws are not immune to this struggle. The categories above demonstrate how states have implemented divorce laws that reflect divergent views of marriage. Since no-fault's inception in 1970, time has provided ammunition for both sides to take aim at the other. No-fault opponents rely on a narrow, dystopian view of the results in no-fault states to argue fault back into domestic relations law.

##### A. NO-FAULT DIVORCE AND THE INCREASE IN DIVORCE RATES

Ostensibly, divorce rates provide an elementary indicator of no-fault's allegedly adverse effect on society. While relevant, divorce numbers only provide a small piece of the entire puzzle. No-fault opponents argue that increased divorce rates are directly related to no-fault divorce statutes.<sup>66</sup>

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husband for the same injury was pending at the time of the divorce decree.

<sup>65</sup> See, e.g., Eric Warner, *Gridlock in Congress may Presage More of the Same to Come*, WASHINGTON POST (Sept. 29, 2016), [https://www.washingtonpost.com/business/congress-clears-stopgap-spending-bill-11b-to-fight-zika/2016/09/28/d233ab98-85e8-11e6-b57d-dd49277af02f\\_story.html](https://www.washingtonpost.com/business/congress-clears-stopgap-spending-bill-11b-to-fight-zika/2016/09/28/d233ab98-85e8-11e6-b57d-dd49277af02f_story.html).

<sup>66</sup> Michael McManus, *Confronting the More Entrenched Foe: The Disaster of No-Fault Divorce and Its Legacy of Cohabitation*, THE FAMILY

Overwhelmingly, the increase in the 1970s provides the basis for this assertion.<sup>67</sup> This ignores a much longer trend—divorce rates in America have been steadily rising since the 1860s.<sup>68</sup> One might quickly correlate these increases to expansions in fault and the development of no-fault divorce. But no-fault divorce has only become more prolific since the 1970s.<sup>69</sup> In Tennessee for example, divorce rates have leveled off and even declined during that period.<sup>70</sup>

Arguments based on divorce rates ignore numerous other aspects that affect those numbers. If reducing divorce numbers were as simple as making divorce more difficult, as fault-based divorce certainly does, then barring divorce altogether presumably would lower the rate to zero. As recently as 1997, Ireland amended its constitution to permit divorce for the first time in over 50 years.<sup>71</sup> The same arguments no-fault detractors use were made in opposition to the constitutional amendment permitting the Irish to obtain a divorce.<sup>72</sup> As the

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IN AMERICA (Spring 2011),  
<http://familyinamerica.org/files/9913/8757/6279/FIA.Spring11.McManus.pdf>.

<sup>67</sup> See Swisher, *supra* note 59, at 243-44.

<sup>68</sup> See 100 YEARS OF MARRIAGE AND DIVORCE STATISTICS, 1973,  
[https://www.cdc.gov/nchs/data/series/sr\\_21/sr21\\_024.pdf](https://www.cdc.gov/nchs/data/series/sr_21/sr21_024.pdf).

<sup>69</sup> N.Y. DOM. REL. LAW § 170 (Consol., LexisNexis current through 2016 released chapters 1-396). Even the most stringent holdouts adopted no-fault grounds, providing some no-fault access in all 50 states.

<sup>70</sup> Compare TENN. DEP'T. OF HEALTH, NUMBER OF MARRIAGES AND DIVORCES WITH RATES PER 1,000 POPULATION BY COUNTY, TENNESSEE RECORDED DATA, 2009, [https://www.tn.gov/assets/entities/health/attachments/TN\\_Marriages\\_Divorces\\_-\\_2009.pdf](https://www.tn.gov/assets/entities/health/attachments/TN_Marriages_Divorces_-_2009.pdf), with TENN. DEP'T. OF HEALTH, NUMBER OF MARRIAGES AND DIVORCES WITH RATES PER 1,000 POPULATION BY COUNTY, TENNESSEE RECORDED DATA, 2014, [https://www.tn.gov/assets/entities/health/attachments/TN\\_Marriages\\_Divorces\\_-\\_2014.pdf](https://www.tn.gov/assets/entities/health/attachments/TN_Marriages_Divorces_-_2014.pdf); see also note 81, *infra*.

<sup>71</sup> James F. Clarity, *Before Date of New Law, Ireland Grants First Divorce*, N. Y. TIMES (Jan. 18 1997),  
<http://www.nytimes.com/1997/01/18/world/before-date-of-new-law-ireland-grants-first-divorce.html>.

<sup>72</sup> Kate Holmquist, *Divorce, Irish Style*, THE IRISH TIMES (Jan. 17, 2015),  
<http://www.irishtimes.com/life-and-style/divorce-irish-style-1.2068656>.



Irish realized, addressing family law issues requires more nuance than a simple prohibition.<sup>73</sup>

Wealth and education affect divorce numbers across the country more than fault-based divorce statutes. Divorce rates are obviously tied to marriage rates. Socioeconomic status and education affect both marriage and divorce far more than no-fault opponents give credence.<sup>74</sup> A Pew Research study in 2009 found that education levels correlated with both marriage rates<sup>75</sup> and the average age at which people marry.<sup>76</sup> Although the Pew study found no direct correlation between socioeconomic status and divorce, socioeconomic status and education affected the average marriage age, and age did show a correlation to divorce rates.<sup>77</sup> This demonstrates only one factor affecting divorce rates, while many other factors, including religious affiliation,<sup>78</sup> foreign military engagements,<sup>79</sup> and economic recessions also affect divorce.<sup>80</sup> Presuming that people will suddenly abandon a personal relationship or, conversely, stay in a relationship based on a state's legal requirements ignores too many realities.

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<sup>73</sup> *Id.*

<sup>74</sup> See Social and Demographic Trends, *The States of Marriage and Divorce*, PEW RESEARCH CENTER (Oct. 15, 2009)

<http://www.pewsocialtrends.org/2009/10/15the-states-of-marriage-and-divorce/>.

<sup>75</sup> *Id.*

<sup>76</sup> UNITED STATES BUREAU OF LABOR STATISTICS, MARRIAGE AND DIVORCE: PATTERNS BY GENDER, RACE, AND EDUCATIONAL ATTAINMENT (2013),

<http://www.bls.gov/opub/mlr/2013/article/marriage-and-divorce-patterns-by-gender-race-and-educational-attainment-1.htm>.

<sup>77</sup> See Social and Demographic Trends, *supra* note 74.

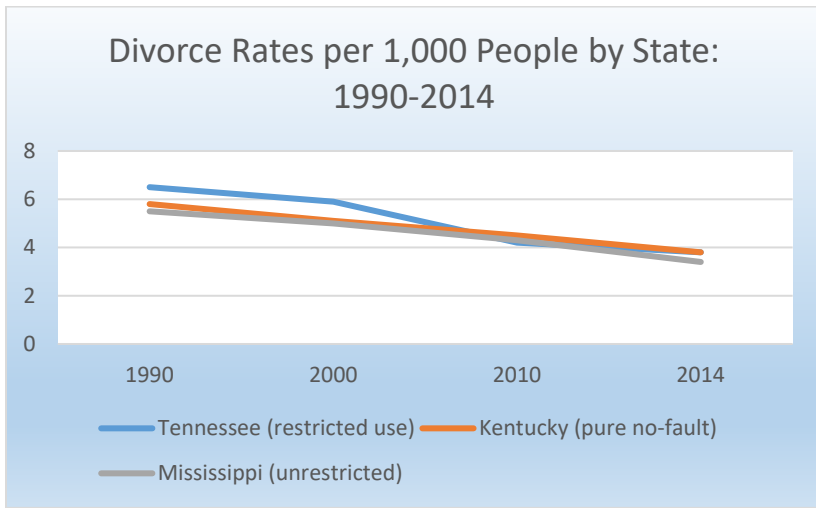
<sup>78</sup> See *infra* Part V.

<sup>79</sup> See NATIONAL CENTER FOR HEALTH STATISTICS, 100 YEARS OF MARRIAGE AND DIVORCE STATISTICS, UNITED STATES, 1867 - 1967, *supra* note 68. Divorce rates rose around the time of the Second World War.

<sup>80</sup> D'Vera Cohn, *Divorce and the Great Recession*, PEW RESEARCH CENTER (May 2, 2012),

<http://www.pewsocialtrends.org/2012/05/02/divorce-and-the-great-recession/>. This study found a correlation between foreclosure and divorce rates but not between unemployment increase and divorce rates.

Over the past twenty-five years, divorce rates have decreased in both no-fault and fault-based states.<sup>81</sup> The chart below shows these trends using states that are close geographically and have no-fault divorce statutes from each category. Despite the three different approaches, divorce rates have followed the same trend – a decline.<sup>82</sup> Kentucky’s pure no-fault approach has at most a negligible impact on divorce rates. These numbers do not corroborate the argument that no-fault divorce equals increased divorce.



## B. NO-FAULT DIVORCE FAILS TO PROVIDE SUFFICIENT REMEDIES

Another argument against no-fault divorce is that eliminating fault causes outcomes that fail to provide for aggrieved parties.<sup>83</sup> No-fault opponents have argued that victims of poor marital behavior lack any real recourse when fault does not play a significant role in divorce.<sup>84</sup> Even then,

<sup>81</sup> See CENTERS FOR DISEASE CONTROL AND PREVENTION, DIVORCE RATES BY STATE: 1990, 1995, AND 1999-2014, [https://www.cdc.gov/nchs/data/dvs/state\\_divorce\\_rates\\_90\\_95\\_and\\_99-14.pdf](https://www.cdc.gov/nchs/data/dvs/state_divorce_rates_90_95_and_99-14.pdf) (last visited Dec. 8, 2016).

<sup>82</sup> *Id.*

<sup>83</sup> Swisher, *supra* note 59, at 254.

<sup>84</sup> *Id.*

fault advocates have still suggested tort and criminal law may provide sufficient remedies.<sup>85</sup>

No-fault divorce does not leave victims out in the cold, and these other areas of law are better suited to remedy particular types of marital misconduct. Criminal law reflects society's social norms for expected human behavior.<sup>86</sup> This essential area of the law provides an efficient platform for society to set moral expectations that place limitations in various arenas when undesirable conduct occurs.<sup>87</sup> Physical spousal abuse, behavior unquestionably in violation of society's social norms, could and should be addressed for the most part in the criminal context. Moreover, defendants in criminal procedures receive greater protections, including proof beyond a reasonable doubt, the right to counsel, right to confront witnesses, and the right to a jury.

In the civil context, tort law provides compensatory remedies outside of marriage dissolution. The evolution of interspousal immunity allowed aggrieved parties access to these tort remedies in a variety of situations.<sup>88</sup> Tort law provides time-proven methods to calculate damages, while retaining limits on claims too stale for remedy.<sup>89</sup> The principles underpinning support and alimony laws were designed based on an entirely different idea – equity.<sup>90</sup> Alimony in Tennessee, for instance, focuses on the ability of the spouse seeking the award to live post-divorce, the other spouse's ability to pay the award, and several other equitable factors.<sup>91</sup> In contrast, tort remedies focus simply on the wrongful conduct and the

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<sup>85</sup> See *id.*

<sup>86</sup> Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1488 (2016).

<sup>87</sup> See *id.*

<sup>88</sup> See *e.g.*, *Davis v. Davis*, 657 S.W.2d 753 (Tenn. 1983) (holding interspousal tort immunity is totally abolished in Tennessee); see also Michelle L. Evans, *Wrongs Committed During a Marriage: The Child that No Area of the Law Wants to Adopt*, 66 WASH. & LEE L. REV. 466 (2009).

<sup>89</sup> PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 1-2 (AM. LAW INST. 2016).

<sup>90</sup> *Id.*

<sup>91</sup> See, *e.g.*, *Aaron v. Aaron*, 909 S.W.2d 408 (Tenn. 1995).

damage flowing from that conduct.<sup>92</sup> While similar policy considerations may play a part in torts and domestic relations law, the two are fundamentally different.

Divorce should focus on what it was designed to do—dissolve a legal relationship. If the relationship is no longer viable, i.e. irretrievably broken, then the court should only require proof that the relationship is in fact broken and leave the “why” for a possible factor for determining equitable allocation of property, ordering support, or determining child custody. The particulars as to the extent of damage caused or the need for punishment to deter future incidences are better left to criminal or tort law. Introducing these ideas into marriage dissolution bogs down the process and confuses law and equity. This could possibly cause important aspects of marriage dissolution to be resolved inefficiently or in a manner which cannot adequately address or deter undesirable conduct. Simply put: A fault-based divorce is counterproductive.

### C. NO-FAULT AVOIDS RESPONSIBILITY

Marriage symbolizes a certain amount of commitment within a relationship. With commitment comes responsibility. Some no-fault critics have contended the absence of fault not only allows parties to avoid moral responsibilities, but also allows certain behavior outside the contractual bonds of marriage to go unpunished.<sup>93</sup> Conservative scholars have argued that catastrophic consequences will result from the ubiquity of divorce, even causing a decline in birth rates.<sup>94</sup> To

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<sup>92</sup> See, e.g., *Rogers v. Louisville Land Co.*, 367 S.W.3d 196 (Tenn. 2012).

<sup>93</sup> Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 871 (June 1994). The authors argue that changes in divorce law have rendered the marriage contract illusory.

<sup>94</sup> See *id.* Brinig and Crafton discuss the decreasing birth rate when marriage morphs into a long date. See Scott Drewianka, *Divorce Law and Family Formation*, 21 J. POPULATION ECON. 484 (2006). Dr. Drewianka’s article examines several studies that contend no-fault divorce significantly contributed to the decline, and posits that no-fault divorce had minimal effect on family structure.

steal a line from the rock band R.E.M., under no fault- divorce “it’s the end of the world as we know it.”<sup>95</sup>

Chaining responsibility to fault is counterintuitive. Child support is an established responsibility in which fault need not play a role. Courts impose obligations that encourage responsibility outside of marital relationships in every jurisdiction. The traditionalist view of divorce holds fast to the fault system to preserve the moral leverage interjected by fault into divorce proceedings. Traditionalists use complete agreements to impose that same leverage to a lesser degree. Some have argued that alimony without fault has no teeth.<sup>96</sup> Yet, alimony statutes, such as Tennessee’s, consider a totality of circumstances in each divorce with or without unscrupulous behavior.<sup>97</sup> Removing fault does not render the marital contract illusory, nor does it allow irresponsible behavior to proliferate.

Removing the impediments to no-fault grounds in mixed states would allow parties to access an equitable system for settling disputes. Unnecessary requirements force parties into a fault-based paradigm that expands costs and increases public humiliation. Forcing fault, by requiring complete agreement or imposing long waits, possibly allows irresponsible behavior to go unaddressed. At minimum, litigants should have the no-fault option without coming to an agreement. Imposing substantial conditions on no-fault grounds is a thinly-veiled attempt to keep old fault-based notions of divorce, rather than preventing some injustice.

#### V. DECLINING RELIGIOUS AFFILIATION AFFECTS SOCIETAL VIEWS ON MARRIAGE AND DIVORCE

Marriage certainly has roots that run deep into human history.<sup>98</sup> The Supreme Court has recognized that “[m]arriage

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<sup>95</sup> R.E.M., *It’s the End of the World as We Know It (And I Feel Fine)*, on DOCUMENT (I.R.S. 1987).

<sup>96</sup> See Brinig, *supra* note 93, at 877-78.

<sup>97</sup> See, e.g., Gonsewki, *supra* note 62.

<sup>98</sup> See Robert S. Walker, ET AL., *Evolutionary History of Hunter-Gatherer Marriage Practices*, PLOS ONE (April 25, 2011), <https://pantherfile.uwm.edu/sdrewian/www/DivorceLawAndFamilyFormation.pdf>.

is sacred to those who live by their religions.”<sup>99</sup> For much of America’s history, an overwhelming majority of the population identified with one faith or another.<sup>100</sup> Although our First Amendment authors recognized the need for separation between government and religion,<sup>101</sup> moral values based on religious beliefs have been manifest through our governing laws.<sup>102</sup> Laws governing marriage and marriage dissolution should continue that process and reflect current societal change. A declining emphasis on religious affiliation could signal the next step for domestic relations law.

#### A. STUDIES SHOW A DECLINE IN RELIGIOUS AFFILIATION

Religious belief and practice appears to be in decline across the board, and in steep decline among younger generations. A recent study from the Pew Research Center reveals a decline in religious affiliation across the United States.<sup>103</sup> A survey of more than 35,000 adults found that those who say they believe in God has declined in recent years.<sup>104</sup> This decline did not come from older adults, but overwhelmingly from millennials.<sup>105</sup> Many of those millennials simply chose not

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<sup>99</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015).

<sup>100</sup> See e.g., LIBRARY OF CONGRESS, *Religion and the Founding of the American Republic* (last visited Sept. 5, 2016), <https://www.loc.gov/exhibits/religion/index.html>; see also PEW RESEARCH CENTER, *Regional Distribution of Christians* (Dec. 19, 2011), <http://www.pewforum.org/2011/12/19/global-christianity-regions/>.

<sup>101</sup> See U.S. CONST. amend. I.

<sup>102</sup> See e.g., TENN. CONST. art. IX, § 2. Article IX, section 2 declares that “no person who denies the being of God, or a future state of rewards and punishments, shall hold any office in the civil department of this State.” See also *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding that a Texas law banning homosexual intimate contact was unconstitutional).

<sup>103</sup> PEW RESEARCH CENTER, *U.S. Public Becoming Less Religious: Modest Drop in Overall Rates of Belief and Practice, but Religious Affiliated Americans Are as Observant as Before* (Nov. 3, 2015), <http://www.pewforum.org/2015/11/03/u-s-public-becoming-less-religious/>.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

to identify with religion at all.<sup>106</sup> The percentage of adults who were religiously unaffiliated rose sharply, with many respondents claiming to have no belief in God whatsoever (referred to in the study as “nones”).<sup>107</sup> Specifically, seven in ten millennials say that religion has little to no importance in their life.<sup>108</sup>

Tennessee adults who identified as a “none” made up fourteen percent of the total number.<sup>109</sup> This study noted a significant decline in religious affiliation between 2007 and 2014.<sup>110</sup> Interestingly, Pew’s research found that adults in the Volunteer State feel substantially more at peace than in the 2007 study.<sup>111</sup> These trends mirror those in Kentucky, where no-fault divorce has persisted for decades.<sup>112</sup> In fact, downward trends in religious affiliation were found across the southeastern United States.<sup>113</sup>

Recent Gallup numbers show that religious affiliation has been on a steady decline for several decades.<sup>114</sup> The number of people that have no religious affiliation has grown nearly

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> PEW RESEARCH CENTER, *Adults in Tennessee* (Nov. 3, 2015), <http://www.pewforum.org/religious-landscape-study/state/tennessee/>.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> PEW RESEARCH CENTER, *Adult in Kentucky* (Nov. 3, 2015), <http://www.pewforum.org/religious-landscape-study/state/kentucky/>.

<sup>113</sup> See PEW RESEARCH CENTER, *Adult in Alabama* (Nov. 3, 2015), <http://www.pewforum.org/religious-landscape-study/state/alabama/>; see also PEW RESEARCH CENTER, *Adult in Arkansas* (Nov. 3, 2015), <http://www.pewforum.org/religious-landscape-study/state/arkansas/>; see also PEW RESEARCH CENTER, *Adult in Mississippi* (Nov. 3, 2015), <http://www.pewforum.org/religious-landscape-study/state/mississippi/>; see also PEW RESEARCH CENTER, *Adult in Georgia* (Nov. 3, 2015), <http://www.pewforum.org/religious-landscape-study/state/gerogia/>.

<sup>114</sup> GALLUP, *Religion: What is your religious preference – protestant, Roman Catholic, another religion, or no religion?*. (last visited Sept. 5, 2016), <http://www.gallup.com/poll/1690/religion.aspx>. This poll shows the rise of the “nones” over several decades.

tenfold over the six decades covered in this survey.<sup>115</sup> These numbers show that Americans are placing less and less emphasis on religious beliefs. As younger generations of Americans replace baby boomer populations, the percentage of Americans who see the law through the lens of religious teachings may fall substantially from where it is now. Looking forward, a move toward less religion-based morality in domestic relations law may align the law with the values of the most affected population. Domestic relations law has followed religious affiliation in the past. Why not now?

#### B. MARRIAGE IS INEXTRICABLY LINKED WITH RELIGION

American marriage finds its historical underpinnings intertwined with religion. In religious context, the reverence given the marital bond dates back to the book of Genesis, where the Bible says “shall a man leave his father and his mother, and shall cleave unto his wife: and they shall become one flesh.”<sup>116</sup> Islam also reveres the bond of marriage, encouraging followers to marry in order to garner the favor of Allah.<sup>117</sup> Judaism defines how a woman is “acquired” as either with money, contract, or sexual intercourse.<sup>118</sup> All of the above, despite subtle differences, refer to a relational bond between persons. The law gives legal recognition to that relationship.

The progression of domestic relations law has tracked America’s religious beliefs. Courts could not break the bond of marriage in nineteenth century England.<sup>119</sup> Divorce law has progressed and established divorce, expanded fault grounds, and then developed no-fault grounds.<sup>120</sup> The decrease in religious affiliation seems to accompany, at least in some degree, that trend. That is not to say that the decline in religious affiliation tells the whole story of increased divorce rates. It does not.<sup>121</sup> But the correlation between marriage and religion

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<sup>115</sup> *Id.*

<sup>116</sup> *Genesis* 2:22-24 (King James).

<sup>117</sup> *Surah* 24:32.

<sup>118</sup> *Mishnah Kiddushin* 1:1.

<sup>119</sup> Bell, *supra* note 2, at 782.

<sup>120</sup> See *supra* Part II.

<sup>121</sup> See *supra* Part IV.



is undeniable, and, as some conservatives might argue, necessary to preserve the institution.

Divorce laws reflect the link between society's concept of marriage and religion. A quick survey comparing states populating the Bible belt with more liberal states on the West Coast reveals the philosophical dichotomy of marriage.<sup>122</sup> States in the Bible belt have higher religious affiliation than states that began the no-fault divorce trend on the west coast.<sup>123</sup> This also explains why New York, with its large Catholic population, has resisted the development of no-fault divorce.<sup>124</sup> With religious affiliation on the decline, even in the Bible belt, fault-based divorce should follow suit.

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<sup>122</sup> Compare ALA. CODE § 30-2-1 (West, WestlawNext Current through the end of the 2016 Regular Session and through Act 2016-485 of the 2016 First Special Session), and GA. CODE ANN. § 19-5-3 (West, WestlawNext current with legislation passed during the 2016 Session of the Georgia General Assembly), and TENN. CODE ANN. § 36-4-102 (West, WestlawNext Current through end of the 2016 Second Regular and Second Extraordinary Sessions of the 109th Tennessee General Assembly), with CAL. FAM. CODE § 2310 (West, WestlawNext current with urgency legislation through Chapter 893 of 2016 Reg.Sess., Ch. 8 of 2015-2016 2nd Ex.Sess., and all propositions on 2016 ballot), and COLO. REV. STAT. § 14-10-106 (West, WestlawNext current through the Second Regular Session of the 70th General Assembly (2016)), and OR. REV. STAT. § 107.025 (West, WestlawNext current with 2016 Reg. Sess. legislation eff. through 7/1/16 and ballot measures on the 11/8/16 ballot, pending classification of undesignated material and text revision by the Oregon Reviser). Bible belt states hold fast to fault-based divorce by restricting access to no-fault grounds in attempt to limit the divorce numbers. California, Colorado and Oregon have discarded fault altogether, focusing resources on other family law related issues.

<sup>123</sup> Compare PEW RESEARCH CENTER, *Adult in Oregon* (Nov. 3, 2015), <http://www.pewforum.org/religious-landscape-study/state/oregon/>; with PEW RESEARCH CENTER, *Adult in Tennessee* (Nov. 3, 2015), <http://www.pewforum.org/religious-landscape-study/state/tennessee/>. Thirty-one percent of the Beaver state's adults do not affiliate with any religion. Compare that with eighteen percent in Tennessee.

<sup>124</sup> See Zborovsky, *supra* note 20.

### C. SOCIETAL CHANGES URGE DIVORCE LAW REFORM

Legal divorce, expanded fault grounds, and no-fault divorce have all correlated with changes in society.<sup>125</sup> Divorce laws should undergo legislative scrutiny as these changes occur. A liberal movement preceded no-fault laws in states like California, Oregon, and Colorado without catastrophic consequences.<sup>126</sup> Kentucky, a state not necessarily known for its progressive values, adopted a pure no-fault model in 1972.<sup>127</sup> The no-fault model in Kentucky has not significantly increased the divorce rate.<sup>128</sup> Other changes were afoot across the United States that affected those rising numbers.

The late 1960s and 1970s brought about a political revolution that was reflected first in divorce statistics and then the law.<sup>129</sup> A shift toward personal autonomy contributed to legislatures reforming divorce laws.<sup>130</sup> The civil rights movement, women's liberation campaign, and the beginning of the LGBT movement all represented a shift in American politics.<sup>131</sup> Combined with an emotional antiwar movement, the 1960s pushed some American laws to the left, discarding several traditionalist values entrenched for over 100 years.<sup>132</sup>

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<sup>125</sup> See *supra* Part IV.

<sup>126</sup> See, e.g., Kay, *supra* note 22.

<sup>127</sup> See KY. REV. STAT. ANN. § 403.140 (West, WestlawNext current through the end of the 2016 regular session).

<sup>128</sup> See KENTUCKY MARRIAGE MOVEMENT, *Marriage & Divorce Rates by County* (last visited Jul. 20, 2016), <http://www.kentuckymarriage.org/marriage-in-kentucky/marriage-divorce-rates-by-county/>; see CENTERS FOR DISEASE CONTROL AND PREVENTION, *DIVORCE RATES BY STATE: 1990, 1995, AND 1999-2014*, *supra* note 77.

<sup>129</sup> See Perry, *supra* note 42, at 62.

<sup>130</sup> *Id.*

<sup>131</sup> See e.g. STUDENTS FOR A DEMOCRATIC SOCIETY, PORT HURON STATEMENT (1962), *reprinted in* Radical Reader 468 (Timothy McCarthy & John McMillan eds. 2003). The Port Huron Statement embodied the discontent of a younger generation with oppressive civil rights. See e.g., BETTY FRIEDAN, *THE FEMININE MYSTIQUE* (1963) *reprinted in* Radical Reader 468 (Timothy McCarthy & John McMillan eds. 2003). Friedan discusses the importance of femininity, and points out the oppressive mores in American society.

<sup>132</sup> See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241; see also Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; see also

Political changes sculpted a new social landscape across America, including no-fault divorce. More recently, millennials have signaled conservative values that rose to prominence over the past few decades are held in low regard now.<sup>133</sup>

Lawmakers should heed this current evolution, and reflect modern societal realities in divorce laws. As was the case in the 1960s, younger generations come of age with different values than their predecessors. Laws written generations ago are ill-fitted to serve the population now living under them.<sup>134</sup> States could avoid this unnecessary friction by reevaluating laws that no longer represent the governed, and that do not address some societal ill. Declining religious affiliation, particularly among millennials, tasks lawmakers with taking a second look at restrictive divorce laws that have roots in religious beliefs. Liberal movements of the 1960s and 70s spurred no-fault statutes around the country, and the time is ripe for conservative states to discard the leftovers of yesteryear. Lawmakers should reevaluate divorce laws to determine the necessity of complete agreement requirements and extended waiting periods. In the spirit of providing access to the courts to amicably resolve disputes, states should just move to a pure no-fault divorce altogether.

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Roe v. Wade, 410 U.S. 113 (1973). Both legislative enactments and the *Roe* opinion provide prominent examples of society departing from what were once thought unshakeable traditional values.

<sup>133</sup> PEW RESEARCH CENTER, *The GOP's Millennial Problem Runs Deep* (Sept. 25, 2014), <http://www.pewresearch.org/fact-tank/2014/09/25/the-gops-millennial-problem-runs-deep/>. This study shows just how socially liberal millennials are, while baby boomers are progressively more conservative as age increases.

<sup>134</sup> See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015). The legalization of gay marriage represents one example of societal values changing the law. See also Colo. Const. art. 18, § 16. Coloradans amended their state constitution in 2012 to allow the legal possession and marketing of marijuana, joining Washington in decriminalizing and regulating a substance society, especially the younger demographic, saw as an acceptable personal choice.

## VI. TENNESSEE SHOULD MOVE TOWARD PURE NO-FAULT DIVORCE

Henry Drummond, depicting the part of attorney Clarence Darrow in *Inherit the Wind*, a movie based on Dayton, Tennessee's Scopes Monkey Trial, declared to the court that "a wicked law, like cholera, destroys everyone it touches. Its upholders as well as its defiers."<sup>135</sup> Granted, Tennessee's restrictive no-fault statute does not qualify as a wicked law. But even laws noble at inception can produce perverse consequences. The adverse effect of this law harms the very people whom proponents of religious-based restrictions sought to protect.

### A. TENNESSEE KEEPS COSTS UP AND ACCESS DOWN

Lessening the no-fault burden would improve access to Tennessee courts. The Volunteer State can ill-afford to force its citizens to waste economic resources. Tennessee ranks in the bottom quintile of states with the most people living in poverty.<sup>136</sup> With contested divorce costs running in the thousands of dollars,<sup>137</sup> those below the poverty line, along with most middle class families, can easily be financially wiped out after a contentious divorce proceeding. Tennessee already holds the distinction for the highest bankruptcy rate.<sup>138</sup> Like any

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<sup>135</sup> INHERIT THE WIND (United Artists 1960).

<sup>136</sup> UNITED STATES DEPARTMENT OF AGRICULTURE, PERCENT OF TOTAL POPULATION IN POVERTY, 2014 (2016), [http://www.ers.usda.gov/data-products/county-level-data-sets/poverty.aspx#P345c97c54e8c48339ab8327ebfca5161\\_2\\_233iT3](http://www.ers.usda.gov/data-products/county-level-data-sets/poverty.aspx#P345c97c54e8c48339ab8327ebfca5161_2_233iT3). This government survey found over 18% of Tennessee's population live below the poverty line and over 25% of Tennessee children ages 0-17 live below the poverty line.

<sup>137</sup> This estimate was based on a \$250.00 hourly rate, which is considered the national average for a divorce attorney. See Kathleen Michon, *How Much Will My Divorce Cost and How Long Will it Take?*, NOLO (Sept. 5, 2016), <http://www.nolo.com/legal-encyclopedia/ctp/cost-of-divorce.html>.

<sup>138</sup> Dave Flessner, *Tennessee Still Leads Nation in Bankruptcies*, CHATTANOOGA TIMES FREE PRESS (Jan. 10, 2016), <http://www.timesfreepress.com/news/business/aroundregion/story/2016/jan/10/tennessee-still-leads-nation->

state, Tennessee's poor have fewer property assets. But the poor typically have more of one common point of emphasis in divorce proceedings—children.<sup>139</sup> Tennessee's family law should focus on providing for these children or, at least, avoid harming them by squandering precious economic resources on fault-based divorce. Onerous agreement requirements may force lower income litigants into inequitable agreements that fail to address the best interest of affected parties, namely children.<sup>140</sup> Equity and best interest aside, directing more people toward fault-based divorce via agreement requirements may cause other poor results.

Moving toward pure no-fault divorce would shift some undesirable behavioral issues into criminal and tort forums better suited to provide sufficient outcomes. Tennesseans injured by conduct actionable in tort who are forced to litigate under a fault-based family law proceeding may preclude future litigation of the same conduct in a forum better situated to provide a remedy.<sup>141</sup> Facts used in divorce proceedings to show fault may not address all the damage that occurred due to the equitable nature of divorce. With particularly egregious behavior, criminal or not, *res judicata* may prevent an injured plaintiff from seeking compensation for non-pecuniary harms or forgo a punitive damages award.<sup>142</sup>

These regrettable outcomes may arise more often in communities with stronger ties to religious ideologies that are resistant to no-fault divorce. Ironically, a recent study in the

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bankruptcies/343890/. In 2015, Tennessee ranked number one in bankruptcy filings for the 6th consecutive year.

<sup>139</sup> Yang Jiang, ET AL., *Basic Facts About Low Income Children*, NATIONAL CENTER FOR CHILDREN IN POVERTY, (Feb. 2016) [http://www.nccp.org/publications/pdf/text\\_1145.pdf](http://www.nccp.org/publications/pdf/text_1145.pdf). Children comprise twenty-three percent of the total population but thirty-two percent of all people in poverty, signaling a higher ratio of children among those in poverty.

<sup>140</sup> Cf. Parkman, *supra* note 43, at 42. This author discusses the changing landscape of divorce negotiation after no-fault divorce.

<sup>141</sup> See *Kemp v. Kemp*, 723 S.W.2d 138 (Tenn. Ct. App. 1987). In *Kemp*, the court held that the doctrine of *res judicata* prevented her suit against her husband for assault and battery because her divorce award was based on the same facts.

<sup>142</sup> See *id.*; see also Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 305 (1997).

*American Journal of Sociology* found the best indicator for increased divorce by county was the concentration of evangelicals or conservatives in that county.<sup>143</sup> To wit, restrictions based on conservative religious beliefs disproportionately affect the people who support no-fault divorce opponents. This same study identified that low income and lower educational attainment were directly related to higher incidences of divorce—both were common characteristics found in southern, conservative communities.<sup>144</sup> Moreover, communities that increasingly encouraged abstinence until marriage sustained higher incidences of divorce.<sup>145</sup> Rural communities – typically poorer and steadfast in their faith – deserve better.

#### B. TENNESSEE COURTS CONFUSE THE ISSUE

The complete agreement requirement has such little relevance to actually dissolving the marriage that Tennessee courts have confused the issue.<sup>146</sup> In 1995, the Tennessee Supreme Court reversed a decision that held that a wife had substantially contributed to property owned by her husband before the marriage.<sup>147</sup> The *Harrison* court held that the real property in dispute was not marital property and that the wife was not entitled to share in the value.<sup>148</sup> The majority opinion glossed over the ground for this divorce—irreconcilable differences.<sup>149</sup> Tennessee’s complete agreement requirements predates the decision in *Harrison*,<sup>150</sup> and shows just how much sense this requirement actually makes. Appellate court

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<sup>143</sup> Press Release, Jennifer Glass, Red States, Blue states, and Divorce: Understanding the Impact of Conservative Protestantism on Regional Variation in Divorce Rates, Counsel on Contemporary Families (Jan. 16, 2014), <https://contemporaryfamilies.org/impact-of-conservative-protestantism-on-regional-divorce-rates/>.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> See *Harrison v. Harrison*, 912 S.W.2d 124 (Tenn. 1995).

<sup>147</sup> *Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.* at 124.

<sup>150</sup> See TENN. CODE ANN. § 36-4-103(b) (West, WestlawNext current through end of the 2016 Second Regular and Second Extraordinary Sessions of the 109th Tennessee General Assembly).

decisions after *Harrison* have amended or remanded trial court judgments that granted divorce based on irreconcilable differences for failing to comply with the statute.<sup>151</sup>

A simplification of the divorce statute would make the judicial task easier and more efficient. If parties could petition for divorce on only one ground, confusion would be unlikely. Discarding the agreement requirement would limit the cases where a divorce is bounced back-and-forth between appellate and trial courts to comply with a misunderstood statutory requirement. These cases show the room for improvement.

Tennessee lawmakers have made clear the conservative agenda that takes priority in the Tennessee legislature.<sup>152</sup> Traditional conservatives should operate with an eye toward a restrained form of government that believes less is more, rather than moral populism operating under the guise of conservatism. Conservatives love to quote Ronald Reagan who said, “[g]overnment is not the solution to the problem; government is the problem.”<sup>153</sup> The underpinnings of fault-based divorce fit well under President Reagan’s statement. Tennessee’s no-fault statute burdens domestic relations law with enforcing archaic values on a generation that increasingly does not share those same values. Continuing to restrict no-fault divorce ignores current economic and cultural realities. In short, the situation has changed and so should the law. Conservative states like Tennessee should recalibrate divorce laws to reflect true conservative principles.

## VII. CONCLUSION

Tennessee domestic relations law should follow the current societal trends and loosen the restrictions on no-fault divorce. Keeping with traditional mores, the legislature persists

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<sup>151</sup> See *Cook v. Cook*, No. E2016-00042-COA-R3-CV, 2016 WL 3679415 (Tenn. Ct. App. July 5, 2016); *Norris v. Norris*, No. E2014-02353-COA-R3-CV, 2015 WL 9946262 (Aug. 24, 2015).

<sup>152</sup> See Joel Ebert, *Tennessee’s 2016 Legislative Session: Key Moments, Key People*, THE TENNESSEAN (Apr. 23, 2016), <http://www.tennessean.com/story/news/politics/2016/04/23/tennessees-2016-legislative-session-key-moments-key-people/83400506/>.

<sup>153</sup> Ronald Reagan, President of the United States, Inaugural Address (Jan. 20, 1981).

in requiring a complete agreement to avoid the expense and contentiousness of fault. To what end? Forcing parties to prove fault increases costs, decreases access and complicates matters even further.

Tennessee's statute runs the risk of unnecessarily compromising desirable outcomes that could preclude further litigation needed to address more severe misconduct. Pure no-fault has not allowed people to avoid responsibility, significantly increased divorce rates, or adversely affected aggrieved parties. Besides the societal ills of fault-based divorce, the current statute has confused parties, attorneys, and courts. This increases costs and burdens the court system. Other remedies, when combined with pure no-fault divorce, more effectively address Tennessee's domestic issues.

Declining religious affiliation in younger generations and the undesirable consequences of fault-based divorce should compel Tennessee lawmakers to take a second look at the state's current no-fault statute. Even if a pure no-fault model remains infeasible, Tennessee should remove the complete agreement requirement to plead irreconcilable differences, allowing litigants to access the court system without proof of fault. In other words, Tennessee should allow divorcing couples to just agree to disagree.