

Divorce, No-Fault Style

FORTY years after the first true no-fault divorce law went into effect in California, New York [appears to be on the verge of finally joining the other 49 states](#) in allowing people to end a marriage without having to establish that their spouse was at fault. Supporters argue that no-fault will reduce litigation and conflict between divorcing couples. Opponents claim it will raise New York's divorce rate and hurt women financially.

So who's right? The history of no-fault divorce may provide some answers as the New York State Assembly takes up its versions of the divorce legislation passed by the Senate on Tuesday. Before no-fault, most states required one spouse to provide evidence of the other spouse's wrongdoing (like adultery or cruelty) for a divorce to be granted, even if both partners wanted out. Legal precedent held that the party seeking divorce had to be free from any "suspicion that he has contributed to the injury of which he complains" — a pretty high bar for any marital dispute.

In 1935, for example, reviewing the divorce suit of Louise and Louis Maurer, the Oregon State Supreme Court acknowledged that the husband was so domineering that his wife and children lived in fear. But, the court noted, the wife had also engaged in bad behavior (she was described as quarrelsome). Therefore, because neither party came to the court "with clean hands," neither deserved to be released from the marriage.

As the Maurer case suggests, such stringent standards of fault often made it easier for couples who got along relatively well to divorce than for people in mutually destructive relationships. Cooperating couples would routinely fabricate grounds for their divorce, picking one party as the wrongdoer.

This strategy was so common in the 1950s that divorce cases seemingly gave the lie to Tolstoy's famous observation that every unhappy family is unhappy in its own way. "Victim" after "victim" testified that the offending spouse had slapped him or her with exactly the same force and in exactly the same places that the wording of the law required. A primary motivation for introducing no-fault divorce was, in fact, to reduce perjury in the legal system.

Initially, some states limited no-fault divorce to cases in which both partners wanted to dissolve the marriage. In theory, limiting no-fault to mutual consent seemed fairer to spouses who wanted to save their marriages, but in practice it perpetuated the abuses of fault-based divorce, allowing one partner to stonewall or demand

financial concessions in return for agreement, and encouraging the other to hire private investigators to uncover or fabricate grounds for the court. Expensive litigation strained court resources, while the couple remained vulnerable to subjective rulings based on a judge's particular opinion about what a spouse should put up with in a marriage.

Eventually every state except New York moved to what is in effect unilateral no-fault, wherein if one party insisted that his or her commitment to the marriage had irretrievably ended, that person could end the union (albeit with different waiting periods). New York has been the holdout in insisting that a couple could get a no-fault divorce only if both partners agreed to secure a separation decree and then lived apart for one year. Otherwise, the party who wanted the divorce had to prove that the other was legally at fault.

In every state that adopted no-fault divorce, whether unilateral or by mutual consent, divorce rates increased for the next five years or so. But once the pent-up demand for divorces was met, divorce rates stabilized. Indeed, in the years since no-fault divorce became well-nigh universal, the national divorce rate has fallen, from about 23 divorces per 1,000 married couples in 1979 to under 17 per 1,000 in 2005.

Even during the initial period when divorce rates were increasing, several positive trends accompanied the transition to no-fault. The economists Betsey Stevenson and Justin Wolfers of the University of Pennsylvania report that states that adopted no-fault divorce [experienced a decrease of 8 to 16 percent in wives' suicide rates and a 30 percent decline in domestic violence.](#)

Social changes always involve trade-offs. Unilateral divorce increases the risk that a partner who invests in her (or more rarely, his) marriage rather than in her own earning power, and does not engage in "bad behavior," may suffer financially as well as emotionally if the other partner unilaterally ends the marriage. When courts have not taken this sacrifice into account in dividing property, homemakers have been especially disadvantaged.

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Fairer division of marital assets can reduce the severity of this problem. And fault can certainly be taken into account in determining spousal support if domestic violence or other serious marital misbehavior has reduced the other party's earning power.

Still, the ability of one partner to get a divorce over the objections of the other may create an atmosphere in which people think twice before making sacrifices that will be costly if the marriage ends. Professor Stevenson found that in states that allow unilateral divorce, individuals [tend to be slightly less likely to invest in marriage-related capital](#), like putting the partner through school, and more likely to focus on building individual, portable capital, like pursuing their own education or job experience.

Unilateral divorce has decreased the bargaining power of the person who wants the marriage to last and has not engaged in behavior that meets the legal definition of fault. On the other hand, it has increased the bargaining power of the person who is willing to leave. So while some marriages end more quickly than they otherwise would, other couples enter marital counseling because one partner's threat of divorce convinces the other that it is time to work seriously on the relationship.

Contrary to conventional wisdom, it is more often the wife than the husband who is ready to leave. Approximately two-thirds of divorces — including those that come late in life — are initiated by wives. Paula England, a senior fellow at the [Council on Contemporary Families](#), found that surveys that separately ask divorced wives and husbands which one wanted the divorce confirm that more often [it was the woman who wanted out of the marriage](#). This jibes with research showing that women are physiologically and emotionally more sensitive to unsatisfactory relationships.

It's true that unilateral divorce leaves the spouse who thinks the other's desire to divorce is premature with little leverage to slow down the process or to pressure the other partner into accepting counseling. It allows some individuals to rupture relationships for reasons many would consider shallow and short-sighted.

But once you permit the courts to determine when a person's desire to leave is legitimate, you open the way to arbitrary decisions about what is or should be tolerable in a relationship, made by people who have no stake in the actual lives being lived. After all, there is growing evidence that marital counseling can repair some marriages even after infidelity, which New York has long accepted as a fault sufficient to end a marriage. But that does not mean New York should reduce its existing grounds for divorce even further.

A far better tack is to encourage couples to mediate their parting rather than litigate it, especially if children are involved. In a 12-year study of divorcing couples randomly assigned to either mediation or litigation, the psychologist Robert Emery

of the University of Virginia and his colleagues found that as little as five to six hours of mediation **had powerful and long-term effects** in reducing the kinds of parental conflict that produce the worst outcomes for children. Parents who took part in mediation settled their disputes in half the time of parents who used litigation; they were also much more likely to consult with each other after the divorce about children's discipline, moral training, school performance and vacation plans.

Paradoxically, people who went through mediation were also more likely to express regret over the divorce in the ensuing years than those who litigated. But New York legislators should face the hard truth that there are always trade-offs in the imperfect world of intimate relationships. To my mind it is better to have regrets about the good aspects of your former marriage because you were able to work past some of your accumulated resentments than to have no regrets because you had to ratchet up the hostility to get out in the first place.

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