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No Fault Divorce and the Best Interests of Children

NO FAULT DIVORCE AND THE BEST INTERESTS OF CHILDREN

DONALD S. MOIR*

I. INTRODUCTION

The fundamental change from law which sought—to the extent the law could—to uphold and sustain the institution of the family¹ to law which facilitates its dissolution began less than twenty-five years ago.² Weitzman³ has called the change a revolution, Glendon⁴ and Jacob⁵ have called it a transformation of the law. Jacob calls it a “silent revolution”—a revolution brought about by “experts” with little public discussion.⁶ The revolution *has been* silent, in that until recently there has been no public and little professional awareness of its impact. Consequences have emerged⁷ that were not within the horizons of the reformers.⁸

Wallerstein⁹ has commented on “how little we really know about the world we have created in the last twenty years—a world in which marriage is freely terminable at any time, for the first time in our history.”¹⁰ But to say we know little is not to say we know nothing. There is substantial

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1. In this Article, “family” means husband and wife in an existing or former marital relationship and children of that marriage, if any.

2. No fault divorce in the United States began with California’s Family Law Act, ch. 1608, §§ 1-32, 1969 Cal. Stat. 3312 (codified at CAL. CIV. CODE § 4506 (West 1970)). See also Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and its Aftermath* 56 CINCINNATI L. REV. 1, 1 & n.1. For the progression of no fault divorce statutes through the states, see Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 B.Y.U. L. REV. 79. The grounds for divorce vary from state to state. Wardle classifies 13 states as “pure” no fault. Other states’ statutes contain mixed grounds. *Id.* at 137.

3. See generally LENORE J. WEITZMAN, *THE DIVORCE REVOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEQUENCES FOR WOMEN AND CHILDREN IN AMERICA* (1985).

4. See generally MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* (1989).

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

6. *Id.* at 15.

7. Some argue that the present high rate of divorce is a social phenomenon, not a legal one. As to that argument, see *infra* notes 62-80 and accompanying text.

8. See *infra* notes 81-99 and accompanying text. In this Article “reformers” include all those who advocated and brought about change in the law. Principal sources of information are Kay *supra* note 2, at 5 nn.14 & 16, citing the CALIFORNIA GOVERNOR’S COMM’N ON THE FAMILY, REPORT 1-2 (1966); JACOBS, *supra* note 5, at 66-79 & nn.10-32.

9. Dr. Judith S. Wallerstein is Executive Director of the Centre for the Family in Transition, Corte Madera, California.

10. JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* 297 (1989)(emphasis in original).

A recent Canadian study found that “[t]he rise of divorce . . . over the past twenty years makes it appear that the institution of marriage, having held firm for centuries, is being shaken to its foundations.” JEAN DUMAS & YVES PÉRON, *Preface to STATISTICS CANADA*,

documentation of two consequences of the "free terminability of marriage:" (1) the impoverishment of divorced women together with the children in their care,¹¹ and (2) the risk of harm to children of divorce.

That there are other consequences of endemic family breakdown broadly affecting society and the economy is apparent, but the available data is insufficient to permit more than informed speculation about their nature and extent. Indeed, it would be surprising if a revolution affecting our basic institution did not substantially affect the social structure and the economy.

The divorce revolution has brought with it grave consequences. This Article will consider those in relation to children. Without diminishing the accomplishment of those single parents who, under great difficulties, *do*, it argues that our society does not know how to raise children well—emotionally, economically, developmentally—except in a secure institution of marriage. If that institution "has been shaken to its foundation"¹² in part, at least, because of no fault divorce,¹³ the law must be reconsidered if society and the economy are to function up to their potential.¹⁴

The Article will suggest that in the concern about symptoms rather than causes, conventional scholarship in family law, and, in the behavioural sciences, has failed to address fundamental issues. I propose a different way of addressing them.

The Article does not offer solutions; that task calls for the knowledge and insights of a broad spectrum of disciplines. I argue that the

DEMOGRAPHY DIVISION, MARRIAGE AND CONJUGAL LIFE IN CANADA: CURRENT DEMOGRAPHIC ANALYSIS (March 1992).

11. WEITZMAN, *supra* note 3, at 338. Weitzman found in her California sample that at the time of her study, divorced women experienced a 73% drop in their standard of living a year after divorce, whereas divorced men experienced a 42% increase. Weitzman attributes her well-known finding to no fault divorce. See also James B. McLindon, *Separate But Unequal: The Economic Disaster of Divorce for Women and Children*, 21 *FAM. L.Q.* 351, 352-53 (1987) (a compilation of studies in other states in addition to McLindon's own New Haven County, Connecticut study); H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 *AM. ECON. REV.* 437 (1986). Weitzman has critics: See JACOB, *supra* note 5, at 159-64; Herbert Jacob, *Faulting No-fault*, *AM. B. FOUND. RES. J.* 773-81 (1986); Marygold S. Melli, *Constructing a Social Problem: The Post-Divorce Plight of Women and Children*, *AM. B. FOUND. RES. J.* 759-72 (1986). But see Weitzman's reply, *Bringing the Law Back In*, *AM. B. FOUND. RES. J.* 791-97 (1986). The most penetrating critique of Weitzman is that of Jed H. Abraham, *The Divorce Revolution Revisited: A Counter Revolutionary Critique*, 9 *N. ILL. U.L. REV.* 251 (1989). The essential difference between Weitzman and her critics appears to be the degree of impoverishment and whether it can be attributed to no fault divorce. An effective support regime is inconsistent with the premises of no fault divorce and, in any event, impractical in most family circumstances. A separated family is economically inefficient. Two can live more cheaply as one.

12. *Supra* note 10, DUMAS & PÉRON.

13. See *infra* notes 100-126 and accompanying text.

14. The Article does not argue that a change in the law of divorce and ancillary relief alone will diminish all the problems now affecting children. A whole spectrum of policy issues needs correction: anti-child tax policy, the social support network, health, security, physical security, education, housing and so on. There is an African saying that "it takes a whole village to raise a child." Nevertheless, I argue that unless family law itself offers a framework within which children can best be nurtured, a nation's capacity to correct the broad spectrum of adverse policies will be diminished.

policy choices are of great difficulty; that simplistic policy changes are at risk of doing more harm than good.

II. THE RISK OF HARM TO CHILDREN OF DIVORCE

The National Centre for Health Statistics reports that in 1988, children in single parent and step families were two to three times more likely to have emotional and behavioural problems than those in intact families.¹⁵ Their academic achievement is significantly lower.¹⁶ There is now a substantial literature reporting the results of empirical studies of varying rigour and research design on the impact on children of the divorce of their parents.¹⁷ This Article will review a few of the recognized longitudinal studies that have implications in structuring legal policy.¹⁸ Given the different research designs, the data are not totally congruent but they do converge on two points: (1) the separation of their parents is profoundly traumatic for all children (except those in highly conflicted or abusive families) and interferes with their developmental progress for shorter or longer periods;¹⁹ and (2) a significant minority of children of divorce do not recover and are chronically disabled in their emotional, social and academic functioning.²⁰

A. *The Data: A Sampling*²¹

The most frequently referred to study is that of Wallerstein and Kelly,²² pioneers in empirical studies on the divorce process and its impact on children. Starting in 1971 they followed sixty divorcing families and their one hundred and thirty-one children ages three to eighteen from Marin County, California, a white, privileged community.²³ The assumption at that time was that divorce was a brief crisis quickly resolved by the adults and children involved. Based on that assumption,

15. Nicholas Zill & Charlotte A. Schoenborn, *Developmental, Learning, and Emotional Problems: Health of Our Nation's Children, United States, 1988*, 190 NAT'L CENTER FOR HEALTH STAT. ADVANCE DATA (1990).

16. John Guidubaldi et al., *The Impact of Parental Divorce on Children: Report of the Nationwide NASP Study*, 12 SCH. PSYCHOL. REV. 300 (1983).

17. There are more than 700 reported studies. Interview with Dr. William F. Hodges, Department of Psychology, University of Colorado, in Halifax, Nova Scotia (Oct. 22, 1990).

18. In doing so, I rely in substantial part on Joan B. Kelly, *Longer-Term Adjustment in Children of Divorce: Converging Findings and Implications for Practice*, 2 J. FAM. PSYCHOL. 119 (1988) and Judith S. Wallerstein, *The Long-Term Effects of Divorce on Children: A Review*, 30 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 349 (1991).

19. Kelly, *supra* note 18, at 122; E. Mavis Hetherington, *Stress and Coping in Children and Families*, in CHILDREN IN FAMILIES UNDER STRESS 7 (Anna-Beth Doyle et al., eds., 1984).

20. For the nature of the disabilities, refer to the studies. It is to be recognized that there is no information about the children beyond the periods of study.

21. A summary of the researchers' findings risks making them appear less complex than they are. The results and symptoms differ with age, gender, economic circumstances and other factors. Nevertheless, these variations should not obscure the generality of the findings reported here.

22. JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* (1980).

23. *Id.* The authors note, "[i]t may well be that there would be a considerably greater emotional decline among children in a general population." *Id.* at 307.

the authors' original intent was a short term study²⁴ from crisis through to resolution. As expected, they found the children to be acutely disturbed at the time of divorce filing. To their surprise, however, and contrary to the then professional expectation, when they assessed the parents and children eighteen months after the divorce filing, they found a large number of the children were on a continued "downward course." In response to the unexpected finding, the study was continued and the parents and children were assessed again five years after the divorce filing.²⁵

In summary, at the five-year assessment, the study found that notwithstanding the initial trauma of the children, about a third had recovered and were doing "especially well,"²⁶ a "middle" group of less than a third had resumed their developmental progress but remained somewhat symptomatic,²⁷ and the disabilities of more than a third of the children observed immediately post divorce and at the eighteen-month checkpoint had become chronic.²⁸

Wallerstein continued to follow a group of the children,²⁹ then aged eleven to twenty-nine, some for ten years and others for fifteen. She reported her findings in *Second Chances*.³⁰ She reports that over half the children "emerged as compassionate and competent people," while almost half were "worried, underachieving, self-deprecating, and sometimes angry young men and women." Boys of school age suffered a wider range of difficulties than did girls at that age, but in young adulthood the differences dissipated "when many of the young women were involved in maladaptive pathways including multiple relationships and impulsive marriages that ended in early divorce."³¹

Two new phenomena became apparent: (1) the "sleeper effect"—those who were doing "especially well" at the five-year checkpoint, in

24. The assessment was essentially clinical, using a variety of techniques, together with interviews of parents, siblings and teachers. The children were initially screened for their psychological health—that is, the study was skewed in favour of sound pre-divorce adjustment. *Id.*

25. WALLERSTEIN & KELLY, *supra* note 25, at 4-5.

26. *Id.* at 209.

27. As to the "middle" group at the five-year checkpoint, it was found that "[a]lthough these youngsters had resumed their developmental progress, islands of unhappiness or anger continued to demand significant portions of their attention and psychic energy and to hamper the full potential of their development." *Id.* at 213.

28. The study:

[F]ound 37 percent of all the children and adolescents to be moderately to severely depressed. As at the eighteen-month check point, depression was the most common psychopathological finding and was manifested in a wide variety of feelings and behaviour, including chronic and intense unhappiness (at least one child with suicidal preoccupation), sexual promiscuity, delinquency (drug-abuse, petty stealing, some alcoholism, breaking and entering), poor learning, intense anger, apathy, restlessness and, . . . a sense of intense, unremitting emotional deprivation.

Id. at 211. Wallerstein later reported that at the five-year checkpoint most of these children were on a yet further downward course. Judith S. Wallerstein, *Children After Divorce: Wounds That Don't Heal*, N.Y. TIMES MAGAZINE, Jan. 22, 1989, at 19, 20.

29. One hundred thirteen out of an initial group of 131.

30. WALLERSTEIN & BLAKESLEE, *supra* note 10.

31. Wallerstein, *supra* note 18, at 354.

particular, girls who had now become young women, became symptomatic;³² and (2) the "over-burdened child"—the child who assumes a parental role over an inadequately functioning custodial parent without the buffering available from a functioning second parent.³³ Particularly disturbing for the purpose of this Article was that forty percent of the nineteen to twenty-three year old young men remained aimless, had limited educations³⁴ and had a sense of limited control over their lives.³⁵

Mavis Hetherington and her colleagues at the University of Virginia followed a matched group of children, half from intact and half from divorced families for six years following divorce.³⁶ Children of divorce were significantly more symptomatic³⁷ than those in intact families at each of the examinations. Hetherington and her colleagues found the problems to be more severe and enduring for boys than for girls of divorce and found that their socio-behavioural difficulties were not related to income.

Guidubaldi and his colleagues conducted a longitudinal study of nationwide, randomly selected matched samples, about half from intact families and half from divorced families.³⁸ Children from intact families performed significantly better on socio-behavioural criteria and mental health indices than did those from divorced families. The academic achievement of children of divorce was much lower.

32. WALLERSTEIN & BLAKESLEE, *supra* note 10, at 56-64; Wallerstein, *supra* note 28, at 42.

33. WALLERSTEIN & BLAKESLEE, *supra* note 10, at 184-204; Judith S. Wallerstein, *The Overburdened Child: Some Long-Term Consequences of Divorce*, 30 SOC. WORK 116 (1985).

34. She reports on a number of well-to-do college-educated fathers who would not support their children at college. WALLERSTEIN & BLAKESLEE, *supra* note 10, at 154-60.

35. Wallerstein, *supra* note 28, at 42.

36. E. Mavis Hetherington et al., *Effects of Divorce on Parents and Children in NON-TRADITIONAL FAMILIES: PARENTING AND CHILD DEVELOPMENT* 233 (Michael E. Lamb, ed., 1982); E. Mavis Hetherington et al., *Long-Term Effects of Divorce and Remarriage on the Adjustment of Children*, 24 J. AM. ACAD. CHILD PSYCHIATRY 518 (1985). Since then, Hetherington has reported 40% of boys whose custodial parent remarries while the child is in early adolescence develop "serious" psychiatric problems. *GLOBE & MAIL*, Nov. 9, 1991, at A4; Hetherington, *supra* note 17. There was a total of 144 white middle-classed children in the group, all four years old when first examined. The children of divorced families were first examined two months after the divorce (together with the others), two years later and after a further four years when the children were ten. The assessment was primarily through standardized objective psychological tests—as opposed to the essentially clinical approach of the Wallerstein and Kelly study.

37. There are convenient summaries of the symptoms in Kelly, *supra* note 18, at 123 and Wallerstein, *supra* note 18, at 351-53.

38. John Guidubaldi, *Differences in Children's Divorce Adjustment Across Grade Level and Gender: A Report from the NASP-Kent State Nationwide Project*, in *CHILDREN OF DIVORCE* 185 (Sharlene A. Wolchik and Paul Karoly, eds., 1988); John Guidubaldi & Joseph D. Perry, *Divorce and Mental Health Sequelae for Children*, 24 J. AM. ACAD. CHILD PSYCHIATRY 531 (1985); John Guidubaldi et al., *Assessment and Intervention for Children of Divorce: Implications of the NASP-KSU Nationwide Study*, in *4 ADVANCES IN FAMILY INTERVENTION, ASSESSMENT AND THEORY* 33 (John P. Vincent ed., 1987). There were 341 children of divorce and 358 from intact families. The children of divorce were first tested, on average, four years after divorce and two and three years later. Children from intact families, matched as to age and sex were tested at the same times. There were standardized tests of socio-behavioural and academic competence supplemented with information from parents, children, psychologists and teachers obtained in standardized interviews.

Socio-behavioural scores did not vary when corrected for income; those for academic performance did.³⁹ As in the Hetherington study, Guidubaldi found the disparity between divorced families and intact families to be greater for boys than for girls. The disparity for girls decreased over the period of the study,⁴⁰ that for boys increased.

There is a recent report based on two large data bases,⁴¹ one in Great Britain, the National Child Development Study (NCDS) and one in the United States, the National Survey of Children (NSC),⁴² which suggests a different etiology of the problems of children of divorce. Both studies sought a broad range of information other than about children and divorce, but included in the report was information on divorce in the cases in which it occurred. There was information on pre-divorce interspousal conflict in each of the studies.

The studies found the disabilities of children of divorce to be greater than those of intact families. However, when pre-divorce spousal conflict was taken into account, the statistical differences between the two groups (children of divorce and children in intact families) disappeared.

The authors of the report (Cherlin and his colleagues) concluded: "[T]hose concerned with the effects of divorce on children should consider reorienting their thinking. At least as much attention needs to be paid to the processes that occur in troubled, intact families as to the trauma that children suffer after their parents separate."⁴³

B. Analysis

As we have seen, all the studies found among children of divorce a higher proportion of dysfunction than among children in intact families. The longer range studies show the dysfunction is chronic among a minority of children of divorce.

Cherlin and his colleagues attribute more of the post-divorce dysfunction to pre-divorce family conflict than the others appear to.⁴⁴ All

39. For the scores, see Guidubaldi, *Differences in Children's Divorce Adjustment*, *supra* note 38, at 202-24.

40. But note the "sleeper effect" observed in WALLERSTEIN & BLAKESLEE, *supra* note 10, at 56-64.

41. Andrew J. Cherlin et al., *Longitudinal Studies of Effects of Divorce on Children in Great Britain and the United States*, 252 *SCIENCE* 1386 (1991).

42. NCDS began as a survey of a total of all 17,414 mothers who gave birth in Great Britain in one week in 1958. The study was not directed at children of divorce, but pertinent findings have been extrapolated from it. When the children were seven in 1965, public health nurses interviewed their mothers using a standardized test. There were reading and mathematics tests and behavioural assessments by teachers. Similar assessments were made in 1969 when the children had reached eleven. *Id.* at 1387. The NSC survey began in 1976 with a national random sample of 2,279 children between seven and eleven. Standardized assessments of their behaviour were made through telephone interviews of their mothers. The mothers were questioned, *inter alia*, about interspousal conflict. There was a second round of interviews in 1981 when the children were between 11 and 16. *Id.* at 1388. The data available from both studies permitted a comparison of the performance of children in intact families and children of divorce.

43. Cherlin et al., *supra* note 41, at 1388.

44. The Hetherington study divided both the divorced and intact families into intense

agree that high levels of family conflict to which children are exposed is detrimental. The difference, if there is a difference, is critical to the policy maker. If Cherlin and his colleagues are correct that a significant part of the post-divorce dysfunction observed in children can be attributed to pre-divorce family conflict, then in the interest of children, theoretically, the law ought to encourage the divorce of conflicted spouses. If, on the other hand, divorce and its attendant circumstances is the more significant causative factor of the dysfunction observed than is pre-divorce conflict, then the law ought not to facilitate divorce as it now does.

It may be that it is the degree of conflict that is crucial. There are reasons to suggest that the conclusions of Cherlin and his colleagues, important as they are to the policy maker, should be carefully examined, if only to determine degrees of conflict:

(a) The data from the British NCDS⁴⁵ was for the period from 1965 to 1969 when England and Scotland had rigorously fault-based regimes of divorce. In England, adultery was the only grounds for divorce; the remedy for cruelty was judicial separation.

The low rate of divorce reflected in the NCDS study,⁴⁶—two percent⁴⁷—among the parents of the cohort probably reflects the then law. It may follow that the small number of children, the subjects of Cherlin and his colleagues' report, came from the most highly conflicted families. The experience of these children may not have been the same as those of children from less conflicted families.

(b) In neither the British NCDS nor the American NSC did the children get better, as might have been expected if the conclusions are correct. They got worse.⁴⁸

(c) Kelly has found that the stereotype of intense spousal conflict preceding divorce is not always accurate. Fifty percent of her group re-

and low-conflict groups. Hetherington found no negative outcomes attributable to pre-divorce conflict among children who were sheltered from parental dispute—"encapsulated" was her term. In the first year following divorce, the children of divorce functioned less well than those in intact, high-discord families. At two years, the difference among children in high-conflict intact families and those in low-conflict divorced families disappeared. Boys from high-conflict divorced families showed more problems than any other group at all times. See Hetherington, *supra* note 36.

45. Cherlin et al., *supra* note 41.

46. Furstenberg and Cherlin estimated that 44% of children born between 1970 and 1984 in the United States lived in single parent families before they were 16 and that the rate for children born in the 1990s may be as high as 60%. FRANK F. FURSTENBERG, JR. & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 11 (1991). See also Neil G. Bennett, *Letter to the Editor*, N.Y. TIMES, May 27, 1990, § 4, at 12. A March, 1990 census survey found that in 1970, 40% of households had a married couple and child or children under 18 as opposed to 31% in 1980 and 26% in 1990. *Change in the American Family, Now Only 1 in 4 is "Traditional,"* N.Y. TIMES, Jan. 30, 1991, at A19. For the purposes of this Article, I need not discuss the complex subject of the rate of divorce. It is sufficient to note that the rate is much higher than it was before no fault divorce.

47. Two hundred thirty-nine out of 11,658. This refers specifically to the instances of divorce occurring when the children were between ages seven and eleven. Cherlin et al., *supra* note 41, at 1387.

48. Cherlin et al., *supra* note 41, at 1387-88.

ported high conflict while twenty-five percent of women and thirty percent of men reported little or no conflict.⁴⁹

(d) Wallerstein questions the reliability of market research methods such as those of Cherlin and his colleagues.⁵⁰

(e) Wallerstein and Kelly selected their sample of children for psychological health at the time of divorce. That is, the sample is skewed towards sound pre-divorce adjustment.⁵¹ Yet five years after divorce, they found a high proportion of dysfunction.

(f) A non-specialist may speculate that there may be something to be learned from the predominant reconciliation fantasies of children, the intense, enduring longing for the absent parent. Is this feeling among such a high proportion of children no more than bizarre masochism? Or are the children telling us that even if parents quarrel (absent, of course, abuse or spousal violence), children's healthy development needs both parents in an intact relationship?

None of the data I have referred to (or other data available) is conclusive. Yet a policy maker never has the luxury of certainty. If evidence shows there to be a likelihood of wide-spread social harm,⁵² the concerned policy maker cannot wait for certainty. She must be cautiously aware of the limitations of the social and behavioural sciences without ignoring what they have to tell.

C. *The Contribution and Limits of Social Science*

Lawyers and behavioural and social scientists are from disparate professional cultures. They think and speak with different languages, or, sometimes, use the same words to express different thoughts. Their implicit, unspoken, value systems are different. Each profession has its own perception of reality (both of which are valid) and varying perceptions of what is relevant to the reality sought to be examined. What lawyers think important, a clinician may not and vice versa. It follows that communication between the professions is subject to misinterpretation and at risk of distortion.

Nevertheless, the insights and the developing knowledge of the social and behavioural sciences are crucial to the development of a benign family law and process, whatever the difficulties of communication. For example, most mental health professionals of the 60s and 70s assumed that divorce was a brief and transitory crisis from which adults and children would recover and go on to a better, happier life.⁵³ All of the studies referred to show that assumption to be wrong for many people and,

49. Kelly, *supra* note 18, at 121-22.

50. Judith S. Wallerstein, 30 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 1022 (1991) (Dr. Wallerstein's reply to a reader's Letter to the Editor).

51. WALLERSTEIN & KELLY, *supra* note 22, at 328-30.

52. *See infra* notes 56-61 and accompanying text (speculating as to the possible dimensions of the social harm).

53. Wallerstein, *supra* note 28, at 19; WALLERSTEIN & BLAKESLEE, *supra* note 10, at 241-73.

in particular, many children. The advice of the behavioural sciences of that time to the policy makers was greatly different than it would be now.⁵⁴ The policy maker must be not only cautious of the “trendy” in the behavioural sciences, she must be equally cautious of the “trendy” in the law.

Similarly, the policy maker must be aware that the search for exactness demanded by the behavioural and social sciences necessarily limits their inquiry. Fineman and Opie are correct when they say that “the elevation of rationality as a primary virtue can result in the construction of a model that depicts only a small segment of the ‘real world’.”⁵⁵ A lawyer’s perception of the “real world” is similarly limited.

The policy maker must also be aware that however rigorous the research design of a behavioural or social scientist, bias is inescapable.⁵⁶ The hypothesis of the researcher will necessarily structure the research design and the data sought. Predisposition will necessarily affect the interpretation of the data. Furstenberg and Cherlin, in discussing the data that only a minority of the children of divorce become chronically symptomatic say that “[t]he glass is either half full or half empty, depending on one’s point of view.”⁵⁷ I illustrate my bias (as they have theirs) when I question that policy makers should be content that as bad as things are, they are not as bad as they might be.

The limitations of the studies referred to in this Article are readily apparent. The sample sizes are necessarily small and some, arguably, select. The longer the period of study, the smaller the sample studied. The larger the sample, the more suspect becomes the methodology. Nor can it be otherwise. It is impossible to conceive that resources can be found to fund a nation-wide study to exclude all the variables or even most of the variables of the human condition except the one under examination. If the problems illustrated by the data we now have are to be addressed, society does not have enough time for the definitive study.

The foregoing brings out yet another cultural difference between the sciences and the legal policy maker. The sciences necessarily seek certainty. The policy maker, necessarily, if he is to serve the perceived social need, must be content to act upon a preponderance of the best evidence available. The evidence from the studies is that children of divorce are at greater risk of harm than are children in the general population. The question becomes: What are the dimensions of the problem?

D. *Economic and Social Effects*

There is little information on the consequences for the society and

54. Robert J. Levy, *A Reminiscence About the Uniform Marriage and Divorce Act — and Some Reflections About Its Critics and Its Policies*, 1991 B.Y.U. L. REV. 43, 48-52.

55. Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policy Making: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 128.

56. *Id.* at 124-30.

57. FURSTENBERG & CHERLIN, *supra* note 46, at 69.

the economy as a whole of endemic⁵⁸ family breakdown with its attendant risk to children. There is some basis for speculation. Take, as an example (but not as fact), the findings of Wallerstein and Kelly⁵⁹ that more than a third of the children of divorce whom they observed became chronically disabled in their functioning.⁶⁰ Suppose those findings applied across the general population. Suppose, further, that fifty percent of children experience the separation of their parents.⁶¹ This would suggest divorce as a significant factor in disabling one-sixth of the population. Society cannot afford that increase in the population of disabled children. The figures are not offered as fact, but as a possible guide to the dimensions of the problems observed. Even if the incidence of disabled children of divorce is less than that found in the Wallerstein and Kelly sample, it is nevertheless so high as to command attention.

The economic component of the harm to children of divorce as an isolated factor contributing to dysfunction has not been measured. Guidubaldi found, as we have seen, that low academic achievement and lowered IQ among the children of divorce was related, in part, to economic factors, but that socio-behavioural problems were not.

In theory, adequate and enforced child support, adequate alimony to the custodial parent or greater public subsidization of children of divorce⁶² could correct the economic component of the harm. As will be discussed later, however, there is seldom enough private money to go around (since a separated family is economically inefficient) and adequate public subsidization is most unlikely.

The long-term consequences to the national economy of such a large new group of under-functioning and malfunctioning children (and, in the Wallerstein sample, young adults), must be serious, though we do not yet have data on the macro-economic consequences.

Poor performance at school entry⁶³ disadvantages the child's whole academic career. Poor performance and limited education in later adolescence and early adulthood must have already diminished the economy's human resources. Both have been measured in higher proportions among children of divorce than among the general population. The economy increasingly needs ever greater competence. This new class of disadvantaged children appears unable to provide it. If the problems have the dimensions they appear to have and diminish society's and the economy's capacity to function, can a change in the law alleviate them?

58. See authorities cited *supra* note 46 and accompanying text.

59. WALLERSTEIN & KELLY, *supra* note 22, at 211.

60. A higher proportion of dysfunction emerged in later years. Wallerstein, *supra* note 28, at 20.

61. See authorities cited *supra* note 46 and accompanying text.

62. Children of divorce are subsidized through various welfare programs, but public support is gravely inadequate.

63. John Guidubaldi & Joseph D. Perry, *Divorce, Socioeconomic Status, and Children's Cognitive-Social Competence at School Entry*, 54 AM. J. ORTHOPSYCHIATRY 459 (1984).

III. DOES THE LAW MAKE A DIFFERENCE?

Is the present high rate of divorce a consequence alone of social and economic influences? Or is the transformation of the law a contributing cause? The conventional wisdom holds that the change in the law in the 70s and 80s had no influence on the rate of divorce.⁶⁴ The argument is that the fault-based divorce laws had become so subverted by collusion and perjury⁶⁵ that legislative abandonment of fault made no difference. The rate of divorce, it is argued, increased in response to the changing social and economic milieu, and the changed law made no difference. Marvell, contrary to the conventional wisdom, found a significant correlation between no fault statutes and the rate of divorce nationwide, but when the impact of changed law was examined state by state, there was a significant correlation in only a minority of states.⁶⁶

Conventional wisdom is that the law does not matter, that people will do what they will, regardless of the civil law, in response to the social and economic influences of the time. I am skeptical of such wisdom for at least four reasons. First, the divorce rate from 1940-65 was essentially stable (with a bulge in 1945-46 immediately post-war). The rate doubled from 1965-76.⁶⁷ This must surely be more than coincidence when one considers that there was not the slightest public clamour for more liberalized divorce—it was a silent revolution, a revolution brought about by “experts” pursuing their own agendas, quietly.⁶⁸ Second, trend lines can be adjusted to show differing results. Third, under which law is the rate more likely to increase: One that facilitates divorce or one that does not? Finally, how could family law not have an influence? Approximately fifty percent of adults have been exposed to it.

There is no doubt that the rate of divorce would not have increased as rapidly as it did following the introduction of no fault divorce had not the social and, even more, economic conditions been favourable to it. The economy was relatively prosperous, and women, increasingly, were less dependent (but still dependant, the more so with children); the moral imperative had diminished. However, as we have seen, it was not these and other social and economic conditions which prompted the change in the law.

64. See, e.g., JACOB, *supra* note 5, at 162 (citing studies). See also Thomas B. Marvell, *Divorce Rates and the Fault Requirement*, 23 LAW & SOC'Y REV. 543, 544, 546-48 (1989) (review of the research).

65. I am not aware of any data nor is it likely that any could have been found. My experience in Canada in the 1960s suggests that the legal profession was not as corrupt as academics seem to think. Nor do I have any reason to suppose that Canadian lawyers were any more upright than those in the United States. Nevertheless, collusion and perjury did happen. Note that collusive divorces, to the extent they occurred, were necessarily consensual—conceptually and in terms of ancillary relief different from unilateral divorce.

66. Marvell, *supra* note 64; (citing Weiss & Willis, *An Economic Analysis of Divorce Settlements*, unpublished, Population Research Centre, University of Chicago (1989)) (a positive relationship found by a different method).

67. Wardle, *supra* note 2, at 139-41.

68. This is convincingly shown by JACOB, *supra* note 5, at 83. A 1982 poll showed, inter alia, that a majority thought divorce laws should be more strict. *Id.*

But there are other reasons to believe that the law makes a difference.⁶⁹ First, in a pluralistic society (as we are said to be), increasingly detached from other value systems, the law alone may in time become a predominant source of values. If the law says, contrary to the cultural perception of the marriage covenant,⁷⁰ that marriage is a transitory arrangement severable at will by one of the parties to it, the law's perception, may in time, like Gresham's Law, change the former cultural perception.

Second, the law has a regulatory function.⁷¹ If family breakdown creates a risk of doing harm to children, it is in society's interest that the law do what it can in a free society to discourage it. The regulatory power of civil law is limited. Law that seeks to impose a standard well beyond the mores of the time will be evaded by one means or another. The civil law cannot compel spouses to live together in harmony and does not try. The law can, however, seek to encourage family stability by financially penalizing the spouse who disrupts it and by rewarding the spouse who keeps to the covenant (or, at least, securing, to the extent possible, his or her economic interest).⁷² Alimony was the principal remedy⁷³ under the old law before law reform destroyed its conceptual roots.⁷⁴

The old law did what it could to encourage family stability. It penalized a spouse erring in its eyes and secured the "innocent" spouse to the extent possible.⁷⁵ With its theological roots, the old law was directly interested in the rectitude of adults, but if family stability is in the interest of children, the law did what it could to protect them. The truly

69. This argument rejects the positivist and relativist allegedly value-neutral school of legal thought, at least as it might influence such a socially sensitive issue as family law. I do not agree that the law should do no more than adapt itself to a perceived (or, more likely, presumed) least common denominator of human behaviour—the "equity of the mean" as Max Weber has called it. In this discussion, I am indebted to Mary Ann Glendon, in MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES* (1987).

70. Marriage as a life-long commitment remains deeply rooted in our culture. There is strong evidence that is so, including the fact that marriage remains a significant personal, family and community festival. Marriage vows, civil and religious, continue to involve a serious life-long commitment. Popular literature, arts and advertisements assume marriage is a lasting commitment. Notwithstanding the law's inducements to divorce, about half of married couples stay married. This author does not find Bellah and his colleagues' assumption that there is a changed ethos of marriage wholly convincing in the face of the evidence to the contrary. See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* (1985).

71. In this context, I equate its protective as well as its dispute-resolving function.

72. I do not here intend to suggest that there is an analogy between contract and the marriage covenant. There is not. The attempt to suggest that there is has only served to distort our thinking about family issues. Marriage is *sui generis*. See Mary E. O'Connell, *Alimony After No-Fault: A Practice in Search of a Theory*, 23 *NEW ENG. L. REV.* 437 (1988); Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 *B.Y.U. L. REV.* 197; Ira Mark Ellman, *The Theory of Alimony*, 77 *CAL. L. REV.* 3 (1989).

73. In few urban families is property division an adequate remedy. Sanctions and rewards of the civil law (at least in family cases) are not likely to be wholly effective for families below the "middle" middle-class.

74. See authorities cited *supra* note 72 and accompanying text.

75. Today, of course, the gender discrimination of former alimony law would have to be removed.

remarkable aspect of no fault divorce is that it is wholly adult-centred, with the welfare of children subservient to adult interest. In that sense, no fault divorce, in theoretically abjuring sanctions and rewards, does what it can to encourage divorce because of the economic benefits to one spouse or the other.

To what extent can the penalties and rewards of the law influence marital conduct? We may be thankful that people, particularly in their intimate relations, may not look to the law as their guide. Yet one wonders, as the knowledge of the present law's economic incentives to the economically stronger spouse to divorce permeate the culture and the law's values displace traditional values, whether the incentives will not be increasingly acted upon.

Further, the law has an hortative function. In the classical view, it was the purpose of law to promote virtue, a view which is now unfashionable⁷⁶ if only because, it is said, the state ought not to define virtue in a diverse society. If, however, family instability puts children at risk, I assume that there can be a broad consensus even in a morally diverse society that the law ought to do what it can to encourage stability. On such an issue law cannot be morally neutral. For the law to be neutral about the welfare of children is to say, as essentially no fault divorce law does, that their welfare takes second place to the "happiness" of adults in the eyes of the law.⁷⁷

Further, Glendon, following Gertz and White, points out that "[b]ecause law is also constitutive, it is incumbent on us to be attentive, intelligent, reasonable, and responsible in the 'stories we tell,' the 'symbols we deploy,' and the 'visions we project'."⁷⁸ In time, these stories, symbols and visions may, as we have seen, displace other values of the culture.⁷⁹

What stories does the present law tell? What is its message? It says, among other things, that the marriage covenant is freely and unilaterally terminable, that the welfare of children is subservient to the personal fulfillment of adults, that a parent's affective relationship with his or her children may be terminated at any time without cause at the will of the other parent.⁸⁰

76. *But see, e.g.*, GLENDON, *supra* note 69; SCHNEIDER, *supra* note 72.

77. GLENDON, *supra* note 69, at 139; SCHNEIDER, *supra* note 72, at 236-37.

78. GLENDON, *supra* note 69, at 142.

79. For example, Chambers argues that with the waning sense of moral responsibility of the non-custodial parent, perhaps unwillingly separated from his children at the will of his former wife without cause, the law may be changed to eliminate child support or limit it to a transitional period. David L. Chambers, *The Coming Curtailment of Compulsory Child Support*, 80 MICH. L. REV. 1614-15 (1982).

80. Furstenberg and Nord found that: (a) "marital disruption effectively destroys any on-going relationship between children and biological parents living outside the home in a majority of cases;" (b) less than half the children had seen the absent parent in a year; (c) 20% had not seen him in more than five years; and (d) normally when there is contact, the relationship is social, not instrumental. Frank F. Furstenberg, Jr. & Christine Winquest Nord, *Parenting Apart: Patterns of Childrearing After Marital Disruption*, 47 J. MARRIAGE & FAM. 895 (1985). A recent study in Canada and Scotland found significant structural and emotional obstacles to anything like shared parenting after divorce in many cases. Edward

Lastly, even if everyone cannot or will not respond to the exhortations of the civil law, if the message of the law is less than the culture's ideal,⁸¹ then, as we have seen, that lesser norm, in time, can displace other societal values in the same way that debased currency drives out good currency. The analogy is more than theoretical: if family stability is in the interest of a child and one parent seeks to achieve that ideal while the other parent, with the permission of the law does not, the latter will prevail. That is, even if the civil law cannot compel socially beneficial conduct, it can impede it if socially beneficial conduct is not encouraged by the law.

If, as I have argued, the law does make a difference, why did the family law reformers go wrong?⁸²

IV. THE FAILURE OF SCHOLARSHIP⁸³

A Canadian survey, *Law and Learning*,⁸⁴ drew a distinction between what it called doctrinal research and fundamental research in law.⁸⁵ Doctrinal research analyzes law (and recommends change) within the context of established doctrine. Fundamental research, in addition, looks to the underlying social forces, the needs to be served, the probable consequences of change and so on. In so doing, the fundamental researcher in law will look not only to her own discipline but to the insights that all other relevant disciplines can bring to bear.

For example, were fundamental research to be done on family law reform, questions would be asked such as: What is the nature and purpose of marriage and the family in the eyes of the state? To what extent should the law in a free society intervene in marital and family affairs and decisions? Such questions would inevitably lead into questions about how the needs and welfare of children can best be served within the framework of the law. In searching for answers, the researcher would look to the sort of people brought together by the Ripon Project.⁸⁶

Kruk, *Psychological and Structural Factors Contributing to the Disengagement of Noncustodial Fathers After Divorce*, 30 *FAM. & CONCILIATION CTS. REV.* 81 (1992). The Kruk study is important as the first to examine reasons for the breakdown of relationships between children and non-residential divorced fathers.

81. That is, assuming, as I do, that society as a whole still values the welfare of children.

82. That they did is, I submit, beyond argument, if only because of the unanticipated consequences. See Weitzman, *supra* note 3.

83. The thinking of the reformers is well outlined in JACOB, *supra* note 5. But see Levy, *supra* note 54, at 45: "The most unrelenting criticisms appear . . . to have been designed primarily to serve the theoretical or ideological agenda of the critic rather than some sensible law reform agenda."

84. CONSULTATIVE GROUP ON RESEARCH AND EDUCATION IN LAW, *LAW AND LEARNING, REPORT TO THE SOCIAL SCIENCES AND HUMANITIES RESEARCH COUNCIL OF CANADA* 65-72 (1983).

85. In French, *recherches ponctuelles* and *recherche sublimé*, which may more clearly suggest the distinction.

86. One recent, innovative and overdue response to the problems of the revolution was a symposium in April, 1991, jointly sponsored by the American Bar Association and Ripon College entitled "Family Law and the 'Best Interest of the Child'." A group of 40

The law reformers did not do fundamental research.⁸⁷ Their focus was on the correction of the ills wrought by fault-based regimes of divorce—the exacerbation of acrimony thought to be implicit in adversarial divorce; the perjurious, consensual nature of divorce law in practice which was condoned by the courts.⁸⁸

Their correction was no fault divorce. It was a path they need not have taken. But no fault divorce, necessarily, required a fundamental reconsideration of the property, alimony and custodial regimes. This the reformers undertook with admirable ingenuity. And today, their solutions offer ample fodder for academics, a comfortable living for lawyers, busywork for judges that is on occasion intellectually challenging, as well as an ever-growing divorce industry.⁸⁹

As a result, the equitable jurisdiction states⁹⁰ (and Canada, including formerly community property Quebec) have been left with elaborate and inefficient⁹¹ family property regimes resting on contrived rationales of dubious tenability⁹²—rationales in the current jargon which boil down to “contribution” and “partnership.”⁹³ A basic flaw in the rationales is that they are modelled on a theory of the marriage covenant that no fault divorce denies, namely, that spouses *will* contribute, each in his and her own way, and *will* be faithful to the partnership. Under no fault, the faithful contributing spouse has no remedy against the spouse who is unfaithful and/or non-contributing.

specialists from a number of disciplines—judges, lawyers, pediatricians, mental-health professionals, child-development specialists, social historians, anthropologists, educators and ethicists—were invited to consider what children need and fundamental changes in law that can best foster their optimal development. Additional “Ripon Project” symposia are in the planning stage. The Ripon Project is innovative. For the first time in North America, a discussion of family law reform begins with fundamentals: What do children need? What framework of law can best serve these needs?

87. *But see* Levy, *supra* note 54. The advisors to the National Conference of Commissioners on Uniform State Laws included representatives of the social and behavioural sciences. Commissioners, advisors and reporters necessarily brought individual agendas to the discussions. Further, it must be recognized that the advice of the social and behavioural sciences today with all that has been learned since the 1970s would be greatly different than it was then. *See* JACOB, *supra* note 5; UNIFORM MARRIAGE AND DIVORCE ACT 9A U.L.A. (1979) and commentary.

88. *See* Wardle, *supra* note 2, at 91-97. Wardle questions whether no fault divorce achieved its limited objectives. *Id.* at 97-112.

89. The phrase, “divorce industry” so far as I know, originated with Mr. Justice Raymond Watson, formerly of the Family Division of the Australian High Court, one of the pioneers in Australia in family law reform. It refers to the growing number of judges, lawyers, mental health professionals, mediators, accountants, tax experts, appraisers, evaluators, actuaries and so on who, under the legislation, have become necessary to serve the industry.

90. I do not extend the analysis to community property states.

91. “Inefficient” as used here means costly to administer. Alimony, lump sum and periodic, rid of some of the encrustations of the past, is the more efficient remedy, but is inconsistent with no fault divorce.

92. A thorough analysis of the untenability of the theories is beyond the scope of this Article. *But see, e.g.*, 23 FAM. L.Q. 147-381 (1989) (“Special Issue on Property Division at Divorce”). A critical reading of these essentially doctrinal analyses well illustrates the point.

93. Even if the partnership analogy is misleading and distorting, it will be an insensitive husband and an imprudent politician who denies that marriage is a partnership.

The essential flaw in the theories is that they do not serve the social need. In most urban family circumstances there is not enough property to go around. Yet to be consistent with the premises of no fault divorce, property division was necessarily put forward as the predominant economic remedy for divorce, and alimony was relegated to an occasional, short term, "bridging" remedy.

We, today, with the benefit of hindsight, may wonder that when fundamental change in the nature of marriage and the parent-child relationship was in contemplation, the need to consider an equally radical change in the family property regime in the interests of children was not apparent. Alimony, much more clearly than property division, was cast adrift from its former theoretical roots, its rationale, by no fault divorce. If marriage is freely terminable at any time without cause; if, in the eyes of the law, marriage is no more than a temporary liaison of two individuals for so long as it is convenient to both and who go back to their two solitudes upon divorce, why should either have any continuing responsibility for the other?⁹⁴

That alimony has uneasily survived its illogic under no fault reflects the need for it. But an ancillary remedy without roots in a defensible rationale consistent with law can, at best, give rise to inconsistent application and, at worst, perceived injustice.

The loss of alimony as a viable remedy has a most direct impact on children of divorce. For if a child's custodial parent is poor, so must be the child.⁹⁵ Nor, under the logic of no fault divorce can that poverty be remedied by adequate child support under private law,⁹⁶ because its logic demands that a custodial parent not share in any benefit to the child.

In distinction, the rationale for the property and alimony regimes under the old law, whatever its flaws, was soundly based in it. Marriage was a lifelong covenant to be severed only for a grave breach. Until death or remarriage, the "innocent" spouse (and children in her care) were, in theory, entitled to what they would have enjoyed but for the breach.

The changes in the custodial regime were, on the face of it, not as far-reaching, but may have been, in substance, more profound. The Uniform Marriage and Divorce Act proposed the already recognized "best interests" test as the guide in determining custody but recommended that conduct, unrelated to the children, be removed from the court as a discretion structuring factor. Thus, not only did no fault divorce change the nature of the marriage covenant,⁹⁷ it changed the parent-child relationship from one that was assumed to be sacrosanct (in

94. See authorities cited *supra* note 72 and accompanying text.

95. The positive relationship between family income and children's academic achievement and IQ is well established. See generally *supra* note 63, at 466-67.

96. Even if there were enough monetary resources to go around. In most family circumstances, there is not.

97. See WEITZMAN, *supra* note 3, at 366-68.

the absence of grave misconduct) to one that is terminable for all practical purposes⁹⁸ by the other parent without cause.

The reformers did not intend to change the nature of the marriage covenant or the parent-child relationship. But in their too narrow focus on the ills of fault-based divorce, in their failure to do fundamental research, to think fundamentally, the reformers, unwittingly, as we now know, profoundly changed the parent-child relationship⁹⁹ and, to the extent that the law has influence, changed the husband-wife relationship, two relationships basic to the functioning of society.

Another gift of reform has been the most bizarre and thought distorting jargon ranging from the offensive—"rehabilitative maintenance," for example, to the misleading—"clean break," "partnership" and "equality," words that become icons detached from the limited reality which spawned them, which ignore the total reality and prevent us from thinking clearly how to serve the underlying social need.

Consider "equality," a principal icon, for example. Surely it is now the cultural perception that the equality of spouses is the very basis of what marriage ought to be—equality of commitment, of management, of obligation. But these words do not readily translate into words of law. Men and women have differing needs¹⁰⁰ and the law's arithmetic equality does not serve them. Those who must show a proper reverence for the icon "equality" at law, yet who recognize the differing needs, have had to devise daedalian rationales for what might be called "asymmetrical equality."¹⁰¹

Would we not think more clearly about what the law ought to be if we were to call "a spade a spade" and recognize need for what it is? But with need goes an obligation to meet it and such an obligation is outside the context of no fault divorce.

With hindsight and more than twenty years of experience under the premises of no fault divorce, we can better see their flaws than could the reformers. And the hubris of that time is no longer with us. We now better know that we must think fundamentally if we seek to change law affecting the fundamental institution of society. It is to be regretted that the now vast, and, for the most part, excellent, literature on legal issues affecting the family remains doctrinally captive so that the remedies proposed are no more than palliative and do not get to the root of the problems we face.

V. REMEDIES

Of the many proposals to alleviate the risk of harm to children of

98. See authorities cited *supra* note 80 and accompanying text.

99. See JACOB, *supra* note 5, at 133 (Levy appears to have considered the custodial issue in more depth than the Commissioners were prepared to accept).

100. O'Connell puts it neatly: "Women are not damaged men . . . [they] are not undamaged men either." O'Connell, *supra* note 72 at 506-07.

101. See, e.g., Martha L. Fineman, *Societal Factors Affecting the Creation of Legal Rules for Distribution of Property at Divorce*, 23 FAM. L.Q. 279 (1989).

divorce in the context of no fault, I will do no more than touch upon a few broad categories. First, the economic component of the harm to children¹⁰² was sought to be addressed in the federally required child support guidelines. Overdue and prudent as that measure was, a recent study has found that the changes brought about by passage of the guidelines have been modest.¹⁰³ The inescapable fact remains that separated parenting is economically inefficient. In the majority of circumstances, separated parents do not have the resources to support their children adequately.¹⁰⁴ The extent of child poverty attributable to divorce is a product of the high incidence of divorce.¹⁰⁵

Second, there have been recent congressional suggestions that the "waiting period" for divorce should be increased to give couples time to "sober up" (as one report put it) and consider reconciliation.¹⁰⁶ The proposal has its flaws. Until 1985, a ground for divorce in Canada was, in theory, three years consensual separation. In practice, the "waiting period" was detrimental to women and children in that during the separation period, they were denied some of the spectrum of remedies available on divorce.¹⁰⁷

There is no evidence that people *do* "sober up" during the waiting period. The tensions and uncertainties of unresolved issues are not conducive to reconciliation. Further, time reduces the chances of women for remarriage more than it does for men, and pre-divorce liaisons are much more open to men than they are for women with children. Nevertheless, there is some symbolism, some "message" in law that says

102. Which, as we have seen, is real but which has not been measured as an isolated factor.

103. Nancy Thoennes et al., *The Impact of Child Support Guidelines on Award Adequacy, Award Variability, and Case Processing Efficiency*, 25 *FAM. L.Q.* 325, 345 (1991). The study involved only three states: Colorado, Hawaii and Illinois, with different guideline models. The results in other states may differ.

104. See generally Harry D. Krause, *Child Support Reassessed: Limits of Private Responsibility and the Public Interest*, 24 *FAM. L.Q.* 1 (1990).

105. It is to be recognized that the impoverishment of children of divorce is only one corner of growing child poverty in general, which is so detrimental to the society of both the United States and Canada and has such short and long run economic implications, if only because you cannot educate a hungry child. Growing child poverty is the result of a spectrum of changed social and economic policies: the unweaving of the support network during the prosperity of the 1980s, tax and welfare policies increasingly detrimental to children, family law and so on. See, e.g., *U.S. Panel Warns on Child Poverty*, *N.Y. TIMES NATIONAL*, April 27, 1990, at A22 (citing a report of the National Commission on Children); SYLVIA A. HEWLETT, *WHEN THE BOUGH BREAKS: THE COSTS OF NEGLECTING OUR CHILDREN* (1991). There has been an enormous transfer of wealth from the young (that is, those who raise children) to the old in the last two decades. Iver Peterson, *Why Older People are Richer Than Other Americans*, *N.Y. TIMES*, Nov. 3, 1991, at E3. It is truly astonishing that during a time when "family values" are on so many political lips (which we, apparently, are intended to read) the tax exemption for children has been reduced. It was 42% of *per capita* income in 1948 and is now 11%. Steven A. Holmes, *Unlikely Union Arises to Press Family Issues*, *N.Y. TIMES*, May 1, 1991, at A18. In Canada (before the imposition of the Goods and Services Tax in 1990), a married couple earning the median income with two children paid marginally *more* tax (100.1%) than a childless couple earning the same income.

106. See Holmes, *supra* note 104.

107. The result might be somewhat different in the United States. In Canada, divorce and ancillary relief, custody and maintenance, are under federal jurisdiction. There are some pre-divorce remedies under provincial jurisdiction.

one cannot be quickly freed from the marriage covenant. It is questionable, however, that longer "waiting periods" would reduce the rate of divorce sufficiently to justify the detriments.¹⁰⁸

Third, joint custody in various guises—from joint residential custody to a right on the part of the access parent to be consulted about major decisions affecting the child—is now the statutory preference in a majority of states. The rationale for joint custody rests on two concepts. First, that children of divorce do best when they maintain a close relationship with both separated parents.¹⁰⁹ Second, that parent and child have a right to a continuing relationship after divorce. "Parents are Forever" was coined to express these two concepts.¹¹⁰

Notwithstanding the broad acceptance of the idea of joint custody and its attractiveness, there have been no long-range and few shorter range studies regarding the impact of joint residential custody on children. We know nothing (except that which can be speculated from theories of child development) about infants and joint custody—at a time when parent-child bonding, if it is to occur, must occur.

Johnston and her colleagues conducted a study of children in post-divorce conflicted families where there was court ordered joint custody or frequent access. Their findings were grave indeed. A comparison of that group and children in sole custody showed the former to be more dysfunctional than the latter.¹¹¹

It seems clear that the automatic imposition of joint custody without skilled and time-consuming assessment of the families can be detrimental to children. But, on the other hand, if as a rule of thumb, joint custody or frequent access are ordered only when there is agreement, the non-residential parent is hostage to the continuing goodwill of the residential parent—an intolerable situation if there is to be equity to both the children and the absent parent. Moreover, it makes an ass of the law.¹¹²

There are perhaps irremovable structural reasons for the findings of Furstenberg and Nord¹¹³ that divorce terminates the absent parent's

108. It is clear, of course, that if the full spectrum of ancillary relief were available during the "waiting period," the separation would be permanent and the chance of resumed cohabitation no greater than that of remarriage to one another after divorce.

109. See, e.g., WALLERSTEIN & KELLY, *supra* note 22. But see FURSTENBERG & CHERLIN, *supra* note 46, at 73-76 (Furstenberg and Cherlin, with their different methodology, found no correlation between children's adjustment to divorce and their relationship with an absent parent).

110. The phrase is that of Meyer Elkin, formerly director of the Los Angeles County Conciliation Court. Elkin was a pioneer and a leader from the 1950s on of the conciliation court movement.

111. See JANET R. JOHNSTON & LINDA E. G. CAMPBELL, *IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT* (1988); Janet R. Johnston et al., *Latency Children in Post-Separation and Divorce Disputes*, 24 J. AM. ACAD. CHILD PSYCHIATRY 563 (1985); Janet R. Johnston et al., *Ongoing Postdivorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AMER. J. ORTHOPSYCHIATRY 576 (1989).

112. Experience suggests the sanction against the obdurate parent of losing custody is seldom a realistic alternative. When patterns of separated parenting have been established it is very difficult, and often impossible, to change them.

113. See Furstenberg & Nord, *supra* note 80.

parent-child relationship in the majority of cases and that in the majority of the remainder, the relationship is social, not affective. A recent study of disengaged divorced fathers found substantial structural impediments to continued parent-child engagement of non-residential fathers. A notable finding was that many fathers who were most engaged with their children during marriage eventually ceased contact because their profound sense of loss and bereavement as well as the artificial access conditions made a continued truncated relationship too painful.¹¹⁴

Fourth, therapists¹¹⁵ propose that the harm to children of divorce that they have observed can be reduced therapeutically. In response to the conciliation court movement¹¹⁶ there are now court-connected programmes in most jurisdictions of varying elaborateness conducted by persons with varying credentials and skills to mediate or conciliate issues involving children and their future parenting and to counsel parents and children.

To say that there has been no overall¹¹⁷ assessment of such programmes and their long-term results is not to diminish their value. Social experience does not yet offer guidance in the difficult art of separated parenting. There is no social knowledge and almost no empirically based clinical guidance in the even more difficult art of step-parenting. Therapeutic programmes, even if they do no more than raise some consciousness of the difficulties, must have value. There is no doubt that in skilled hands (of which there are too few) some children can be saved from harm.

Yet there is no evidence that such programmes, extended as they are, have or can significantly reduce the incidence of harm to children of divorce.¹¹⁸ It is doubtful that we have the resources in money or in uniquely skilled personnel to be able to address the problem in all its dimensions. In any event, if the law is counter-therapeutic, the law will prevail.

There is another issue: state intrusion into parenting through doctrinal¹¹⁹ therapeutic intervention following divorce is now on a scale

114. Kruk, *supra* note 80.

115. "Therapists" is used here generically for lack of a better word to encompass all those in "helping professions" of different disciplines who assist, in a number of ways, to resolve the human issues of divorce and ameliorate the consequences.

116. It is beyond the scope of this Article to discuss the nature and extent of the movement, its ideological thrusts or to assess their merits. In general, the movement seeks to humanize the divorce process, to observe and within the possible, correct the consequences. It is interesting and perhaps regrettable that conciliation (to use the term broadly) has had no legal analysis although through it, for the most part, judges in practice, if not in form, delegate decision-making involving children (but not their support) and their future parenting to therapists.

117. See 30 FAM. AND CONCILIATION CTS. REV. (April, 1992) which is devoted to reports on court-connected mediation and conciliation in California.

118. See, e.g., Johnston, *supra* note 111; Furstenberg & Nord, *supra* note 80; Kruk, *supra* note 80.

119. This refers to the fact that, of necessity, state administered programmes (e.g. mediation, conciliation, counselling, child custody assessment) must be doctrinally conforming within themselves. It does not mean that the programmes are necessarily homogeneous across the nation—nor that the doctrines followed are necessarily "wrong."

about which a free society might be uneasy, however benign the intent and the therapeutic accomplishment.

In summary, the experience so far does not suggest that the continuing search for the "best" custodial/access regime and therapeutic guidance has or is likely to obviate the structural impediments to effective separated parenting or to significantly reduce the incidence of harm to children of divorce. That does not mean, given the present state of the law, that we should not try or, in trying, ignore the risks of state intrusion that trying involves.

Fifth, Weitzman,¹²⁰ Glendon¹²¹ and others propose what Glendon calls a "children first" regime of property division, alimony and child support to remedy the economic component of harm to children and the economic deprivation of custodial mothers. Without going into the details,¹²² they propose that the needs of children have a first call on the income of the non-custodial parent and the family home. For example, Weitzman proposes that a custodial mother be granted either title to the family home or a right of occupation while the children are dependant. Neither she nor Glendon recommend that a child's interest in family property be expressly recognized but rather that it be derivative through the custodial parent.

A "child first" policy is attractive conceptually, but there are substantial practical and theoretical impediments to it. It does not address the psychic component of harm to children. It does not recognize the economic inefficiency of separated parenting and would leave in effect law which facilitates that inefficiency. However draconian its measures against the non-custodial parent, in the majority of family circumstances, he will seldom have enough to maintain his family at an adequate standard without public subsidization,¹²³ no matter what penury is imposed on him.

What I call the theoretical impediments to a "child first" policy

However, following Bellah, Glendon says that the therapeutic culture "not only refuses to take a moral stand, it actively promotes distrust of 'morality'." GLENDON, *supra* note 69, at 108 n.113. That is, in this context, it exalts perceived self interest at the expense of obligation to others or to the society. "Americans are seldom as selfish as the therapeutic culture urges them to be." BELLAH ET AL., *supra* note 70, at 112. Thus, the crucial involvement of the therapeutic community in family law decision-making reinforces the adult-centredness, implicit in no fault divorce. As noted before, the law appears to be counter-cultural: the cultural perception of marriage and family is on a "higher," less self-centred, plane than is the law. It is, of course, an argument of this Article that the law's perception must, of necessity, in time displace that of the culture.

120. WEITZMAN, *supra* note 3, at 379-87. Weitzman gives detailed proposals for remedying the economic consequences of no fault divorce within its context, which are a more or less unseverable "package." *Id.* at 357-401. The text refers to those most directly affecting children, but all have an indirect impact.

121. GLENDON, *supra* note 69, at 91-104.

122. For example, that there should be three classes of marriage and divorce—short childless marriages, those with dependent children and those involving older women who have reared now independent children. Arguably, the details of the proposals are crucial if one is to assess their effects, but they are beyond the scope of this Article.

123. Weitzman seeks an equalization of standards of living in the separated households. This would mean, in most circumstances, a significant reduction from that formerly enjoyed by the children. WEITZMAN, *supra* note 3, at 380.

within the context of no fault divorce are substantial. In operation, the proposal would surely leave the adult self-interestedness of the custodial parent with the benefits of no fault divorce and leave the non-custodial parent to pay most of its costs.¹²⁴ The proposal is inconsistent with and against the tenets of no fault divorce, namely, that each adult is equally free to terminate a marriage at any time without cause, to equally share in the acquests of it and each, thereafter, to have the fruits of her and his individual efforts.¹²⁵ Law which is not equitably coherent within itself cannot stand, however benign its intent. Finally, Wardle came more directly to the point of harm to children of divorce by tentatively proposing that "divorces involving minor children [might be] excluded from no fault divorce processes or be subject to more protective no fault divorce procedures."¹²⁶

The Wardle proposal for different grounds of divorce when there are children and when there are not, is of a different dimension than the "child first" policy. Different grounds of divorce necessarily mean that the marriage covenant at law changes once there are children. What changes in the alimony, property and custodial regimes are suggested? What would be the grounds of divorce? Would the pre-child marriage be, in effect, only a trial marriage to become "real" only when a child was born—with what impact on the alimony and property regime?

I argue that for the law to recognize differing classes of marriage giving rise to differing grounds of divorce and differing economic entitlements and obligations is to diminish the institution of marriage;¹²⁷ and that society's interest in the welfare of children is best and most simply and logically served by sustaining that institution. The complexities of any other approach are formidable.

In summary, I submit that the ever more elaborate search for palliatives will, in the end, be unavailing because they do not get to the root of the problem, the high incidence of divorce facilitated by the law and the consequent risk of harm to children.¹²⁸

Does not the question come down to this: If the law influences the rate of divorce (as I argue it does) and if divorce puts children at risk and they do best in an intact family (in the absence of exposure to abuse or marked spousal conflict), should not the law do what it can to encourage

124. Weitzman's proposal for equalization of standards would, in theory, avoid the problem. But maintaining the family home for children either by transfer to the custodial parent or postponement of sale while the children are dependant (with all the practical and financial difficulties involved) would be at the individual cost of the non-custodial parent. This is true even if determining the respective standards of living included a right on the part of the non-custodial parent to own or occupy a property equivalent to the family home. Such duplication is within the means of only a few.

125. To state the proposition in its stark terms is to show its fallacy in the real world. The reformers, of course, had to dilute the stark premise to grudgingly allow for the facts that women are sometimes economically disadvantaged by marriage and that children are, as the premises of no fault divorce would have it, an economic liability.

126. Wardle, *supra* note 2, at 133-35.

127. Bearing in mind, as Groucho Marx has told us, "that marriage is a great institution but who wants to live in an institution?"

128. Together with other problems accompanying a high incidence of divorce.

family stability, rather than facilitating instability? Finding the answer to that question seems to be urgent.

VI. DIRECTIONS

A beginning, if not yet a substantial literature, calls for a changed direction in the law, new law that encourages family stability. Bartlett urges that family law ought to be based on "notions of benevolence and responsibility . . . [that] reinforce parental dispositions toward generosity and other-directedness . . ." ¹²⁹ Minow says that the law must not create "obstacles to affiliation;" that it should "nurture the relationships between individuals that constitute families."¹³⁰ Schneider would go further in saying that the law of divorce (and, therefore, of marriage) should emphasize the unity of spouses and not their separateness; that it should emphasize their obligations to each other and not their autonomy.¹³¹ Hafen argues that the individualism of no fault divorce is, in fact, counter-productive; that true freedom arises from and, for its exercise, is dependent on belonging; that, in any event, a sense of belonging is crucial to a child's capacity to become an individual.¹³² We know beyond doubt that these ideals, these aspirations, are just those under which children can best be nurtured. The vitality of the society and its economy, in turn, depends on the quality of their nurture.

What framework of law can best help people to try to reach these ideals? Turning the clock back to a fault-based regime of divorce is, I suggest, repugnant to most of us. Yet policy options based on "notions of benevolence," that "nurture relationships," and "emphasize obligations, not autonomy" and which, at the same time, do not reintroduce the flaws of the old law are not yet clearly apparent. To find them, is, I suggest, a pressing need, and will require a reorientation of thinking among legal scholars.

We must bear in mind Ronald Coase's caution in another context:

[I]n choosing between social arrangements within the context of which individual decisions are made, we have to bear in mind that a change in the existing system which will lead to an improvement in some decisions may well lead to a worsening of others. . . . In devising and choosing between social arrangements we should have regard for the total effect. This, above all, is the change in approach which I am advocating.¹³³

129. Katherine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 294 (1988).

130. Martha Minow, "Forming Underneath Everything That Grows:" *Toward a History of Family Law*, 1985 WIS. L. REV. 819, 894.

131. Carl E. Schneider, *Rethinking Alimony: Marital Decisions and Moral Discourse*, 1991 B.Y.U. L. REV. 197, 257.

132. Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 B.Y.U. L. REV. 1, 3, 39-41.

133. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 44 (1960). Dr. Coase was awarded the 1991 Nobel Prize in Economics.

