2002

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A Discursive Essay on the Nature of Marriage and Divorce in Italy and the United States

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I. INTRODUCTION.

As challenges to the notion that marriage is reserved to members of the opposite sex have been increasing in the judicial, legislative and popular arenas over the past decade in the Western World, our basic concept of marriage has been, depending on one's point of view, diminished or expanded. Society defines marriage in various spheres simultaneously: legal, economic, social, moral, ethical and religious (or non-religious, which is nevertheless a statement about religion).

There are, in truth, three temporal time frames, at which society makes and constantly remakes critical decisions that shape this fundamental institution: point of entry (who may marry whom, and how), during marriage (which may, in turn, actually be divided in many cases between the time a married couple cohabits and the time(s), if any, during which they are separated and estranged, but still married) and point of exit (dissolution, divorce, annulment or nullification, or death of one of the parties).1 Any changes, however slight, in the rules relating to any of these time frames (whether the altered rules relate only to the spouses, or to their relationship with children of their union or children of either of them, or to third parties) necessarily alters what it means to be married.

Without attempting to be exhaustive, this essay will compare and contrast developments in Italian and American law in these arenas.

The reader must keep one important caveat in mind, however. While one can speak with some certainty about Italian family law, American family law remains fragmented. It is governed by the laws of the fifty states, notwithstanding an increasing overlay of federal law. When the National Conference of Commissioners on Uniform State Laws (hereinafter, “NCCUSL”) was founded in 1892, it was suggested that one of the major subjects for a uniform act would

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1. Additionally, especially where a marriage has produced children who are minors when their parents divorce, society fashions and refashions rules that continue to regulate the parties in various ways, often long after a marriage is terminated.
be marriage and divorce. A mere seventy-eight years later, the NCCUSL promulgated a proposed Uniform Marriage and Divorce Act (hereinafter, "UMDA"). Today, over three decades later, only eight (8) states have adopted some form of the UMDA. Thus generalizations about the status of American family law are only that: generalizations. To the extent that the authors purport to make such generalizations, they are surely subject to valid dispute in many instances.

II. ENTRY INTO MARRIAGE.

A. THE ITALIAN PERSPECTIVE.

As in any other legal system, according to Italian law, no marriage celebration can validly take place unless the individual holds full capacity for marriage. Marriage is defined as the legal union between a man and a woman, therefore both same sex and polygamous marriages are not allowed. The minimum age of capacity to marry is eighteen, but Article 84 of the Civil Code states that the minor may be authorized by the Tribunal to enter into marriage if the following requirements are satisfied: (a) he or she is at least sixteen; (b) there exist “serious reasons” to grant the authorization; and (c) the minor is “mature” both from a psychological and a physical point of view.

The other main requirement is competence which, after the reform brought about by the law of 19 May 1975, is considered only from a psychological perspective. In order to enter into a valid marriage, an individual must hold an adequate degree of discretionary judgment, and he or she must be capable to freely determine whether or not to get married. For example, a person who has attempted to kill or actually did kill a spouse of either party is not allowed to marry the other spouse. In addition, the Code also envisages consanguinity restrictions between ascendant relatives, descendant relatives, siblings and other close relatives.

There are also other legal requirements—the so-called formalities. A violation of the formalities does not render the marriage invalid; however, it might...
subject the party that does not comply with them to criminal punishment. Under Italian law there are three fundamental formalities, two directly dealing with a woman's marriage and one regarding a woman's remarriage. Specifically, the formalities are: a period of public notice before the commencement of the marriage; government registration upon marriage; and satisfaction of the waiting period before a remarriage.

The first formality is in place in order to allow “interested parties” to file an opposition, alleging that a legal impediment exists to a projected marriage. Article 93 of the Italian Civil Code requires that the future spouses give public notice of their intention to marry. If an opposition is filed before the Tribunal, no marriage celebration can take place until the opposition is dismissed.

The second formality relating to the governmental registration of a marriage is governed by Article 107 of the Italian Civil Code. This article states that the officer of vital statistics must inform the spouses about the fundamental rights and duties arising out of marriage by reading Articles 143, 144 and 147 of the Italian Civil Code; and after each spouse has expressed his or her willingness to enter into marriage, the officer must then declare that the parties are legally married. At this point, the act of the marriage's registration, which is merely intended to inform the community that the marriage was celebrated, will follow.

The third formality, implemented by Article 89 of the Italian Civil Code, is in place in order to prevent the risk of the so-called “confusion of paternity.” Specifically, Article 89 provides that a previously married woman cannot remarry unless three hundred days have expired since her divorce or the marriage's annulment, unless her former marriage was declared invalid because of either spouse’s impotence or infertility. The Tribunal may grant a dispensation from this requirement if the woman can demonstrate that she is not pregnant, or if there is conclusive evidence that during the above three hundred day period the woman did not cohabit with her spouse. If the woman does not comply with this requirement, and thus gets married before the indicated time period, she is subject to criminal punishment, namely a fine.

8. C.c. art. 102.
9. However, an author pointed out the complex and time-consuming publication procedure is also directed to warn the prospective spouses about the importance of the matrimonial bond. ANDREA TORRENTE & PIERO SCHLESINGER, MANUALE DI Diritto Privato 828 (Giuffré, 1981). [hereinafter TORRENTE, MANUALE].
11. If the officer failed to officially declare that the parties were united in marriage, the bond must be considered valid as long as he or she actually received both spouses’ nuptial declaration and duly reported in the act of marriage that the exchange of consent took place. MASSIMO BIANCA, Diritto Civile 49 (2d ed. 1985). The opposite conclusion is presented by another doctrinal point of view, which considers the officer’s declaration to be an essential legal requirement to a valid civil marriage. TORRENTE, MANUALE, supra note 10, at 830.
12. C.c. art. 89.
Following the Concordat of 1929, the Italian State (then a fascist state) and the Holy See agreed that religious marriages would have "civil effects" (i.e. be considered valid and binding by the State too) as long as two fundamental requirements are fulfilled: (a) the minister must remind the parties that the marriage will be considered valid by the Italian State and, as we have seen with reference to civil marriage, the minister must read articles 143, 144 and 147 of the Italian Civil Code; and (b) after the marriage celebration, the minister must send the "act of marriage" to the officer of vital statistics, who will proceed to its registration.\(^\text{13}\)

Similar to civil marriage, the Concordat marriage must be preceded by the completion of the public notice procedure, which takes place before both the religious and civil authorities. The purpose of this is to allow a concerned party to follow the opposition procedure described above. In contrast to a civil marriage, where the registration is considered a formality, the registration in a Concordat marriage is an essential requirement for the marriage's validity vis-a-vis the Italian State. It should also be noted that the Concordat marriage registration cannot take place if one of the above indicated essentials is lacking. If the registration is performed, the Concordat marriage is considered "civilly" valid from the time its celebration actually took place – not from the time of the registration itself.\(^\text{14}\)

B. THE AMERICAN PERSPECTIVE.

Despite recent challenges, the American legal rules for entry into marriage have evolved only incrementally in the last hundred years. There has been a gradual abatement of affinity prohibitions and, to a lesser extent, a reduction of consanguinity restrictions.\(^\text{15}\) During the Twentieth Century, several states abandoned, either by legislation or judicial decree, the doctrine of "Common Law" marriage.\(^\text{16}\) That relic of frontier times continues in place (but not in a place of honor) in roughly ten states, including Pennsylvania, where state courts have repeatedly said that the doctrine is to be tolerated, not encouraged.\(^\text{18}\)

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13. See Accordo di Revisione del Concordato Lateranense, February 18, 1984, It.-Holy See, art. 8 n.1, enacted in Italy by Law no. 121 of March 20, 1985.

14. The above-described "retroactive effect" of marriage registration occurs even when the registration itself is requested a second time and no essential requirement is lacking. Torrente, Manuale, supra note 10, at 843.


18. "Because claims for the existence of a marriage in the absence of a certified ceremonial marriage present a fruitful source of perjury and fraud," Pennsylvania courts have long viewed such claims with hostility. see In re Estate of Wagner, 398 Pa. 531, 533, 159 A.2d 493, 497 (1960). Common law marriages are tolerated, but not encouraged. Id. While we do not today abolish common law marriages in Pennsylvania, we reaffirm that claims for this type of marriage are disfavored." Id. at 1019-20.
In the last third of the Twentieth Century, the United States Supreme Court issued several significant constitutional rulings affecting the ability of states to regulate marriage. Utilizing the Equal Protection Clause, the Supreme Court struck down an embarrassing relic of the Nineteenth Century, the so-called “miscegenation” laws that still lingered on in sixteen southern states until 1967. These laws prohibited persons of different races from marrying each other. Remarkably, it was not until November 2000 that the last hold-out state, Alabama, actually repealed its unenforceable miscegenation statute.

The Supreme Court also decided two cases involving the impact of poverty on marriage. In one, the Court struck down a Wisconsin statute that prohibited the issuance of a marriage license to a person who had a child out of wedlock who was not in that person’s custody, and for whom that person was in arrears in child support or the child was a “ward of the state.” This legislation was targeted at “deadbeat dads.” The Court held that the regulation was not sufficiently tailored to the governmental purposes involved. Similarly, but ironically in a case involving divorce, the Court struck down mandatory filing and service fees in divorce actions, as applied to indigent married persons, on the grounds that this prevented remarriage.

Subsequently, the Court struck down a state’s prison regulations requiring inmates to obtain permission from the prison superintendent before getting married. The Court distinguished an earlier summary affirmation of a decision upholding a state law prohibiting prisoners serving life sentences from getting married.

Toward the end of the Twentieth Century, litigation was brought in a number of American jurisdictions which some perceived as attacking the very foundations of marriage. We refer here of course to the various lawsuits challenging explicit or implicit prohibitions on same-sex couples being married throughout the United States. Particularly momentous were the decisions of the Hawaii and Vermont Supreme Courts. In Baehr v. Lewin, the Hawaii Supreme Court held that the plaintiffs had stated a cause of action for violation of their rights under the Hawaii Constitution and remanded the case for trial. In a more final decision, that was nevertheless an incomplete victory for gay rights activists,

27. Baehr, 852 P.2d at 68.
the Vermont Supreme Court in *Baker v. State of Vermont* ruled that denying same-sex couples the benefits of marriage violated their rights under the Common Benefits Clause of the Vermont Constitution.28

After the Hawaii Supreme Court remanded the *Baehr* case for trial, Congress and many state legislatures enacted “defense of marriage” acts, in an effort to make clear their disapproval of same-sex marriage.29 Particularly notable is the federal Defense of Marriage Act (DOMA), which not only allows states to refuse to give “full faith and credit” to same-sex marriages from other states,30 but also for the first time purports to generally define marriage for federal purposes.31 Outside of the arena of immigration, it had previously been thought that the federal government would always defer to the determination under state law as to whether a couple was legally married.32 Now if a state should allow same-sex marriages, DOMA provides that those marriages will not be recognized for any federal purposes.

To some extent congruent with this development, there has been the creation of various quasi-marital statutes. These are in place, not only in a number of major metropolitan centers, such as in New York City where domestic partners are entitled to share various benefits,33 but also now at the statewide level. In response to the *Baehr* litigation, the state of Hawaii now allows same-sex couples to register as “reciprocal beneficiaries” with many of the same rights and obligations as married couples.34 Similarly, in response to the Vermont Supreme Court decision in *Baker*, the Vermont legislature has authorized same-sex couples to enter into “civil unions,” with essentially all of the rights and duties of married couples in Vermont.35

A fascinating variation on the same-sex marriage controversy in recent years has been the issue of determining the legal sex of a post-operative transsexual for purposes of entry into marriage. The predominant Western view has been that one maintains the legal gender that one was born with (which, in itself, is

28. *Baker*, 744 A.2d at 889. However, the Vermont Supreme Court stopped short of ordering that same-sex couples be allowed to marry (as opposed to having all the rights of married persons). *Id.* at 886-89.
32. See, e.g., 20 C.F.R. § 404.344 (1979)(“You may be eligible for [Social Security] benefits if you are related to the insured person as a wife, husband, widow or widower. To decide your relationship to the insured, we look first to State law.”)
not always readily determinable). Nevertheless, as early as 1976, one state intermediate appellate court upheld a trial court judgment that found that a transsexual, who was born a male, and was both medically and legally transformed into a female, by virtue of sex-reassignment surgery, was entitled to support from her husband. In 1999, a Texas appellate court followed the dominant view that a sex change does not legally change one’s gender. Accordingly, the wife was still legally a male post-operatively, and thus, her marriage to a man was void ab initio. Therefore, she was precluded from maintaining a wrongful death action where the husband had died, allegedly as a result of medical malpractice.

Yet another intermediate appellate court addressed this same subject in 2001. The Court of Appeals of Kansas, in an extremely thorough opinion, concluded that:

[a] trial court must consider and decide whether an individual was male or female at the time the individual’s license was issued and the individual was married, not simply what the individual’s chromosomes were or were not at the moment of birth. The court may use chromosome makeup as one factor, but not the exclusive factor, in arriving at a decision. . . .

[O]n remand, the trial court is directed to consider factors in addition to chromosome makeup, including: gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity. The listed criteria we adopt as significant in resolving the case before us should not preclude the consideration of other criteria as science advances.

In March 2002, the Kansas Supreme Court reversed and reinstated summary judgment for the party challenging the validity of the marriage. The Court acknowledged that, there are two distinct lines of cases. One judges the validity of the marriage according to the sexual classification assigned to the transsexual at birth. The other views medical and sexual procedures as a means of unifying a divided sexual identity and determines the transsexual’s sexual classification for the purpose of the marriage at the time of marriage.

According to the Court, the sole issue was the meaning of the following provision of the Kansas marriage law: The marriage contract is to be considered in

41. Id. at 124.
law as a civil contract between two parties who are of opposite sex. Summa-
rizing the differing approaches, the Court noted, "[T]he essential difference be-
tween the line of cases. . . that would invalidate the Gardiner marriage and the
line of cases. . . that would validate it is that the former treats a person's sex as a
matter of law and the latter treats a person's sex as a matter of fact." The Court opined:

The district court granted summary judgment, finding the marriage void under
K.S.A. 2001 Supp. 23-101. Summary judgment is appropriate when there is
no genuine issue of material fact (citation omitted). Here, the parties have
supplied and agreed to the material facts necessary to resolve the issue. There
are no disputed material facts. We disagree with the decision reached by the
Court of Appeals. We view the issue in this appeal to be one of law and not
fact.

In a passage that is anything but clear, the Court then suggested that transsex-
uals are in a kind of legal limbo: "The words 'sex,' 'male,' and 'female' in
everyday understanding do not encompass transsexuals." However, without really addressing the more complex biological issues, the Court concluded:

The plain, ordinary meaning of "persons of the opposite sex" contemplates a
biological man and a biological woman and not persons who are experiencing
gender dysphoria. A male-to-female post-operative transsexual does not fit
the definition of a female. The male organs have been removed, but the abil-
ity to produce ova and bear offspring does not and never did exist. There is
no womb, cervix, or ovaries, nor is there any change in his chromosomes.

Finally, the Court noted that the legislature is free to change the law on this
subject:

The legislature has declared that the public policy of this state is to recognize
only the traditional marriage between two parties who are of the opposite sex,
and all other marriages are against public policy and void. We cannot ignore
what the legislature has declared to be the public policy of this state. Our
responsibility is to interpret K.S.A. 2001 Supp. 23-101 and not to rewrite it.
That is for the legislature to do if it so desires. If the legislature wishes to
change public policy, it is free to do so; we are not.

Unlike the situation in Italy, there is generally speaking no distinction
throughout the United States between the legal consequences of a marriage per-
formed in a religious rite and one performed civilly. There remain in a few
jurisdictions some civilly recognized religious anomalies. In the United States,
however, there are severe restrictions on what the states can do to treat marriages differently, based upon religion, because of the First Amendment to the United States Constitution. Nevertheless, we see in Rhode Island the ability of first cousins to marry if allowable within their religion, but not otherwise. Although there is no difference in legal effect from any other ceremony, Pennsylvania still authorizes the “Quaker wedding” in which a couple marries themselves without an officiating religious authority, such as a minister.

Normally, once those who wish to get married have reached the age of majority, generally eighteen (18), they do not need the consent of a parent to obtain a marriage license to get married. The United States does not generally have legally compelled publication of the intention to get married, nor does it provide a mechanism for parents of adult children to oppose a marriage.

An interesting development, starting in 1997 in Louisiana, has been the notion of “covenant marriage.” This concept has now also been adopted in Arkansas and Arizona. The covenant marriage statutes generally provide an option for marrying couples to obtain pre-marital counseling, normally religious counseling. The couples must also agree to enter into a covenant, whereby they will be subject to a lengthier, and presumably more difficult, process if one or both should later decide to get divorced, as opposed to if they had gone through the normal marriage procedures. The rationale was that it is too easy for couples, particularly young couples, to marry without adequate thought, and that this haste gives rise to a high divorce rate. No matter what one may think of this concept in theory, it is already fairly clear that it will have minimal, if any, effect. In 1998, the first full year that covenant marriages were available in Louisiana, there were 39,544 marriages in that state. Of those, a grand total of 609 were covenant marriages. The following year, 1999, which is the last year for which statistics are currently available, even fewer couples opted for covenant marriage in Louisiana; of 41,343 marriages, only 499 (or barely 1 percent) were covenant marriages. Thus, even if such a covenant were later

49. Glendon, supra note 14, at 48.
found to be legally binding, which is far from obvious particularly if one of the parties were to seek a divorce in another jurisdiction, it simply appears that the option is so unpopular that it will have little practical impact.

III. THE STATE OF MARRIAGE.

A. THE ITALIAN CONCEPTION OF MARRIAGE.

Marriage can be defined as the legal union between a woman and a man, a partnership for life or until its legal dissolution, which by its own nature is formed and maintained for the well-being of the spouses. This definition requires some thought on the nature of marriage and on the specific meaning of the word “contract,” when applied to marriage.

Certainly, the definition of marriage as a contract is common, as it belongs to common law and civil law systems, as well as canon law. However, one may question whether marriage can actually be considered a contract. In fact, under general contract principles, no contract may be considered valid, and thus binding, unless consideration exists.

It is clear that, in some cases, a marriage may involve people owning considerable estates, and that there may be between them a “marriage of financial interests;” however, the abstract notion of marriage does not envisage any economic consideration. Otherwise, the validity of the bond would depend upon the existence of said consideration. Therefore, according to this perspective, marriage is not by its own nature a typical contract.

On the other hand, almost all legal systems provide for a marriage’s dissolution, just as in the area of contracts, where, according to the applicable norms, a judge may revoke a contractual agreement. In addition, a marriage can be also declared null and void, and this fact may still be considered as consistent with the idea that marriage is a contract, as it is quite clear that marriages can be declared null and void. Therefore, our dilemma does not seem to find an appropriate solution as to whether a marriage must be considered a contract.

In order to solve this problem, the perspective should be quite different from the one stated above. This is because the definition of marriage as a contract actually describes the specific requirement of marriage; and as is common to

58. See Bianca, supra note 12, at 31; Bessone, supra note 3, at 3.
60. Mario Francesco Pompedda, Studi di Diritto Matrimoniale Canónico 166 (Giuffrè ed., 1993).
61. See C.c. arts. 1453-1469.
63. See, e.g., Italy C.c. arts. 1418-1424.
any contract, both parties’ mutual consent is needed in order to enter into that specific agreement.\(^\text{64}\) By stating that marriage is a contract, we refer to both parties’ agreement. In fact, applicable general contract norms are enacted to protect an individual from binding oneself into any covenant that he or she may choose. For instance, no marriage shall ever be considered valid or binding, just as it happens under contractual theory, if either spouse was forced, lacked capacity or the marriage was celebrated in jest.

We thus define marriage as a covenant between one man and one woman,\(^\text{65}\) where both parties are bound to mutual rights and duties. It is up to the parties to make the marriage successful, since accountability for its failure on either spouse may involve considerable economic and moral consequences. The economic consequences may include court ordered support and property obligations.\(^\text{66}\)

If marriage is a contract or a covenant, we must recognize some differentiation between “marriage ... and the act of becoming married.”\(^\text{67}\) The latter describes the moment in which the covenant is concluded, while the former has a double, fundamental meaning. In fact, marriage here means both “the legal status, condition or relation of one man and one woman united in law for life, or until divorced,” and “the act, ceremony, or formal proceeding by which persons take each other for husband and wife.”\(^\text{68}\) However, note that the “act of becoming married,” (i.e. marital consent), cannot take place unless the required formality or ceremony is performed. Thus, we have the important consequence that the former takes place through the latter. No consent is possible unless expressed in due form.\(^\text{69}\) That is not to say that the “act of becoming married” and the “formal proceeding” are nothing but the same phenomenon: marriage. Whereas the former concept focuses on the intentional change of personal and social status, the latter refers to the formal act of consent, which constitutes marriage.

Marriage should be considered from two distinct perspectives: public law and private law. The public law view concerns the spouses’ position with reference to the public interest. This includes criminal law,\(^\text{70}\) the law concerning the family’s protection, tax law and, finally, welfare dispositions. The private law per-

\(^{64}\) Bianca, supra note 12, at 32 (“marriage is a bilateral legal act, which is concluded by the spouses’ will expressed through the legal formalities.”).

\(^{65}\) Id.

\(^{66}\) Francesco P. Luiso, 4 Diritto Processuale Civile 263 (Giuffrè ed., 1999).

\(^{67}\) Torrente, Manuale, supra note 10, at 822.

\(^{68}\) Id. at 822.


\(^{70}\) See C.R. art. 570 (Italy Codice Penale) (“Whoever, deserting the family dwelling or, however, indulging in a conduct contrary to family order or morals, neglects the assistance obligations inherent in
spective regards spouses' personal and economic duties and obligations, whose breach may lead to legal separation and divorce. It also relates to issues such as ancillary orders on maintenance, property distribution (including pensions), child custody, and support.\textsuperscript{71}

Breaking down centuries of marital supremacy within Italian society, Article 143 of the Civil Code\textsuperscript{72} provides a rather revolutionary family pattern by stating that: "through marriage... [the spouses] acquire the same rights and assume the same duties..."\textsuperscript{73} The husband is no longer considered the head of the family. Rather, the whole of the familial unit is now intended as a partnership of lives. As a matter of fact, both spouses are mutually bound to "loyalty, moral and material support, cooperation in the interest of the family and cohabitation."\textsuperscript{74}

The duty of loyalty not only refers to its first evident meaning, the duty not to engage in extramarital sex, but it also refers to all types of relationships that may affect the exclusive nature of married life. Thus, this duty extends beyond the commission of adultery; it prohibits a spouse from engaging himself or herself in an exclusive relationship with a third party, so as to deny the other spouse the right to a true common life, in violation of Italian law.\textsuperscript{75}

Although adultery cannot be considered a criminal offense anymore,\textsuperscript{76} it does constitute a tort. The effect of this is that the offended spouse has a meritorious cause of action for legal separation, and he or she may even demand it be declared that the marriage breakdown's accountability be placed on the responsible spouse.\textsuperscript{77} The same type of petition, whose effects will be examined below, can also be filed with regard to the violation of other duties, which will be briefly illustrated as follows. First, the duty of cohabitation includes not only the right to the sharing of lives within the same residency, but it also refers to the "communio amoris" which is the natural right to a conjugal sexual life.\textsuperscript{78} Having said that, the spouse who wrongfully refuses either to live in the same home with the other, or to have a normal conjugal life, equally infringes this

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  \item 71. Torre\textit{ente}, \textit{Manuale}, \textit{supra} note 10, at 847-67.
  \item 72. This statement reflects the amendments of Law no. 151 of 1970, which is mainly an application of Article 29 of the Italian Constitution. It should be noted that it is this portion of the constitution that has consistently been the basis of Family Law innovations contained in the Italian Civil Code.
  \item 73. For the translation of the hereinafter omitted Italian language, see \textit{Mario Beltramo et al., The Italian Civil Code and Complementary Legislation} (Oceara Publications ed., 1991).
  \item 74. Cf. C.C. art. 143
  \item 76. Articles 559 and 560 of the Criminal Code on adultery were declared unconstitutional, and thus, have not been enforced. See Racc. uff. 68-126 Foro It I; Racc. uff. 69-147 Foro It I.
  \item 77. C.C. art. 151.
\end{itemize}
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duty.\textsuperscript{79} It is clear, however, that the spouse can legitimately interrupt cohabitation any time it becomes intolerable or contrary to a child’s interest.

Second, both spouses are obliged to cooperate in the family’s interest\textsuperscript{80} and to mutual support, both economic\textsuperscript{81} and moral, as an everyday effort to constitute and strengthen their community of life. Marriage involves both personal and economic consequences. The first consequence, generally represented by the formula of “personal rights and duties,” is to be intended and interpreted according to the general principle of moral and legal equality of spouses. By statute, spouses are mutually obligated to provide moral support and material care, as well as to cohabit and to jointly decide matters concerning the family’s interests.\textsuperscript{82} This includes the duty of faithfulness, which concerns not only the obligation to refrain from engaging in extramarital affairs, but also the duty of the sharing of life.

The second set of consequences, i.e. economic consequences, vary according to each European country, to the extent that some apply the presumption of common ownership to both spouses’ or either spouse’s acquisitions from the moment of celebration of marriage to its legal termination. Other countries provide for a system of separate estate, in which the single spouse’s acquisitions do not become joint property with the other spouse. In both cases, “European law” generally leaves to both spouses the choice to maintain or change the above presumptions.

In any event, each spouse is obliged to assist in the needs of the family according to his or her own economic possibilities. Importantly, a spouse can fulfill this obligation by work within the home.

As far as Conflict of Laws norms are concerned, both personal and economic aspects of marriage are governed by the spouses’ common national law and, if different, by the law of the state where conjugal life is primarily located. In any event, spouses have the right to choose to be subject to the national or residential law of either of them.

B. THE AMERICAN CONCEPTION OF MARRIAGE.

The American conception of marriage remained relatively static for the first three quarters of the Twentieth Century. However, in recent decades, marital rights and duties, in certain significant ways, have changed. Perhaps the most profound changes have come about by virtue of federal constitutional recogni-


\textsuperscript{80} Natalino Ireti, \textit{Il governo della famiglia, il Nuovo diritto di famiglia} 6 (Giappichelli ed., 1976).

\textsuperscript{81} See C.c. art. 148 (The measurement of the spouses’ contribution is “in proportion to their respective means, and according to their trade or household working ability.”).

\textsuperscript{82} Gazzoni, supra note 11, at 353-57.
tion of gender equality under the rubric of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.\footnote{Gender-based discrimination by a state actor is subject to "middle tier" scrutiny under the 14\textsuperscript{th} Amendment. Had the states ratified the proposed Federal Equal Rights Amendment (ERA), it is almost certain that strict scrutiny would be applied. \textit{See} \textit{Frontiero v. Richardson}, 411 U.S. 677, 691 (1973) (Powell, J. concurring).} Ironically, in a series of decisions, starting with the "conservative" Burger Court of the 1970's, the Supreme Court struck down several state statutory schemes that tended to treat wives as less competent or capable than their husbands. In the watershed case of \textit{Reed v. Reed}, the Court unanimously held unconstitutional a state law granting preferential placement as estate administrators to men over similarly situated women.\footnote{\textit{Reed v. Reed}, 404 U.S. 71 (1971).} Subsequently, the Court nullified a state statute that provided that only wives, and not husbands, were eligible for alimony.\footnote{\textit{Orr v. Orr}, 440 U.S. 268 (1979).} The Court likewise held unconstitutional a statutory scheme in a community property state where the husband, as "head and master," had authority to unilaterally sell or encumber the community property of the marriage.\footnote{\textit{Kirchberg v. Feenstra}, 450 U.S. 455 (1981).} A provision in the Social Security Act presuming that widows but not widowers are "dependent" also fell to an equal protection challenge.\footnote{\textit{Califano v. Goldfarb}, 430 U.S. 199 (1977).}

Thus, in the late Twentieth Century, the Court carried forward a process begun by state legislatures in the Nineteenth Century with enactment of the Married Women's Property Acts\footnote{Judith T. Younger, \textit{Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform}, 67 \textit{CORNELL L. REV.} 45, 61-63 (1981).} to end the common law myth of the lack of legal identity (and therefore lack of rights) of the married woman.\footnote{4 \textit{WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND} 430-432 (Facsimile of 1st ed. 1765-1769, Univ. of Chi. ed., 1979).} Of course, both Congress and state legislatures also enacted a variety of statutes in the latter part of the 20\textsuperscript{th} Century to accord rights to married (and unmarried) women.\footnote{A particularly important example is the Federal Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (1976).}

In other ways, the states moved to redefine marriage during the Twentieth Century. Many states enacted rather misnamed "heart balm" statutes, which abolished such common-law torts actions as breach of promise to marry, alienation of affections, and "criminal conversation."\footnote{See \textit{Hoye v. Hoye}, 824 S.W.2d 422 (Ky. 1992); \textit{Gilbert v. Barkes}, 987 S.W.2d 772 (Ky. 1999). Other states repealed some of these causes of action by judicial decision, see \textit{Fadgen v. Lenkner}, 365 A.2d 147 (1976). A minority of states continue to recognize certain of these causes of action. \textit{See} Emily Heller, \textit{North Carolina's Legal Heart Balm}, \textit{NATIONAL LAW JOURNAL}, July 30, 2001, at A6.}

Of course, as in Italy, marriage in the United States is viewed as a contract that is \textit{sui generis}. It is a contract that requires the consent of the parties entering into it, and it is one that is highly regulated by the state. As opposed to
general notions of freedom of contract, state law greatly restricts the ability of marital contractors to elect the terms and conditions of their contract, especially for terminating their contract. Justice Harlan, writing for the Supreme Court three decades ago, noted:

As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society. (citations omitted) It is not surprising, then, that the States have seen fit to oversee many aspects of that institution. Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.92

The rights and duties within the marriage contract have not evolved at a constant rate throughout the last century. Events and movements, such as World War II (with millions of American women entering the workforce, at least temporarily), the Civil Rights Movement and, of course, the Feminist Movement, all played a role.

One supposedly fundamental marital duty, to engage in sex -- normally perceived as a duty of the wife (and a concomitant right of the husband) -- came under fire.93 Recognizing the harsh results, especially in situations where a couple was separated, legally separated or in the process of divorce, or where there was violence94 or threat of violence used, several states acted to limit or abrogate the husband's exemption from rape laws.95 One particularly notorious case, which generated tremendous publicity by the standards of the day, involved a husband's unsuccessful constitutional challenge to a marital rape law as violating guarantees of marital privacy and equal protection.96

Corresponding with the legal attack on a husband's unconditional right to demand sex, came a rise in awareness of, and legal responses to, domestic violence. Pennsylvania was the leader among the states in enacting a statute that allows one to obtain prompt injunctive relief in domestic violence situations.97

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94. We do not mean to suggest that rape, by itself, is not a crime of violence.
Subsequently, Congress enacted federal legislation, the Violence Against Women Act, also addressing this scourge.\(^98\)

Within the criminal realm, the notion of unity of marital partners continues to evolve in other ways. Spousal testimonial privilege, once almost absolute, has been subject to legislative and judicial diminution.\(^99\) In 2001, a federal appeals court upheld prosecution of a wife for harboring her husband as a fugitive and being an accessory after the fact to his violation of the Child Support Recovery Act.\(^100\) The court denied her claims based on alleged rights of association, marriage, privacy and due process.\(^101\)

IV. LEAVING THE STATE OF MARRIAGE.

A. DEVELOPMENTS IN ITALY.

Not surprisingly, given the overwhelming dominance of the Catholic Church, legal divorce came late to Italy. The 1942 Civil Code made no provision for divorce, and the dominant political party in the post-war era, the Christian Democrats, opposed divorce as antithetical to the family "as a natural society whose stability should be safeguarded by the indissolubility of marriage."\(^102\) Allied with the Christian Democrats in opposition to divorce were the Monarchists and Neo-Fascists.\(^103\) The Socialists, Liberals and all other political parties coalesced to enact Law No. 898 of 1 December 1970, legalizing divorce. In most instances, the Act required a five to seven year separation as a predicate to divorce.\(^104\)

The Christian Democrats and the Catholic Church did not simply accept this political defeat. They forced a popular referendum to abolish divorce, which took place in the Spring of 1974. After a bitter campaign, the electorate voted to retain legal divorce by an overwhelming 59 percent to 40.9 percent.\(^105\) It was not until 1987 that the period of legal separation prior to divorce was lowered to the current minimum of three years.\(^106\) An overview of the current processes for legal separation and divorce in Italy follows.

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103. Id.

104. Id. at 619.

105. Id. at 621-22.

In the event of marital failure, legal separation is the first remedy as it is intended both to declare the spouses' right to live apart and to regulate all consequential matters.\textsuperscript{107} The second remedy, divorce, leads to marriage dissolution and, thus, to the right to remarry. There are two distinct types of legal separation: (1) separation by mutual consent; and (2) so-called judicial separation. These remedies have two common aspects. They both require judicial intervention and must be based on either the intolerability of joint life or the safeguard of a child's interest. Actually, the formal basis of a mutual consent separation consists of the filing of the petition requesting to separate,\textsuperscript{108} and therefore, no allegation as to a petition's legal justification would seem necessary. In practice, Italian lawyers commonly allege one of the legal grounds for separation to back up the petition. This is because from an Italian jurisprudential standpoint, the fundamentals of the Italian legal system provide that no covenant can have a binding effect, unless it is founded on a reasonable ethical or economic justification.\textsuperscript{109} Therefore, no judicial remedy can technically be sought unless the petitioner demonstrates a justifiable interest in obtaining it.\textsuperscript{110}

The first remedy, separation by mutual consent, consists of a combined procedure, whereby contractual and judicial aspects are both involved. In this procedure, both spouses file a joint petition containing their demand to be legally separated according to the terms of their agreement. The terms of the agreement are listed in the petition itself, and this will regulate each aspect of their new status (e.g., child custody, alimony, etc.). Once the petition is filed, both parties will appear before the President of the Tribunal, or a Delegate Judge, who, after the ritual attempt to reconcile the parties, will approve their agreement.\textsuperscript{111} A successive formal ratification decree will issue after 1-2 months from the "Presidential hearing," thus rendering the separation definitive.\textsuperscript{112} While separation by mutual consent can be considered a dispute resolution remedy,\textsuperscript{113} in many cases, there may either be no agreement on the legal separation itself or on its material conditions, and therefore, the party seeking to leave the marriage is left with no other remedy but judicial separation.

\begin{itemize}
\item \textsuperscript{107} C.C. arts. 151 & 155.
\item \textsuperscript{108} Cf. C.C. art. 158; See Bianca, supra note 12, at 166; Dogliotti, Alcuni Problemi Interpretativi in Materia di Separazione e Divorzio, 5 FAMIGLIA E DIRITTO 479 (1997).
\item \textsuperscript{109} In practice, this is often referred to as "the causa." See C.C. art. 1322 (describing the principle that a contract cannot be enforced unless the covenant "be apt to realize those interests which deserve the protection of our legal system.").
\item \textsuperscript{110} See C.P.C. art. 100 (Italy Codice di Procedura Civile); Salvatori Satta & Carmine Punzi, DIRITTO PROCEDUALE CIVILE 151 (Giuffré ed., 1993).
\item \textsuperscript{111} Separation can be denied if the agreement affects the children's well-being, see C.C. art. 158.
\item \textsuperscript{112} Bessone, supra note 3, at 205-11.
\item \textsuperscript{113} See Bianca, supra note 12, at 175.
\end{itemize}
According to the judicial separation procedure, one spouse files a petition to the Tribunal indicating the grounds for separation, the specific court orders requested, and the declaration that the other spouse carries the responsibility for the marriage breakdown.\textsuperscript{114} Once the petition has been duly filed, the President of the Tribunal issues a decree indicating the day of the hearing.

At the hearing, the President, after attempting to reconcile the parties, will issue a temporary decree providing for the following temporary measures:\textsuperscript{115} the authorization for the spouses to live separately; and decisions concerning child custody, support,\textsuperscript{116} alimony\textsuperscript{117} and possession of the marital house (usually awarded to the spouse who has custody of the child or children).\textsuperscript{118}

This first step of the separation procedure is intended to provide an immediate response to the marriage crisis before the definitive sentence is rendered.

In fact, with the above decree, the President appoints an Investigating Judge (or Giudice Istruttore, hereinafter GI), who has a diversified jurisdiction over the case. He or she can take various types of evidence including: documents, testimony and psychological evaluations of the parties or the children, or both. The GI also has jurisdiction over the President’s orders which, if there is new evidence or new facts emerges, can be modified or revoked.\textsuperscript{119} It is clear that the GI also has the power to issue new orders or confirm the old ones, if the facts so require.\textsuperscript{120}

Once the evidence has been gathered, the GI closes the investigating phase, remitting the parties before a panel of three judges (the President of the Tribunal, the GI himself or herself, and another judge). Before a final decision is made, the parties are allowed to present written and oral arguments.\textsuperscript{121} The final decision, immediately enforceable but subject to appeal, will provide for the same matters regulated by the President and, eventually, the GI’s orders.

\footnotesize{\begin{itemize}
    \item \textsuperscript{114} Often times a comparative evaluation of spouses’ behavior is necessary, see Corte di Cassazione, January 12, 2000, n. 279. In any event, the accountable spouse is not entitled to alimony or to inherit from the other spouse. Yet, he or she may still be entitled to child custody, depending on the child’s interests. See Corte di Cassazione, April 14, 1988, n. 2946.
    \item \textsuperscript{115} See The decision on March 8, 1999, of the Tribunale di Taranto, \textit{printed in 4 Famiglia e Diritto} 376 (1999).
    \item \textsuperscript{116} The spouse is obliged to child’s support even when the latter has attained the majority but does not have adequate means for self-support. No support is due when the child neglects to look for a job. See Corte di Cassazione February 18, 1999, n. 1353, \textit{printed in 5 Famiglia e Diritto} 455 (1999).
    \item \textsuperscript{117} See Corte cost., March 29, 2000, n. 5792.
    \item \textsuperscript{118} Cf. Law no. 74 of 1987 (art. 8).
    \item \textsuperscript{119} Bressone, \textit{supra} note 3, at 399-403; Fernando Sansonioso, \textit{Il divorzio}, 3 \textit{Trattato di Diritto Privato} 284-314 (UTET ed., 1989).
    \item \textsuperscript{120} Chusano Mundrioli, \textit{Corso di Diritto Processuale Civile} 249 (Giappichelli ed., 2000).
    \item \textsuperscript{121} C.p.c. arts. 275-282.
\end{itemize}}
Generally speaking, legal separation is a preliminary step to divorce itself; in fact, three years of uninterrupted separation must then transpire before a party may file a divorce petition.\textsuperscript{122}

There are, however, cases in which one might be eligible for divorce without being previously separated, cases where either for personal reasons or because of the couple’s difficulties, public policy authorizes an “immediate” divorce petition.\textsuperscript{123} Such fault-based grounds include the following:

(a) One of the spouses has been condemned to life imprisonment or to a prison term exceeding fifteen years, whether by single or multiple sentences, even if the judgment concerns a crime committed before the marriage, or one or more intentional crimes, provided that the sentence is final and not related to crimes committed for political, moral, or social motives.\textsuperscript{124}

(b) One of the spouses has been condemned for crimes against sexual liberty (a term used in the Italian Civil Code to refer to situations where a person’s freedom of choice with regard to sexual relations has been violated, such as rape) or for inducement or coercion to prostitution and/or participation in, or exploitation of, prostitution.\textsuperscript{125}

(c) One of the spouses has been found guilty and sentenced in any way for voluntary homicide of his or her child or for the attempted homicide of either the spouse or the child.\textsuperscript{126}

(d) In cases where criminal proceedings have been suspended due to the extinction of the crimes, such as by amnesty, pardon, or period of limitation, and the court hearing the divorce case finds that enough evidence exists to support the allegation that the offense was indeed committed.\textsuperscript{127}

(e) One of the spouses has been condemned for aggravated assault or the circumvention of an incapable, a term that means taking advantage of the lack of understanding or experience of a person in order to induce him or her to engage in actions, which are self-damaging. This category also includes certain types of fraud. In order to obtain a divorce on this ground, the victim of the circumvention must be either the spouse or child.\textsuperscript{128}

However, there is an important caveat to the above grounds. Specifically, in any of the cases in (a) to (e), the petition for divorce may not be presented if the

\textsuperscript{122.} See Law no. 898 of 1970, art. 3, n.2.


\textsuperscript{124.} Law no. 989 of 1970, modified by Law no. 436 of 1978 & Law no. 74 of 1987, art. 3, ¶1(a).

\textsuperscript{125.} Law no. 74 of 1987, art. 3, ¶1(b).

\textsuperscript{126.} Id. at art. 3, ¶1(c).

\textsuperscript{127.} Id. at art. 3, ¶1(d).

\textsuperscript{128.} See id.
applicant spouse has been condemned for cooperation in the crime or if the spouses have resumed cohabitation.\textsuperscript{129}

Moreover, an acquittal of one of the listed offenses does not necessarily vitiate that fault ground, inasmuch as additional related grounds include:

(f) One of the spouses has been acquitted of a crime listed under (b), but the court establishes that he or she is unfit to resume the matrimonial relationship.\textsuperscript{130}

(g) A person has been cleared or acquitted of a charge of incest because of the absence of public knowledge or moral disapprobation, but the judge believes that this crime has occurred.\textsuperscript{131}

Other grounds for divorce not requiring a prior legal separation are:

(b) The other spouse, a foreign citizen, has obtained an annulment or dissolution of the marriage and, notwithstanding the fact that such divorce or annulment has not been recognized in Italy, has married again;\textsuperscript{132}

(i) The marriage has not been consummated;\textsuperscript{133} and

(j) A declaration of change of sex has been issued and the period to appeal has expired.\textsuperscript{134}

The divorce judgment leads to marriage dissolution and – if relevant – to the awarding of alimony, child custody and support and to marital home possession.

As we have already seen in the field of separation, divorce can be obtained through either a litigated procedure or by mutual consent. The basis for both remedies is the impossibility of maintaining or reestablishing "the spiritual and material communion between the spouses.”\textsuperscript{135}

As far as divorce by mutual consent is concerned, there is not much difference between this procedure and the one examined already with reference to separation. Both spouses file a joint divorce petition containing their agreement, which can be different from the separation petition, on personal matters, economic matters and, finally, on child custody. If the judge\textsuperscript{136} approves their agreement, a divorce decree will be issued.

\textsuperscript{129} See id.
\textsuperscript{130} Id. at art. 3, ¶ 2(a).
\textsuperscript{131} Id. at art. 3, ¶ 2(d).
\textsuperscript{132} Id. at art. 3, ¶ 2(e).
\textsuperscript{133} Id. at art. 3, ¶ 2(f).
\textsuperscript{134} Id. at art. 3, ¶ 2(g).
\textsuperscript{135} Id. The party is eligible to file for divorce only when he or she can prove that a spiritual and material common life between the parties no longer exists; but as one author stated, "the end of the affectio coniugalis is implicit in the submission of the divorce petition to the judge." \textit{Gazzoni, supra} note 11, at 380.
\textsuperscript{136} The wording “judge” here impersonally refers to a panel of three Tribunal judges. See, Law no. 898 of 1970, \textit{modified} by Law no. 74 of 1987.
If no agreement has been reached between the spouses on the “divorce conditions,” a litigated procedure becomes necessary. The spouse wishing to divorce files a petition, demanding marriage dissolution and, if relevant, awarding of consequential orders on alimony, child custody and other related aspects. The judge will then issue a decree setting the hearing for both spouses. At that hearing, the judge will try to reconcile them and, if the reconciliation fails, an ordinary judgment will take place, until a definitive divorce decree is rendered.

The initial judgment is appealable and it is not immediately enforceable. Therefore, the spouses do not have the right to remarry unless the judgment becomes definitive. During the whole procedure, the judge has full jurisdiction to confirm, modify or revoke the judicial orders regulating petitioners’ arrangements. Usually, unless new facts arise, the “divorce judge” will confirm the orders already issued at the time of separation.

Italian law provides for two different forms of marriage celebration: one before the Civil Authority and one before the Minister of a Religious Authority. In the first case, “civil marriage” can be declared void according to the provisions of the Civil Code. However, this procedure is time-consuming and it employs a strict statute of limitations that discourages a majority of eligible petitioners from seeking this remedy.

The procedure for annulment of Catholic marriages does not have the same limitations. In fact, the rendering of a judgment does not usually require more than three years, and no statute of limitations regulates the matter.

The proceeding is run by the Catholic Church’s Judiciary and is governed by the norms set forth in the seventh book (second section) of the Code of Canon Law. The religious annulment covers a wide range of cases where, for instance, a spouse: did not have the right to marry, suffered from a mental pathology or illness, or abused the institution of marriage. This list is not exhaustive and other cases do apply. To be definitive, the annulment must be

139. This statement does not, however, apply to those orders which, by their own nature, require immediate enforceability, such as in the case of alimony, child custody and support, among others. See Santonocito, supra note 119, at 333.
140. Law no. 898 of 1978.
141. Gazzoni, supra note 11, at 317-22.
142. See C.c. arts. 117-124.
143. Bianca, supra note 12, at 113-35.
145. Cf. Pompedda, supra note 60, at 3-508.
147. 1983 Code c. 1095, § 2 (dealing with mental defects).
149. See Fernando Della Rocca, Diritto Matrimoniale Canonico (Cedam, 1992).
pronounced by two conforming decisions on the same ground of nullity and
between the same parties.\textsuperscript{150}

The right to due process is enforced by Section 1620 of the Canon Code,
which invalidates a proceeding where the defendant was not given the possibil-
ity to act or argue in his or her favor. Also, under Section 1644 of the Canon
Code, a new hearing of the case will be granted if the petitioner presents new
and conclusive evidence.\textsuperscript{151}

According to the Treaties between the Holy See and the Italian Republic, the
definitive ecclesiastic decision can be enforced in the Italian legal system if it
meets the already examined requirements for recognition.\textsuperscript{152} However, a for-
mal ratification procedure before the Appellate Court is still necessary to give
effect to the judgment.

Pursuant to a marriage annulment, both parties have the right to remarry and
no further alimony by the obligor is due, in consideration of the fact that what is
null and void cannot produce any legal effect.\textsuperscript{153} In any event, both the restitu-
ction of past alimony and child's legitimacy are not questioned by the ecclesiastic
annulment sentence.\textsuperscript{154}

B. DEVELOPMENTS IN THE UNITED STATES.

Perhaps the most critical change in American marriage law in the last century
started in California, with the signing in 1970 of the first no-fault divorce act by
the newly-elected conservative governor, later to be our first divorced President,
Ronald Reagan.\textsuperscript{155} By 1985, the last hold-out state, South Dakota, had enacted
a no-fault divorce statute.\textsuperscript{156} As is now well understood, the essence of no-fault
divorce – that a marriage is unilaterally terminable – has had profound impacts
on the nature of marriage.\textsuperscript{157} Nevertheless, despite what one would believe
from the popular media, it appears that divorce rates in the United States have
in fact been declining over the two last decades.\textsuperscript{158}

\textsuperscript{150} 1983 Code c. 1644.
\textsuperscript{151} See 1983 Code c. 1620 & 1644; see also Autori Vari, IL PROCESSO MATRIMONIALE CANONI-
ECA 797 (Nuova edizione aggiornata e ampliata, a cura di F.A. Bonnet e C. Gulio, LEV ed., 1994).
\textsuperscript{152} Law no. 218 of 1995, art. 64.
\textsuperscript{153} Corte cost., June 11, 1986, n. 1905.
\textsuperscript{154} C.c. art. 128.
\textsuperscript{155} Herbert Jacob, SILENT REVOLUTION, 43-59 (1988).
\textsuperscript{156} Id.
\textsuperscript{157} See generally Lenore J. Weitzman, The Divorce Resolution: The Unexpected Social
And Economic Consequences for Women and Children (1985) (some of Prof. Weitzman's most
disturbing statistics about the financial impact of divorce on wives and children have been unarguably
discredited); Richard R. Peterson, A Re-Evaluation of the Economic Consequences of Divorce, 61 Am.
Soc. Rev. 528 (1996); Richard R. Peterson, Statistical Errors, Faulty Conclusions, Misguided Policy:
Reply to Weitzman, 61 Am. Soc. Rev. 539 (1996); Lenore J. Weitzman, The Economic Consequences
\textsuperscript{158} Ira M. Ellman, Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional
Although one may describe modern state divorce laws in a variety of ways, certain generalizations may be made. All states have one or more forms of no-fault divorce. As noted, a no-fault divorce may be unilateral; that is, one spouse asserts that the marriage is "irretrievably broken" (or some similar statutorily mandated phrase) and that the parties have been living "separate and apart" (or some similar statutorily mandated phrase), for at least a minimum prescribed period of time. Unless there is a genuine dispute as to the period of separation, the other spouse is unlikely to be able to persuade the court not to grant a divorce by challenging irretrievable breakdown. Thus, even if the plaintiff/petitioner spouse would have been found to be primarily at fault under the old regime, and even if the defendant/respondent spouse is comparatively "innocent and injured" and wishes to remain married, the divorce will almost certainly be granted.

Like Italy, some states, such as New York, require a formal separation for a period of time before entry of a no-fault divorce decree. Other states do not even have the concept of "legal separation." A number of states also have a bilateral form of no-fault divorce in which both parties consent to entry of the divorce decree. However, if the other spouse will not consent, the unilateral form of no-fault, typically available after a period of living separate and apart, remains available to the spouse seeking the divorce. Thus, in such states, the non-cooperating spouse can only delay, not prevent, entry of a divorce decree.

Finally, a number of states have retained traditional fault grounds for divorce, while augmenting them with no-fault provisions. Such fault grounds, as a practical matter, are seldom used today as the basis for divorce. Indeed, in some states, they are statutorily disfavored. For example, in Pennsylvania, in cases where a no-fault ground is established, the court is prohibited from hearing an alternative fault ground.

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159. See UNIF. MARRIAGE AND DIVORCE ACT §302(a), 9B U.L.A. Part II, 1 (Master Ed. 1998). Under the UMDA, the period of separation is 180 days. Id. In Pennsylvania, by contrast, this period is two years, 23 PA. CONS. STAT. § 3301(d) (2001). However, Idaho requires a separation period of five years! IDAHO CODE § 32-610 (2000).
164. See W. VA. CODE §§ 48-5-201 (2001); 23 PA. CONS. STAT. § 3301(c) (2001).
Nevertheless, fault in the form of marital misconduct can remain an important factor in determining subsidiary issues, notably alimony.\textsuperscript{168} There is great dispute among the states as to whether fault is a valid consideration in determining alimony. States that follow the UMDA explicitly preclude consideration of marital misconduct in awarding or denying maintenance.\textsuperscript{169}

As with entry into marriage and rights of the parties to a marriage, exit from marriage has not escaped the attention of the U.S. Supreme Court. As already noted, the Court struck down a non-waivable divorce filing fee which prevented indigent spouses from seeking a divorce.\textsuperscript{170} The Court upheld, against a due process challenge, a state's one-year residency requirement for divorce plaintiffs.\textsuperscript{171} The Court has fashioned elaborate jurisdictional rules for entry of divorce decrees and decrees over ancillary matters to enable those decrees to be entitled to "full faith and credit" in other states.\textsuperscript{172}

With the adoption of no-fault divorce laws, the states have had to grapple with how, and to what extent, to provide economic protection for the jettisoned dependent spouse. For example, this situation arises where a husband abandoned his housewife in favor of a new girlfriend and the marriage was for many years (where the wife's job during the marriage was to entertain and to maintain the marital home), or the marriage was not for many years but the wife's job was to raise the marital children who are still young. The old fault regime provided some promise (not always fulfilled) of economic protection for the "innocent and injured" spouse. The erring husband could not obtain a divorce without the jilted wife's cooperation; thus, she could name her economic terms as his price for the divorce. In the brave new world of no-fault divorce, the relatively innocent and injured spouse's bargaining power diminishes as the requisite time period of living separate and apart nears. Once the spouses have lived separate and apart for the required period, the innocent and injured spouse can only fight a delaying action.

Thus, it was necessary for the states to examine and expand concepts for economic protection of the dependent spouse. Since the dependent spouse was also likely to be the custodial parent of any minor children, there emerged a clear connection between ensuring such protections to the dependent spouse and the best interests of such minor children.\textsuperscript{173}


\textsuperscript{169} \textit{Unif. Marriage and Divorce Act} § 308(b) (amended 1973).


\textsuperscript{171} \textit{Sosna v. Iowa}, 419 U.S. 393 (1975).


\textsuperscript{173} \textit{Weitzman}, supra note 157.
A DISCURSIVE ESSAY ON THE NATURE OF MARRIAGE

Accordingly, the states have had to address and modify provisions for alimony and distribution of marital property. This has involved, and continues to involve, a highly complex set of issues, the details of which are beyond the scope of this essay.

With regard to post-divorce maintenance, many states expanded provisions for periodic payments to the dependent spouse. This involved rethinking such concepts as economic “need” and whether alimony ought be merely “rehabilitative” (i.e., for a short period to allow the dependent spouse to get “back on her feet”) or for an indefinite duration. Some states, such as Pennsylvania, only created provisions for post-divorce alimony when they adopted no-fault divorce grounds.

Roughly concomitant with the adoption of no-fault came enactment of equitable distribution statutes in the common law property states. Prior to modern notions of marital property subject to equitable distribution, title typically controlled ownership (hence distribution) at the time of divorce. Since it was common for the working spouse (husband) to title significant assets in his name alone, this could lead to very harsh results. Under the currently prevalent mandate that (most) property acquired during marriage is marital and thus subject to equitable distribution, even such traditionally separate property as one spouse’s pension earned during marriage may be distributed between the spouses.

However, one very valuable asset of many marriages, the graduate degree or professional license of one party (typically the husband) acquired while the other party provided support for the household, has been held in most jurisdictions not to be marital property subject to equitable distribution. Only New York State adheres to the contrary view. Some of the states adhering to the majority view have crafted ameliorative doctrines such as “equitable reimbursement” to mitigate the result for the jettisoned, supporting spouse. Nevertheless, the majority position excluding degrees and licenses from distribution has been harshly criticized.

183. Wertz, supra note 157, at 124-29.
Unlike Italian law, American law does not generally distinguish between civil and religious marriages at the time of divorce. A notable exception is the New York state "Get" law which requires a party moving for a divorce to certify to the court that he has taken all other steps to free the other spouse to remarry within the religion. This peculiar New York statute is aimed at requiring religious Jewish men to obtain a "Get" from the rabbinate so as to allow their ex-wives to remarry within Judaism. Even the commentary on this law contained in the New York statute book suggests that it is of dubious constitutionality.

V. DIFFERENCES AND SIMILARITIES.

Italy and the United States have traveled greatly different paths to their current concepts of marriage and divorce. Italy, until recently a far more homogeneous and mono-religious society, largely adhered to the formal Catholic view of marriage until late in the Twentieth Century. Then, with one leap, for good or ill, Italy went from a system without divorce to a system with no-fault as the dominant method of divorce.

By contrast, at least on paper, the United States had a lengthy period of fault-based divorce only, prior to its embracing of the no-fault revolution.

Clearly, the grip of the Church on Italian family practices has dramatically loosened. As noted, Church opposition long delayed, but could not ultimately prevent, the legalization of divorce in Italy. Despite the Church's emphasis on marriage, the number of marriages celebrated annually in Italy dropped from 440,000 in 1947 to 306,000 in 1987. Similarly, in the United States, marriages per 1,000 unmarried women age 15-44, fell from 149 to 91 between 1969 and 1988.

Interestingly, while cohabitation of unmarried opposite-sex couples is increasingly common and accepted (or at least tolerated) in the United States, Italy has the lowest rate in Europe (9%) of men and women under the age of 30 cohabiting.

By 1991, it was reported that over one-quarter of Italian marriages were celebrated in registrar offices only. Furthermore, Italian women, pursuing educat-

184. N.Y. DOM. REL. LAW § 253 (McKinney 1999).
185. N.Y. DOM. REL. LAW § 253, Alan D. Scheinkman, Practice Commentaries at C253-1: Background and Commentary (McKinney 1999).
186. See Max Rheinstein, Marriage Stability, Divorce, and the Law, 256-60 (1972).
191. Richards, supra note 168, at 180.
tion and careers, and delaying or avoiding marriage, have become notoriously non-fecund. According to the World Bank, by the 1990s they were producing an average of only 1.3 children, the lowest birthrate in Europe, and far below the 1.9 average of American women.\textsuperscript{192}

Current data indicate that Italian children are still far less likely than American children to be raised in one-parent households. A recently released study by the U.S. Census Bureau shows 1.1\% of households in Italy to be single-parent households, compared to a staggering 9\% in the United States.\textsuperscript{193} In the United States, “Single-mother families increased from 3 million in 1970 to 10 million in 2000, while, the number of single-father families grew from 393,000 to 2 million. . . . Meanwhile, the proportion of single-mother families grew to 26 percent and single-father families grew to 5 percent (from 12 percent and 1 percent, respectively in 1970).”\textsuperscript{194} Since single-parent households are usually headed by mothers and are highly correlated with poverty and related social ills, the continued increase in American single-parent households is appropriately a matter of much concern.

Divorce rates in Italy have been a subject of concern there; after all, there was no divorce prior to 1970. Yet, compared with the United States and other Western countries, Italy’s divorce rate is modest indeed. By the early 1990s, it was hovering between 7 and 8 percent of marriages.\textsuperscript{195} By contrast, provisional 1998 data in the United States indicate a divorce rate of 4.2 per 1000 population per year, or approximately 1,135,000 divorces in 1998.\textsuperscript{196} Obviously, one cannot attribute the significant disparity between the high American divorce rate and low Italian divorce rate to the availability of no-fault divorce in the United States inasmuch as it is equally available (if generally slower) in Italy. Surely, the lower marriage rate is a factor if the comparison figure is divorce per women, or both men and women. (That is, one cannot get divorced if one is not married.) Yet, even if one only compares divorce rates per married couple, divorce remains far more prevalent in the United States than in Italy. One can speculate whether the “answer” lies deep in the American psyche, such as the frontier experience of “moving on,” or in the relatively secular nature of American society, or a host of other reasons.

Some, of course, suggest that the “ease” of no-fault divorce causes the high American divorce rate. But then, how does one explain the comparatively low Italian divorce rate, or the fact that the admittedly high American divorce rate

\textsuperscript{192. Id. at 137-38.}
\textsuperscript{193. 1-Parent Households Increasing, THE PATRIOT-NEWS, Nov. 21, 2001, at A5.}
\textsuperscript{194. JASON FIELDS & LYNNNE M. CASPER, U.S. CENSUS BUR., AMERICA’S FAMILIES AND LIVING ARRANGEMENTS (2001).}
\textsuperscript{195. RICHARDS, supra note 168, at 141-42; see also WILLIAM J. GOODE, WORLD CHANGES IN DIVORCE PATTERNS, 54-78 (1993).}
\textsuperscript{196. NATIONAL CENTER FOR HEALTH STATISTICS, FAST STATS (2001), available at http://www.cdc.gov/nchs/ (last visited April 30, 2002).}
has actually leveled off or declined over the last twenty years? In the words of Professor Ellman, "Indeed, the historical pattern in divorce rate trends is the most persuasive evidence we have for why the law was not itself a major factor for causing either the increase in divorce rates earlier in the century, or their more recent decline." 197

If anything, Italian divorce law demonstrates that American divorce rates are not caused by American divorce law. To the extent that Americans view our divorce rate as a cause for alarm, we would do better to study Italian society than revert to the regrettable days of fault divorce in the United States.

197. ELLMAN, supra note 159, at 3.