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### Finding Fault with Irish Divorce Law

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## FINDING FAULT WITH IRISH DIVORCE LAW

### I. INTRODUCTION

For nearly seventy years, divorce was not only banned in Ireland, but was also unconstitutional.<sup>1</sup> Until November 1995, this predominately Catholic country was the last European nation to forbid divorce other than the island of Malta.<sup>2</sup> On November 24, 1995, Irish citizens voted in a public referendum to remove the long-standing ban on divorce.<sup>3</sup>

The final vote shattered previous expectations and was extremely close: 50.3% to 49.7% in favor of the reform.<sup>4</sup> Out of 1.62 million voters, only 9124 votes separated the sides.<sup>5</sup> Although some may see the referendum's victory as a "wake-up" call for Ireland to join the modern world,<sup>6</sup> such a close result shows that there is a great division in the Irish community.

In addition, the referendum's victory did not end the Roman Catholic Church's (Catholic Church) influence in Ireland. Even after the passage of the divorce amendment, the Catholic Church remains a strong social force in Ireland. The Catholic Church showed its strength by narrowing the polls to such a close vote.<sup>7</sup> When the referendum was first announced in May 1995, seventy-

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1. See Ray Moseley, *A Changing Ireland Votes on Divorce*, CHI. TRIB., Nov. 24, 1995, at 1.

2. See *Irish Narrowly Vote to Legalize Divorce*, ASHEVILLE CITIZEN-TIMES (N.C.), Nov. 26, 1995, at 1A [hereinafter *Irish Narrowly Vote*].

3. See Michael J. Farrell, *Irish Vote for Divorce Ends Era of Church's Social Dominance*, NAT'L CATHOLIC REP., Dec. 8, 1995, at 19.

4. See *id.*

5. See Boyd Tonkin, *Dublin's Splitting Headache*, NEW STATESMAN & SOC'Y, Dec. 1, 1995, at 22, 22.

6. See Anna Margaret McDonough, Comment, *When Irish Eyes Aren't Smiling—Legalizing Divorce in Ireland*, 14 DICK. J. INT'L L. 647 (1996).

7. The slippage in the polls was attributed to a public letter of the Irish Bishops Conference dated October 26, 1995, "which reaffirmed church opposition to divorce and branded the proposed change as 'false kindness, misguided compassion and bad law.'" Moseley, *supra* note 1, at 1.

two percent of voters favored divorce.<sup>8</sup> By September 30, the polls showed that sixty-one percent of voters desired reform.<sup>9</sup> Ultimately, the referendum passed by less than one-half percent.

This Comment recommends the type of divorce law that Ireland should adopt in light of the recent referendum.<sup>10</sup> Part II examines the background of divorce in Ireland, including the Catholic Church's influence on Irish law and its struggle with the modern trend towards secularization. Part III explores issues surrounding the referendum, including a look at the forces aligned on each side of the vote. Part IV discusses post-referendum activity in Ireland. Part V analyzes the referendum's proposed system of divorce and alternative systems, including the fault-based system and the no-fault system. Part VI examines the effects of the two alternative systems in Canada and the United States. Finally, in light of Ireland's strong Catholic history and its attempt to align with the modern world, Part VII recommends that Ireland adopt a fault-based system of divorce.

## II. BACKGROUND OF DIVORCE IN IRELAND

The 1995 Referendum reversed sixty-four years of constitutional prohibition of divorce in Ireland. The prohibition of divorce began at a time when the Catholic Church's influence was dominant in Irish society. Subsequently, the Church lost some of its influence and no longer maintains a dominant position.

### A. *The Catholic Church's Influence*

#### 1. The Past

The Catholic Church greatly influenced the development of Irish law. One reason for this influence is that ninety-five percent of Irish citizens are Catholic.<sup>11</sup> Large numbers of followers, however, are not the only reason for the Catholic Church's strength in

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8. *See id.*

9. *See id.*

10. The Referendum allows courts to grant divorces where spouses have been separated for four or more years and there is no hope of reconciliation. *See* The Fifteenth Amendment of the Constitution Act (1995) (Ir.) [hereinafter Amendment].

11. *See* THE WORLD ALMANAC AND BOOK OF FACTS 1994, at 775 (Robert Famighetti ed., 1994) [hereinafter ALMANAC].

Ireland. Spain<sup>12</sup> and Italy<sup>13</sup> also have dominant Catholic populations, yet the Catholic Church has much less influence there.<sup>14</sup> Apparently, the reason for the Catholic Church's social dominance in Ireland goes beyond the number of adherents.

Historically, the Catholic Church offered hope and guidance to the Irish people. Catholicism not only survived the famine and depopulation of Ireland in the eighteenth century, it prospered through these hard times.<sup>15</sup> The Catholic Church also survived penal codes designed to eliminate it.<sup>16</sup> Furthermore, during the British occupation of Ireland, the clergy won the loyalty of the Irish people with their heroism.<sup>17</sup> Even though the British imposed capital punishment on priests caught conducting mass, the clergy refused to submit.<sup>18</sup> Much of the loyalty that the clergy earned during the occupation is still evident today.

This Catholic influence was determinative in the formation of Irish family law. Catholic doctrine holds that marriage is permanent and indissoluble,<sup>19</sup> although the Church may provide an annulment.<sup>20</sup> This Catholic view of marriage was so strong that the Irish included it in their 1937 constitution.<sup>21</sup> The constitution not only forbade the granting of divorce, but also contained a provision that confirmed the "special position of the Holy Catholic Apostolic and Roman Church as the guardian of the Faith professed by the great majority of the citizens."<sup>22</sup>

The determination and influence of John Charles McQuaid, Archbishop of Dublin, symbolizes the important role that the

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12. *See id.* at 810.

13. *See id.* at 777.

14. *See* John Macleod, *Faithful Daughter of Mother Church*, *HERALD* (Glasgow), Nov. 28, 1995, at 23, available in LEXIS, News Library, Non-US File.

15. *See* Aolain Fionnuala, *Where Hope and History Rhyme*, *J. INT'L AFF.*, Summer 1996, at 63, available in LEXIS, News Library, World File.

16. *See id.*

17. *See* Farrell, *supra* note 3, at 19.

18. *See id.*

19. *See* THE CATECHISM OF THE CATHOLIC CHURCH 409 (1994).

20. *See* ALAN JOSEPH SHATTER, *FAMILY LAW IN THE REPUBLIC OF IRELAND* 80 (1981).

21. *See* Macleod, *supra* note 14.

22. *Id.*

Catholic Church played in Ireland.<sup>23</sup> Ireland's previous refusal to recognize the remarriage of individuals who obtained annulments from the Catholic Church demonstrated that Ireland was more conservative about marriage than the Catholic Church.<sup>24</sup> Similarly, Archbishop McQuaid was more conservative than the liberal reforms of Vatican II.<sup>25</sup> He returned from Vatican II determined to resist similar reforms in his province. McQuaid told his congregation, "You may have been worried by much talk of changes to come. Allow me to reassure you. No change will worry the tranquillity of your Christian lives."<sup>26</sup>

Archbishop McQuaid not only illustrates Ireland's conservative Catholicism, but also exemplifies the Catholic Church's influence on Irish politics. For example, in 1951 the government abandoned a newly proposed mother-child welfare system because of Archbishop McQuaid's opposition.<sup>27</sup> His tremendous influence illustrates the previous dominant social position of the Catholic Church in Ireland.

## 2. Modern Times

Times have changed in Ireland since the period of Archbishop McQuaid's tenure. In 1972, Ireland demonstrated its growing secularization by removing the constitutional provision establishing the Catholic Church.<sup>28</sup> Nevertheless, the Church maintains a strong position in modern Irish life. For example, it operates nearly all of Ireland's hospitals and teacher-training colleges.<sup>29</sup> Furthermore, the Catholic Church successfully opposed the 1986 divorce referendum to legalize divorce.<sup>30</sup> Although government

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23. See generally DESMOND FARRELL, *THE CHANGING FACE OF IRELAND* 109-20 (1968).

24. See McDonough, *supra* note 6, at 651.

25. Vatican II was the Catholic Church's 21st ecumenical council. MALACHI MARTIN, *THE KEYS OF THIS BLOOD* 256 (1990). It spanned three years, from 1962 to 1965. See *id.* at 258. At Vatican II, "the traditional Roman Catholic view was replaced by a new standpoint, which had more to do with modern . . . concepts of democracy and people's power than Roman Catholic teaching." *Id.* at 589.

26. David McKittrick, *The Changing Face of Ireland*, *INDEPENDENT*, Nov. 23, 1994.

27. See *id.*

28. See Macleod, *supra* note 14.

29. See *id.*

30. See McDonough, *supra* note 6, at 651-52.

sponsorship of such legislation shows a growing independence from the Church, the final result of the referendum reveals Catholicism's continued influence in Irish culture and politics.

Initially, the success of the 1986 divorce referendum looked promising. Not only did it have government support, a poll taken two months before the election revealed that fifty-seven percent of the people favored lifting the ban on divorce.<sup>31</sup> In a surprising turn of events, the lead in the polls collapsed in the face of episcopal opposition, and the measure lost by a two-to-one margin.<sup>32</sup> The Catholic Church brought up secular as well as spiritual objections to the referendum.<sup>33</sup> With these tactics, the Catholic Church triumphed against the 1986 divorce referendum, once again showing its ability to influence public policy in Ireland.

### B. Secularization

Despite the Catholic Church's influence other increasingly influential forces have begun to emerge. Ireland's bishops are "but one pressure group among many."<sup>34</sup> Although the Church remains a strong force in Irish culture, Ireland has secularized to a large extent. This change came about for many reasons, and the Church is as responsible as modernization.

#### 1. Scandals

Repeated scandals involving the clergy have diminished the stature of the clergy in Ireland.<sup>35</sup> First, the public learned of Father Brendan Smyth's sexual attacks on children, and the Church's subsequent attempts to "hush them up."<sup>36</sup> This incident was followed by the well-publicized fall of the Bishop of Galway, Dr. Eamonn Casey, who used church money to provide for his teenage son.<sup>37</sup> Furthermore, priests have been involved in numerous child sexual abuse incidents.<sup>38</sup>

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31. *See id.*

32. *See Farrell, supra note 3, at 19.*

33. *See id.*

34. *McKittrick, supra note 26.*

35. *See Moseley, supra note 1, at 1.*

36. *See McKittrick, supra note 26.*

37. *See id.*

38. *See Moseley, supra note 1, at 1.*

The most recent scandal involved sixty-eight year old priest Father Liam Cosgrave, who collapsed and died in a gay club in Dublin.<sup>39</sup> Cosgrave did not, however, die without proper religious attention as another priest was on hand to give him his last rites.<sup>40</sup> In a subsequent interview, the club owner revealed that at least twenty other clergy members frequented the club.<sup>41</sup> Combined, these incidents undermined the credibility of the clergy, and diminished the influence of the Church.

## 2. Modernization

External factors have also contributed to Ireland's growing secularization. Among these factors are a better educated<sup>42</sup> and more well-traveled population, which has brought with it many European and U.S. influences.<sup>43</sup> These trends altered the way that many Irish citizens view social issues such as divorce.

Furthermore, Reverend Enda McDonough, the President of the National Conference of Priests in Ireland, believes that the "weakness of Irish theology and its absence from colleges of the National University" are partially responsible for the lessening of Catholic influence.<sup>44</sup> He believes that there is a fear of theology in the church leadership that is self-destructive.<sup>45</sup> He also states the failure of the Irish clergy in this respect has hampered the churches ability to affect the society.<sup>46</sup>

## 3. Legislation

In response to its defeat in the 1986 divorce referendum, the Irish government enacted legislation to broaden the recognition of some divorces and separations.<sup>47</sup> The first act was the Domicile

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39. See McKittrick, *supra* note 26.

40. *See id.*

41. *See id.*

42. *See id.*

43. *See id.*

44. Dennis M. Linehan, *Christmas in Killarney-Catholic Church In Ireland*, AMERICA, Dec. 16, 1995, at 6.

45. *See id.*

46. *See id.*

47. "Since that vote, the government has introduced 18 pieces of legislation covering property rights, child custody, maintenance payments, marriage counseling, mediation,

and Recognition of Foreign Divorces Act of 1986,<sup>48</sup> which expanded the recognition of foreign divorces.<sup>49</sup> The Act allows recognition of foreign divorces where at least one spouse is a domiciliary of the foreign jurisdiction.<sup>50</sup> Previously, both spouses had to be domiciliaries of the foreign jurisdiction.<sup>51</sup>

Next, the Irish Parliament passed the Judicial Separation and Family Law Reform Act of 1989.<sup>52</sup> This Act was intended to reform the Matrimonial Causes and Marriage Law of 1870<sup>53</sup> by providing six grounds for obtaining a decree of separation.<sup>54</sup>

### III. 1995 REFERENDUM

Over 1.6 million Irish citizens voted in the 1995 Referendum.<sup>55</sup> The referendum amended Ireland's Constitution to allow the government to grant divorces if the couple has lived apart for four of the last five years and there is no hope of reconciliation.<sup>56</sup> Previously, one who obtained a foreign divorce, or even an annulment from the Catholic Church, was considered a bigamist under Irish civil law.<sup>57</sup> Now, the government has the authority to grant and recognize divorces.

#### A. *The Pro-Divorce Movement*

The results of the 1995 Referendum reach far beyond changing divorce law; they illustrate the divergent forces in Irish society.<sup>58</sup> The Irish government, for the most part, advocates the continued "modernization" of Irish society, while the Catholic Church

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social welfare and other issues involved in divorce." Moseley, *supra* note 1, at 1.

48. Domicile and Recognition of Foreign Divorces Act (1986) (Ir.).

49. "For the rule of law that a divorce is recognized if granted in a country where both spouses are domiciled, there is hereby substituted a rule that a divorce shall be recognized if granted in the country where either spouse is domiciled." *Id.* at Sec. 5(1).

50. *See id.*

51. *See id.*

52. Judicial Separation and Family Law Reform Act (1989) (Ir.).

53. *See* McDonough, *supra* note 6, at 653.

54. *Id.*

55. *See* Tonkin, *supra* note 5, at 22.

56. *See id.*

57. *See* Moseley, *supra* note 1, at 1.

58. "The campaign divided Ireland in several ways. It was a matter of government and most politicians against the church, urban areas against rural communities and middle-aged voters against the elderly and the young." *Irish Narrowly Vote*, *supra* note 2.



and other conservatives desire to retain Ireland's moral heritage.

### 1. Advocates for Change

The strongest proponent of divorce reform was the Irish government. All six political parties in the Irish Parliament supported the amendment, including the largest and most conservative party, Fianna Fail.<sup>59</sup> Fianna Fail's support of the amendment signifies how disenfranchised many traditional Catholics feel. According to Nick Lowry, editor of the traditionalist Catholic magazine *The Brandsma Review*, the parties' liberalization has left many Irish Catholics without a voice in government.<sup>60</sup> "They used to be able to rely on Fianna Fail, . . . but now they feel let down and unable to trust any of the parties."<sup>61</sup>

Two of the most vocal proponents of change were high government officials: Mary Robinson, the President of Ireland, and Bertie Ahern, the leader of Fianna Fail. Robinson is a zealous advocate for the legalization of divorce<sup>62</sup> and a supporter of women's and minority rights. Many commentators consider her to be the most radical head of state in the European Union.<sup>63</sup>

Ahern is legally separated from his wife and publicly presents another woman as his partner.<sup>64</sup> If Mr. Ahern becomes Prime Minister as expected,<sup>65</sup> Ireland may find itself with its first divorced head of state.

In addition to endorsing the amendment, the government mounted a substantial public campaign on its behalf. The campaign expenditures totaled £500,000, which the Irish Supreme Court later held unconstitutional.<sup>66</sup>

### 2. Reasons for Change

Various concerns, ranging from individual liberty to reunifi-

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59. See Mosely, *supra* note 1, at 1.

60. See Andy Pollak, *A Lightning Conductor for the Disenfranchised*, IRISH TIMES, July 9, 1994, at 7.

61. *Id.*

62. See Tonkin, *supra* note 5, at 22.

63. See *id.*

64. See Moseley, *supra* note 1, at 1.

65. See *id.*

66. See *infra* Part IV.

cation with Northern Ireland, motivated the proponents of divorce. One main reason behind the amendment was to provide separated citizens with a right to remarry.<sup>67</sup> According to the Irish government, 80,000 people were legally separated but unable to obtain divorces because of the Constitutional ban.<sup>68</sup> Furthermore, many separated individuals had children with new partners,<sup>69</sup> resulting in significant numbers of "families" being legally illegitimate.<sup>70</sup> The only way for the government to recognize these new families and legitimize their children was to pass the amendment and provide separated couples with the ability to remarry.

In addition, removing the ban on divorce was seen as a way to hasten the unification of Northern Ireland and Ireland.<sup>71</sup> Because Great Britain controls Northern Ireland, divorce is legal there. Supporters claimed that liberalizing divorce law would make reunification more palatable for the citizens of Northern Ireland.<sup>72</sup>

Many Irish citizens also believed that Ireland needed to shed its Catholic heritage to join the "modern" world. Proponents of divorce cast anti-divorce supporters as ignorant and intolerant.<sup>73</sup> For example, one government poster stated, "This [ban on divorce] is no way to tackle the problem of marriage breakdown."<sup>74</sup> The text accompanied a picture of an ostrich with its head in the sand,<sup>75</sup> obviously accusing anti-divorce forces of ignoring reality.

Supporters of the amendment implied that the only way for Ireland to truly join the twentieth century was to rid itself of Catholic influence. First, President Robinson expressed her desire

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67. See Moseley, *supra* note 1, at 1. ("[T]he right to remarry is what we are talking about.").

68. See *id.*

69. See *id.*

70. "If married persons domiciled in England were divorced and remarried the remarriages would be valid in England and the children of the remarriages legitimate; but if the remarried persons came to Ireland they would be subject to prosecution for bigamy and in Ireland their children would rank as illegitimate." *Helen Joan Mayo-Perrott v. Frederick Mayo-Perrott*, No. 1183 (Ir. May 1958) (LEXIS, Int'l Library, Irecas File).

71. See McDonough, *supra* note 6, at 663.

72. See *id.*

73. See Fawn Vrazo, *Irish Conflicts*, ATLANTA J. CONST., Nov. 24, 1995, at 12A, available in LEXIS, News Library, US File.

74. *Id.*

75. See *id.*

to free Ireland from Christian influence.<sup>76</sup> She referenced, and apparently adopted, the statement of a liberal theologian, who claimed that Ireland needed to "detach doctrine from law."<sup>77</sup> Second, a newspaper editorial applauded the move to change Ireland's Constitution as "part of a much more general attempt to free the civil law from the tenets of one church's beliefs."<sup>78</sup>

These examples show that the leaders for the amendment wanted to separate modern Ireland from Catholic influence. The Catholic Church helped mold Ireland, basing many of the nation's laws on traditional Christian morality.<sup>79</sup> Ireland is divided between those who wish to pursue the modern trend by focusing on individual rights and secularization and those who wish to move gradually and retain Ireland's traditional heritage.<sup>80</sup>

### B. The Anti-Divorce Movement

The movement against the 1995 Referendum was different from its 1986 predecessor. Both the Catholic Clergy and conservative lay people opposed the latest referendum. Thus, the rationales for opposing the reform were secular as well as theological.

#### 1. Forces Against Divorce

The Catholic Church opposed changing Ireland's Constitution.<sup>81</sup> Even Pope John Paul II weighed in against the referendum, urging Irish Catholics to "pray all the more intensely" for its defeat.<sup>82</sup> The Catholic Church did not focus exclusively on theological reasons for opposing the referendum; it also stressed the social evils that divorce would bring.<sup>83</sup>

Additionally, polls indicated that opposition to divorce was strongest in the age groups of those eighteen to twenty-four years

76. See Tonkin, *supra* note 5, at 22.

77. *Id.*

78. Ronan Mullen, *Pro-Divorce Lobby Refuses to Discuss Negative Effects*, IRISH TIMES, Nov. 20, 1995, at 14.

79. See McDonough, *supra* note 6, at 671.

80. *See id.*

81. *See generally* Mullen, *supra* note 78.

82. Vrazo, *supra* note 73.

83. Much of the opposition to divorce derived from the opposition's understanding of its negative social effects. *See id.*

old and over sixty years old.<sup>84</sup> It may be no surprise that the elderly opposed legalizing divorce. It is surprising, however, that the young so strongly opposed the measure and that the first generation to grow up with a more lenient government approach to separation<sup>85</sup> rejected an attempt to further liberalize family norms.

Perhaps most informative as to the nature of the opposition to divorce was the large grassroots movement against the amendment. Instead of the Catholic hierarchy dominating the opposition to divorce, Christian lay people in Ireland led the protest against the legalization of divorce. Grassroots organizations such as Family Solidarity and the Pro-Life Campaign typified non-church opposition to the referendum.<sup>86</sup> Family Solidarity is an umbrella organization that shelters other groups: Family Alert, Parents Against Stay Safe, Women Hurt by Abortion, Family and Youth Concern.<sup>87</sup> This is an important distinction because it shows that the opposition's commitment to marriage as a permanent institution was not imposed upon the people, but embraced by them.

## 2. Reasons for Restraint

The anti-divorce campaign concentrated on the adverse societal effects of divorce, including increased marriage breakdown, increased demand for social welfare, and increased family dissolution.<sup>88</sup> In their campaign, anti-divorce forces repeatedly stressed that divorce was not a solution to problems in Irish society.<sup>89</sup> One particular poster epitomized the belief that legalizing divorce

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84. See Moseley, *supra* note 1, at 1.

85. The government expanded the ability to obtain foreign divorces by passing the 1986 Domicile and Recognition of Foreign Divorces Act. See McDonough, *supra* note 6, at 652-53. Additionally, the government enacted the Judicial Separation and Family Law Reform Act in 1989, which basically granted couples the ability to separate, but withheld the ability to remarry. See *id.* at 653-54. Thus, this generation experienced more lenient marital norms for nine years.

86. See Fintan O'Toole, *Catholic Right Has No Interest in Debate on Divorce*, IRISH TIMES, Sept. 1, 1995, at 14.

87. See *id.*

88. See Carol Coulter, *Ten Year Wait Is Finally Over for Those Who Campaigned for Divorce*, IRISH TIMES, June 13, 1996, at 7; see also Tonkin, *supra* note 5, at 22.

89. The Anti-Divorce Campaign released a list of 26 arguments against divorce. See Coulter, *supra* note 88, at 7. One of the main arguments was that the availability of divorce encourages marriage breakdown. See *id.*

would increase marriage breakdown.<sup>90</sup> It read, "Hello Divorce, Bye-Bye Daddy."<sup>91</sup>

Divorce opponents also sought to show the social costs of divorce in economic terms. Because Ireland has expansive social welfare programs, anti-divorce forces claimed that the legalization of divorce would lead to increased social welfare costs of \$24,000,000.<sup>92</sup> Further, they claimed that these increased costs would require an increased tax rate.<sup>93</sup> As an Irish divorce opponent stated, "[d]ivorce will mean the decay of the Irish family . . . . It will cost taxpayers an extra [ten] percent, and that doesn't even include the costs of child delinquency and crime and work days lost by people involved in divorce."<sup>94</sup>

These examples show that the amendment's opponents feared the consequences of legalizing divorce. Their concern was not necessarily focused on the violation of a sacrament, but on the social costs of divorce. Divorce opponents were aware of the problem of marriage breakdown in Irish society, but they feared that legalizing divorce would only exacerbate the problem.

#### IV. POST-REFERENDUM ACTION

The referendum did not end the debate over divorce in Ireland. There was a subsequent attempt to overturn the referendum in the courts. The challengers based their case on an Irish Supreme Court decision holding that the government acted illegally in spending £500,000 to promote the amendment.<sup>95</sup> Unfortunately for divorce opponents, this ruling came after much of the money had already been spent.<sup>96</sup>

Subsequently, divorce opponents challenged the referendum's results on the basis that the illegal expenditures affected the vote.<sup>97</sup> Although the lower court ruled for the challengers, the Su-

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90. See Tonkin, *supra* note 5, at 22.

91. *Id.*

92. See Moseley, *supra* note 1, at 1.

93. See *id.*

94. *Id.*

95. Patricia McKenna v. An Taoizeach and Ors, (Ir. 1996) (LEXIS, Int'l Library, Irecas File).

96. See *Irish Narrowly Vote*, *supra* note 2.

97. See Hanafin v. Minister for the Env't, No. 86/96 (Ir. June 12, 1996) (LEXIS, Int'l

preme Court reversed.<sup>98</sup> The Supreme Court stated that:

The unconstitutional activity itself was not an electoral wrongdoing and the manifestation of the constitutional abuse in the form of the highly organized advertising campaign whether or not an influential factor in the outcome was not an interference, obstruction, hindrance, or irregularity in the conduct of the referendum.<sup>99</sup>

Although these efforts failed, they revealed continuing opposition to legalized divorce.

## V. ALTERNATIVE SYSTEMS OF DIVORCE

By passing the 1995 Referendum, Ireland has entered into a new era of family law. Divorces will soon be granted to couples who meet the Amendment's requirements. The following sections review the system of divorce Ireland adopted, as well as other systems of divorce extant today. A study of these methods can help devise a better divorce system for Ireland.

### A. *The Referendum's System*

The 1995 Referendum not only reversed the ban on divorce in the Irish Constitution, but also provided the conditions upon which future divorce legislation must be based.<sup>100</sup> The new Amendment did not establish a divorce system by its passage, rather it authorized the Irish legislature to enact divorce legislation in compliance with the Amendment.<sup>101</sup>

The Amendment provides as follows:

A Court designated by law may grant a dissolution of marriages where, but only where, it is satisfied that—

1. at the date of the institution of the proceedings, the spouses have lived apart from one another for a period or periods amounting to, at least four years during the previous five,
2. there is no reasonable prospect of reconciliation between the spouses,

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Library, Irecas File).

98. *See id.*

99. *Id.*

100. *See Amendment, supra* note 10.

101. *See id.*

3. such provisions as the court considers proper having regard to the circumstances exist or will be made for the spouses, and the children of both of them and any other person proscribed by law,

4. any further conditions proscribed by law are complied with.<sup>102</sup>

The Amendment's system is very similar to the no-fault system; however, it requires that the couple be separated for at least four of the last five years.

The Family Law (Divorce) Bill, which was published in June 1996, sets out the terms of divorce.<sup>103</sup> It should become law by Fall 1997.<sup>104</sup> The Bill is nearly identical to the system contained in the Amendment.<sup>105</sup> The first divorces under the legislation are expected to be granted by the end of 1997.<sup>106</sup>

The approach taken in the Family Law (Divorce) Bill reveals the rigidity of the new Amendment. It is nearly identical to the wording of the 1995 Referendum. Significant changes to the adopted system would require another referendum.<sup>107</sup> Some proponents of the Amendment claim to rely on judicial interpretation to mitigate its rigidity, but judicial interpretation is an unpredictable method of establishing a uniform system of divorce.<sup>108</sup>

The Amendment does, however, allow the law to prescribe "further conditions,"<sup>109</sup> which essentially means that the legislature may add conditions. Although the law may add new provisions, the Amendment's structure prohibits the waiver of any of the bill's original provisions. For example, Ireland could adopt fault requirements in addition to the four-year separation requirement, but it could not institute a fault-based system in place of the separation period requirement. Therefore, unless Ireland

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102. *See id.*

103. *See* Maol Muire Tynan, *First Divorces Expected Late Next Year*, IRISH TIMES, June 20, 1996, at 6.

104. *See id.*

105. *See id.*

106. *See id.*

107. *See* McDonough, *supra* note 6, at 660.

108. *See id.* at 661.

109. *See* Amendment, *supra* note 10.

once again alters its Constitution, it has a no-fault system of divorce with a four year separation requirement.

### B. The Fault-Based System

#### 1. Origins

The fault-based system of divorce was prominent in the United States until the 1960s.<sup>110</sup> The development of fault as a basis for divorce is rooted in religious law because religious institutions regulated marriage and divorce in the Anglo experience.<sup>111</sup> This religious influence shaped the ideal of marriage.

For over a century, divorce law reflected and sought to enforce society's sense of the proper moral relations between husband and wife . . . . That ideal included duties of life-long mutual responsibility and fidelity from which a spouse could be relieved, roughly speaking, only upon the serious breach of a moral duty by the other spouse.<sup>112</sup>

This viewpoint does not see marriage as a useful social construction of the state, but rather as the creation of a moral duty between the husband and the wife. That duty is enduring and not terminable at will. In essence, the fault-based system of divorce conveys the message that family commitments are permanent.

#### 2. The Law

The idea that marriage is a permanent moral bond between husband and wife translated into a legal system that grants divorce only when one spouse transgresses that bond.<sup>113</sup> When an innocent spouse proves such a transgression, that spouse may obtain a divorce. Courts give no consideration to whether the marriage is salvageable.<sup>114</sup> The lack of examination of the marriage's surviv-

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110. See Adriaen M. Morse Jr., Comment, *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605 (1996).

111. See Lynn D. Wardle, *Divorce, Violence and the No-Fault Divorce Culture*, UTAH L. REV. 741, 759 (1994).

112. Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1809 (1985).

113. See J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519, 534 (1994).

114. See *id.*



ability underscores the fault-based system's concern with moral obligation as opposed to social utility.

Generally, there are a few statutorily enumerated grounds for divorce. The most common grounds for divorce are adultery, extreme cruelty, willful desertion, habitual intemperance, willful neglect, and a felony conviction.<sup>115</sup>

The burden of proving fault is on the plaintiff. The standard of proof varies, with some jurisdictions requiring proof by a preponderance of the evidence and others requiring proof beyond a reasonable doubt.<sup>116</sup> Meeting the burden of proof does not, however, always end the inquiry. Even if the plaintiff proves fault, the offending spouse may assert a number of legal defenses.

The most prominent defense is the "clean-hands doctrine." It maintains that if both spouses commit a fault, neither may obtain a divorce.<sup>117</sup> Other defenses include: connivance, where the spouse seeking the divorce consented to the commission of the transgression; collusion, where both spouses committed fraud in order to obtain the divorce decree; and condonation, where the offended spouse "conditionally forgives the marital fault, so that the condonation is nullified if the fault is repeated."<sup>118</sup>

Although fault-based systems of divorce were common in the past, few modern jurisdictions retain them as the exclusive means of obtaining a divorce. Many U.S. states now possess such systems in conjunction with no-fault systems of divorce.<sup>119</sup> Further, fault often plays an important role in the division of marital assets.<sup>120</sup>

### C. The No-Fault System

#### 1. Origins

Many jurisdictions established the no-fault divorce system in response to increasing dissatisfaction with fault-based systems of divorce, the growing divorce rate in Western nations, and the rise

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115. See Morse, *supra* note 110, at 607-08. For a discussion of early divorce law in England, see DiFonzo, *supra* note 113, at 520.

116. See Morse, *supra* note 110, at 610.

117. See *id.* at 611.

118. *Id.* at 612.

119. See *id.*

120. See *id.*

of the philosophy of individualism. Fault-based systems became unpopular in Western Europe and the United States for many reasons, including the conflict and adversity that fault systems seemed to cause.<sup>121</sup> Many commentators believed that the adversarial nature of the system promoted hostility and violence.<sup>122</sup> By eliminating fault as the basis for divorce, reformers hoped to reduce the animosity that arose from conflict.<sup>123</sup>

Another reason that reformers reacted against the fault-based system was its "messiness." "[L]awyers and judges—the professional community—found that working within the fault-based divorce system was unpleasant, difficult, and *messy*."<sup>124</sup> Courts became less comfortable handling moral questions in the family context due to the rise of liberal individualism, which "increased our national tolerance for heterodox moralities, and has diminished the urge to impose morality profligately."<sup>125</sup>

Rooted in the Protestant view of marriage, the fault-based system could not survive as the dominant means of divorce in a society that increasingly valued liberal individualism over its religious past. Instead of viewing marriage as a moral duty, established by God, no-fault divorce views marriage as the creation of the state.<sup>126</sup> It frees courts from making uncomfortable moral decisions and allows them to base their decisions on more value-neutral criteria.

During the time that the fault-based system was falling out of favor, the demand for divorce was increasing. A reform movement reacted to the problem. "Between 1969 and 1985 divorce law in nearly every Western country was profoundly altered."<sup>127</sup> This reform was not due to hostility against the institution of marriage, but rather was an attempt to preserve troubled marriages.<sup>128</sup>

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121. See Morse, *supra* note 110, at 613 ("[O]ther rationales for doing away with fault were to eliminate the bitterness of the proceedings . . . and also to avoid the adversarial character of most divorces obtained on fault grounds.").

122. See generally Wardle, *supra* note 111.

123. See *id.* at 741.

124. *Id.* at 748 (emphasis added).

125. Schneider, *supra* note 112, at 1843.

126. See Morse, *supra* note 110, at 606.

127. MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 66 (1987).

128. See DiFonzo, *supra* note 113, at 520.

In fact, many reformers believed that no-fault divorce would lower the divorce rate. Professor DiFonzo provides this example:

The last hurrah of therapeutic divorce came in the 1960s in England and California. Realizing that fault was no longer a barrier to divorce by mutual consent, conservative reformers in both jurisdictions staged a dramatic gambit . . . . [R]eformers gambled that eliminating all fault grounds would be a sufficient enticement for divorce-minded couples to submit to a reconciliation-minded social welfare establishment.<sup>129</sup>

Thus, reformers intended for no-fault divorce to replace the moral-laden fault-based system with a utilitarian approach that allowed divorce only when there was no hope of reconciliation.

## 2. The Law

The methods of obtaining a no-fault divorce vary, but the most common requirement is a court finding that the marriage has irretrievably "broken down." This finding does not rest on moral blame or impose a standard of behavior on married couples. Instead, the court's function is "simply to determine whether a breakdown has occurred without raising questions of blame."<sup>130</sup>

The extent to which a court will examine the marriage relationship depends on the jurisdiction. Since the beginning of its no-fault divorce reform, the United States has not put any serious obstacle in the path of couples wishing to obtain a divorce.<sup>131</sup> On the other hand, Canada maintained fairly rigid standards until 1986.<sup>132</sup>

Canada's resistance to divorce on demand eventually gave way to a less restrictive standard.<sup>133</sup> Today, most Western jurisdictions do not seriously examine the survivability of the marriage. Current no-fault divorce standards allow divorce on demand.<sup>134</sup>

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129. *Id.*

130. See LYNNE CAROL HALEM, DIVORCE REFORM 238 (1980).

131. See *infra* Part VI.A.3.

132. See WILLIAM J. GOODE, WORLD CHANGES IN DIVORCE PATTERNS 136 (1993).

133. See *id.*

134. As discussed previously, no-fault divorce was originally intended to lower divorce rates. In practice, however, no-fault divorce systems evolved to the point of allowing unilateral divorce. See *infra* Part VI.A.2.

## VI. SYSTEMS IN PRACTICE

The effects of different divorce systems becomes evident by examining their application in different jurisdictions. The United States and Canada utilized both fault and no-fault systems at different times.. Their experiences with both systems are relevant to Ireland's current situation.

A. *The U.S. Experience*

Although the United States is not a Catholic nation, Catholicism and Protestantism heavily influenced how the United States dealt with divorce.<sup>135</sup> Through the period of fault-based divorce, the U.S. ideal of marriage closely paralleled the Catholic ideal.<sup>136</sup> The advent of no-fault divorce, however, brought a new ideal of marriage to the United States and resulted in strong social effects.

## 1. The United States Under the Fault-Based System

England incorporated Catholic ecclesiastical law into secular law until Henry VIII created the Anglican Church.<sup>137</sup> Nonetheless, much of the Catholic ideal of marriage remained a part of the legal system.<sup>138</sup> Because the British simply imposed Anglo common law on their colonies instead of granting local autonomy, many of its colonies adopted British family law.<sup>139</sup> Thus, even after winning its independence from England the United States retained the British divorce system.<sup>140</sup>

Because the United States did not have ecclesiastical courts, it eventually conferred divorce jurisdiction on the state courts.<sup>141</sup>

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135. See generally GOODE, *supra* note 132, at 136-37.

136. The Protestant view of marriage was not far removed from the Catholic view. The Protestant Reformers believed that "marriage . . . was an estate ordained by God." RODERICK PHILLIPS, *PUTTING ASUNDER: A HISTORY OF DIVORCE IN WESTERN SOCIETY* 41 (1988). According to the Catholic ideal of marriage, "the marriage bond has been established by God himself." *CATECHISM OF THE CATHOLIC CHURCH*, *supra* note 19, at 409.

137. See GOODE, *supra* note 132, at 136.

138. See *id.*

139. See *id.*

140. See *id.*

141. See Morse, *supra* note 110, at 607.

The most common system of divorce law was fault based.<sup>142</sup> It was not a rationally planned system designed to maximize social utility, but rather a system that "reflected and sought to enforce society's sense of the proper moral relations between husband and wife."<sup>143</sup>

The law conveyed a message. Marriage was more than a contract; it was a life-long partnership dissolvable only by death or serious fault.<sup>144</sup> In *Maynard v. Hill*,<sup>145</sup> the U.S. Supreme Court enunciated the rationale behind fault-based divorce:

[Marriage] is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of parties. Not so with marriage. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.<sup>146</sup>

This moralistic view of marriage was not without criticism. Critics charged that fault-based divorce resulted in gender inequities.<sup>147</sup> Additional criticism focused on the fault-based system's inability to resolve the following issues: the steady increase in divorce rates, the increasing divorce rates among the middle and upper classes, the feminist movement's attempt to upgrade the status and opportunities of women, and a reactionary backlash of non-custodial fathers.<sup>148</sup>

Furthermore, many couples went to extreme lengths to circumvent the fault-based restrictions.<sup>149</sup> First, couples traveled to jurisdictions with less restrictive divorce laws to obtain quick di-

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142. *See id.*

143. Schneider, *supra* note 112, at 1809.

144. *See* Wardle, *supra* note 111, at 749; *see also* Schneider, *supra* note 112, at 1809.

145. 125 U.S. 190 (1888).

146. *Id.* at 210-11.

147. *See* Morse, *supra* note 110, at 616.

148. *See* HALEM, *supra* note 130, at 235.

149. *See id.* at 234-35.

divorces.<sup>150</sup> Second, many couples lied to courts in order to convince judges that a fault had been committed.<sup>151</sup> This deception raised concerns that the requirements of the fault-based system caused people to disrespect the legal system.<sup>152</sup>

## 2. No-Fault Era

### a. California Leads the Way

These criticisms finally began to influence public policy in 1963 when the movement to change the divorce system began.<sup>153</sup> The first successful move toward a no-fault system occurred through the California Governor's Commission on the Family (Commission).<sup>154</sup> Former Governor Jerry Brown created the Commission to abolish the existing fault-based system of divorce and to make recommendations for a new system.<sup>155</sup> Furthermore, reformers intended for the Commission to find the "real" causes of divorce and to make recommendations to deal with those causes.<sup>156</sup>

The Commission recommended that the state adopt a no-fault divorce system.<sup>157</sup> Its recommendations, however, went further. "The Commission tied the removal of fault grounds to the operation of a powerful socio-legal agency, whose mission would be to provide restorative aid to failing marriages."<sup>158</sup> Divorce reformers hoped to substitute therapeutic jurisprudence for fault-based adversarial methods.<sup>159</sup>

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150. *See id.* at 234. Some jurisdictions intentionally tried to attract the profitable divorce trade. Nations including Mexico, Haiti, and France offered "quickie" divorces. *See id.*

151. *See id.* at 234-35.

152. *See* GLENDON, *supra* note 127, at 65.

153. *See id.*

154. *See generally* Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 3-4 (1987).

155. *See id.*; *see also* GOODE, *supra* note 132, at 137.

156. *See Kay, supra* note 154, at 5.

157. *See id.* at 5.

158. DiFonzo, *supra* note 113, at 541.

159. *See* HALEM, *supra* note 130, at 238. The Commission stated, "the purpose of adopting the standard we suggest would be to permit, indeed to require, the Court to inquire into the whole picture of the marriage." GLENDON, *supra* note 127, at 79.

Under the Commission's recommendations, the state would be responsible for determining whether a marital breakdown had occurred. This determination would not be a cursory finding by a judge; instead, the couple would be forced to submit to therapy and counseling to ascertain whether their marriage was "broken."<sup>160</sup> Experts in the fields of psychology and counseling would make recommendations to the court concerning the status of the petitioning spouse's marriage.<sup>161</sup>

In 1969, many of the Commission's recommendations were enacted into law, and California became the first state to adopt a no-fault divorce system.<sup>162</sup> Some Commission recommendations, however, were not adopted and the recommended inquiry into the status of the marriage never materialized. California trial courts simply refused to deny divorce petitions.<sup>163</sup> In fact, seven years after California adopted the no-fault divorce system, not one California trial judge refused to grant a divorce.<sup>164</sup>

The legislature ignored the initial policy recommendations because a therapeutic approach was too costly in terms of finances and privacy.<sup>165</sup> The recommended system would have created a costly system including judges and therapists,<sup>166</sup> and some feared that the new system of courts would be too intrusive.<sup>167</sup> These concerns prompted the California legislature to veto the creation of a statewide system of family courts.<sup>168</sup>

### *b. Reform Sweeps the Nation*

Although California only partially enacted the Commission's recommendations, no-fault divorce continued to sweep the nation.

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160. See DiFonzo, *supra* note 113, at 541.

161. Professor DiFonzo records that "the counselor was expected to work with the parties and prepare a written report setting forth the 'counselor's recommendations together with supporting facts as to the continuance of their marriage.'" *Id.* at 542.

162. *See id.*

163. *See id.* at 547.

164. *See id.* at 550.

165. *See id.* at 547-50.

166. *See id.* at 548 ("The cost estimates for supplying the requisite psychiatrists and social workers were daunting.")

167. *See id.* at 547-49.

168. *See id.* at 547-48.

In 1970, the influential National Conference of Commissioners on Uniform State Laws (National Conference) addressed divorce.<sup>169</sup> It issued the Uniform Marriage and Divorce Act (UMDA),<sup>170</sup> which was a model no-fault system. Through the UMDA, the National Conference advocated no-fault divorce laws for the nation.<sup>171</sup> With California and the National Conference pioneering the reform movement, all states adopted no-fault divorce systems by 1987.<sup>172</sup>

As in California, however, recommendations for serious inquiry into the breakdown of the marriage never took shape.<sup>173</sup> Instead, the no-fault system became a system of unilateral termination of marriage at will. "Inquest into the reality of breakdown became a mere ritual."<sup>174</sup> As a result, there are no legal obstacles to unilateral divorce in the United States.<sup>175</sup>

### 3. Effects of the Transition

The no-fault divorce system failed to solve the old problems, and in some cases, made them worse.<sup>176</sup> Rather than providing solutions to marital breakdown, it provided divorce on demand.<sup>177</sup> Instead of eliminating the combative nature of fault divorce, no-fault divorce propagated it.<sup>178</sup> Contrary to the intentions of reformers, the adoption of the no-fault divorce system resulted in increased divorce rates, higher levels of poverty among women and children, and increased violence against women.

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169. See Kay, *supra* note 154, at 5.

170. See *id.*

171. See *id.*

172. See *id.* at 2. Some states, however, retain concurrent fault-based grounds. See *id.* at 5.

173. The writers of the UMDA, like the California Governor's Commission, insisted that there be an inquest into the reality of marriage breakdown. See GLENDON, *supra* note 127, at 77.

174. See *id.* at 78.

175. See *id.* at 81.

176. See *id.* at 65.

177. See HALEM, *supra* note 130, at 282 (Stating that clearly the reform drive has made divorce easier to obtain).

178. See *id.* at 281 ("As long as the attorney's 'goal is always to get the best terms for his client . . . the ethic of combat survives.'").



a. *Increased Divorce Rates*

Many commentators reject the notion of a causal connection between no-fault divorce and increased divorce rates.<sup>179</sup> An undeniable surge in divorce rates, however, accompanied the adoption of no-fault divorce in the United States. In 1960, when all states retained a fault based system, sixteen percent of first marriages ended in divorce.<sup>180</sup> By 1996, when all states possessed no-fault systems, forty percent of first marriages ended in divorce.<sup>181</sup>

Notwithstanding these figures, divorce is even more widespread than the statistics concerning first marriages indicates. Because remarriage rates are high in Anglo nations,<sup>182</sup> the overall divorce rate is higher than indicated by the number of first marriages ending in divorce. Another, and perhaps more representative inquiry into the actual numbers of divorces in the United States may be achieved by examining the ratio of divorces to married women. According to the Statistical Abstract of the United States, the ratio of divorces per 1000 married women was 1.3 in 1950.<sup>183</sup> This ratio increased nearly twenty fold, reaching 21.0 by 1980.<sup>184</sup>

Professor Mary Ann Glendon contends that some studies may have difficulty in finding a direct causal relationship between no-fault divorce and increased divorce rates.<sup>185</sup> She points out that changes in the law will have long-term effects that are slow to appear and hard to distinguish from other social factors.<sup>186</sup> Moreover, changing the law affects the symbolism and moral lesson that the government projects.<sup>187</sup> "Statute books and case reports are remote from most people's lives, but the imaginative portrayal of family life and ethics in divorce law reaches deeply into our culture. . . ." <sup>188</sup> In Glendon's view, no-fault divorce carried a message

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179. See GLENDON, *supra* note 127, at 107.

180. See David Whitman, *The Divorce Dilemma*, U.S. NEWS & WORLD REP., Sept. 30, 1996, at 58.

181. See *id.*

182. See GOODE, *supra* note 132, at 150.

183. *Id.* at 138.

184. See *id.*

185. See GLENDON, *supra* note 127, at 107.

186. See *id.*

187. See *id.*

188. *Id.*

that changed the U.S. ideal of marriage.

It began to carry the suggestion that no one is ever to blame when a marriage ends: marriages just break down sometimes, people grow apart, and when this happens even parents have a right to pursue their own happiness . . . .

The American story about marriage, as told in the law and in much popular literature, goes something like this: marriage is a relationship that exists primarily for the fulfillment of the individual spouses. If it ceases to perform this function, no one is to blame and either spouse may terminate it at will.<sup>189</sup>

The no-fault divorce culture propagated this viewpoint in the United States.

The no-fault divorce system replaced the fault based system's moral message of permanence and loyalty with a message of self-fulfillment and individualism.<sup>190</sup> Thus, the change to the no-fault system caused people to increase their expectations of marriage by viewing it as a means of self-fulfillment. The change also increased the likelihood that the rising expectations would not be met because spouses were focusing on their own fulfillment. Combining increased expectations with a lower likelihood of fulfilling them resulted in an increased rate of divorce.<sup>191</sup>

#### *b. Harmful Effects on Women*

The consequences of the no-fault system go beyond increased divorce rates. The new divorce system also created unequal bargaining positions, thereby causing economic hardship and physical hardship by contributing to divorce-related violence.

#### *i. Financial Hardship*

Research indicates that women generally fare worse economically under the no-fault system than under the old fault-based re-

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189. *Id.* at 107-08.

190. *See id.* at 108; *see also* Schneider, *supra* note 112, at 1839-40.

191. *See* PHILLIPS, *supra* note 136, at 630-31. I do not claim that no-fault divorce was the sole, or even most important, cause of increased divorce rates. "National and state legislation, different demographics and social structures, varying economic conditions and cultural climates all have their impact on divorce." *Id.* at 630.

gime.<sup>192</sup> Surveys indicate that the income of women tends to decline substantially following divorce, while the income of men tends to increase.<sup>193</sup> Moreover, the likelihood of receiving alimony, the duration of alimony awards, and the proportion of marital property awarded to women decreased under the no-fault system, while the proportion of debt that women were required to pay increased.<sup>194</sup>

An important reason that women fare worse economically under no-fault divorce systems is a shift in bargaining power that puts women in a weaker negotiating position than they would be under a fault-based system.<sup>195</sup> Under the fault-based system, “[n]egotiating practices developed in which one spouse might exchange cooperation in obtaining a divorce for economic concessions from the other.”<sup>196</sup>

The fault-based system often afforded economic protection to a dependent wife and children when a family broke up.<sup>197</sup> The economic protection applied whether the fault basis for the divorce was legitimate or contrived. A husband seeking a divorce under the fault-based system was not free to leave.<sup>198</sup> He had to convince his wife to lie or press charges. As a result, the wife had leverage in post-divorce economic concessions<sup>199</sup> that she does not possess in the no-fault system. Overall, under a no-fault regime women have less earning potential after divorce than men, yet receive a greater portion of the debt and fewer assets.

## ii. Divorce-Related Violence

Reformers intended the no-fault divorce system to replace the

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192. See Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results*, in *DIVORCE REFORM AT THE CROSSROADS* 75, 76 (Stephen D. Sugarman & Herma Hill Kay eds. 1990).

193. *See id.*

194. *See id.*

195. *See* GLENDON, *supra* note 127, at 82.

196. *Id.*

197. *See id.*

198. *See id.* at 65 (“[F]or one spouse to get a divorce when the other was unwilling and had committed no marital offense . . . was difficult and time consuming.”).

199. *See id.*

adversarial nature of the fault-based system.<sup>200</sup> They believed that the adversarial system “tended to aggravate and perpetuate bitterness between the spouses.”<sup>201</sup> “Families on the verge of marital breakdown were forced to appear in court as adversaries before judges who were limited to taking testimony on the existence of matrimonial misconduct.”<sup>202</sup> Because no-fault divorce does not require this adversarial setting, reformers thought that divorce would be less traumatic.

Ironically, adopting no-fault divorce may have had the opposite effect. Since the implementation of no-fault divorce there has been a rise in domestic violence and other forms of violence against women.<sup>203</sup> “[T]he continued existence of pervasive serious violence associated with divorce-related litigation a quarter of a century after the adoption of no-fault divorce laws defies the claims and expectations of no-fault divorce reformers.”<sup>204</sup>

No-fault divorce does not prevent bitterness and violence, but causes it.<sup>205</sup> Professor Lynn Wardle states:

[T]he no-fault divorce culture that has grown out of specific no-fault divorce law reforms is the real seedbed of divorce related violence. Three facets of the no-fault divorce culture nurture seeds of violence: (1) underestimation of the value of the family and stable family relationships, (2) overestimation of the power of the law to engineer the happy breakup of marriages, and (3) marginalization of religious values in family law and public discourse. These factors have produced alienation and normalized conflict, and contributed to an authoritarian mindset in the no-fault divorce culture.<sup>206</sup>

Unilateral divorce at will robs spouses of any way to prevent the break up of their marriage. Thus, a sense of powerlessness of-

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200. No-fault supporters “proclaimed its potential for . . . eliminating adversary contests.” HALEM, *supra* note 130, at 281.

201. GLENDON, *supra* note 127, at 65.

202. Kay, *supra* note 154, at 35.

203. See David Blankenhorn, *The State of the Family and the Family Policy Debate*, 36 SANTA CLARA L. REV. 431, 433 (1996).

204. Wardle, *supra* note 111, at 741.

205. See *id.* at 745. *But see*, Martha Heller, Note, *Should Breaking Up Be Harder To Do?*, 4 VA. J. SOC. POL’Y & L. 263 (1996).

206. Wardle, *supra* note 111, at 774.

ten accompanies the dramatically life-changing consequences of divorce. Meanwhile, the divorce culture reinforces the "victim's" feelings of helplessness. "The message of the law is clear—there is no causality, no fault, and thus no legal control."<sup>207</sup> This situation produces feelings of helplessness, frustration, and anger that often lead to violence.<sup>208</sup>

### c. Harmful Effects on Children

No-fault divorce has radically increased the number of single-mother families in the United States. In 1960, five percent of children lived in single-mother families; by 1990, this number had risen to twenty-seven percent.<sup>209</sup> Because of the high number of children living with their divorced mother, many of the financial and physical hardships that women suffer also affect their children.

Increased family disruption may also have harmful physical and emotional effects on children. Divorce often results in dislocation, which can be traumatizing to a child.<sup>210</sup> Furthermore, children of divorce are more likely to have emotional trouble, perform poorly in school, and become delinquents.<sup>211</sup> "Many children and adolescents develop a wide range of post-divorce symptoms that include very aggressive behaviors, depression, sleep disturbance and learning problems."<sup>212</sup>

These results are even more disturbing because the effects of divorce are not short-term. Studies show that the effects of divorce are long-term; children do not "bounce back" after their parents divorce.<sup>213</sup> In fact, studies show that the harmful effects of

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207. *Id.* at 766.

208. *See id.* at 766.

209. *See* DiFonzo, *supra* note 113, at 552.

210. *See id.*

211. *See id.*

212. *See* Judith S. Wallerstein and Tony J. Tanke, *To Move or Not to Move: Psychological and Legal Considerations in the Relocation of Children Following Divorce*, 30 FAM. L. Q. 305, 309 (1996). Certainly, not all children of divorce suffer from such problems as severely as others; some may not suffer at all. *See id.* at 310-11. Several factors mitigate the harmful effects of divorce. "These include: (1) a close, sensitive relationship with a psychologically intact, conscientious parent; (2) the diminution of conflict and reasonable cooperation between parents; (3) whether or not the child comes to the divorce with pre-existing psychological difficulties." *Id.* at 311.

213. *See* Barbara Dafoe Whitehead, *Dan Quayle Was Right*, ATLANTIC MONTHLY,

divorce may affect children ten to fifteen years after the event.<sup>214</sup>

### B. The Canadian Experience

As a nation of Anglo heritage, Canada's experience with divorce is comparable in many ways to that of the United States. Both nations adopted their legal traditions and early family law from England. As a result, both Canada's and the United States' original systems of divorce law were fault-based.

There are, however, important differences that make the Canadian experience particularly relevant to Ireland's situation. Canada's smaller population<sup>215</sup> more closely mirrors Ireland's population.<sup>216</sup> Furthermore, the Canadian system places more authority in the hands of the federal government, similar to Ireland's system under the Referendum.<sup>217</sup>

Another important similarity between Canada and Ireland is that the Canadian system provides a more generous "safety net"<sup>218</sup> than the United States.<sup>219</sup> In this regard, Canada is more similar to Ireland than to the United States.<sup>220</sup> Furthermore, Canada's system of divorce under the 1968 Divorce Act is similar to the system Ireland will adopt.<sup>221</sup>

#### 1. The Fault-Based Era

Canada, like the United States, adopted much of its law from

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Apr., 1993, at 47, 47-48.

214. *See id.*

215. Canada had a population of 27,351,000 in 1992. *See* ALMANAC, *supra* note 11, at 748. The United States had a population of 256,561,239 in 1993. *See id.* at 823.

216. Ireland had a population of 3,521,000 in 1992. *See id.* at 775.

217. Canada's Constitution gives the federal government jurisdiction over "marriage and divorce". CAN. CONST. (Constitution Act, 1867) § 91(26).

218. By safety net I mean the social welfare mechanisms of the state.

219. *See* Claire L'Heureux-Dube, *Economic Consequences of Divorce: A View from Canada*, 31 HOUS. L. REV. 451, 459 (1994).

220. "Canada has a strong state, bent towards communitarianism . . . more welfare, and a higher rate of taxation than the United States." GOODE, *supra* note 132, at 137.

221. Ireland's proposed divorce system requires a finding that there is no hope of reconciliation and that the couple has been separated for four years. *See* Amendment, *supra* note 10. Likewise, Canada's 1968 Divorce Act required a three-to-five-year waiting period and a finding of marital breakdown. *See* ALASTAIR BISSETT-JOHNSON & DAVID C. DAY, *THE NEW DIVORCE LAW* 25 (1986).

England.<sup>222</sup> Both Protestantism and Catholicism influenced England's divorce law, which used the fault-based system of divorce.<sup>223</sup> Thus, Canada inherited a fault-based system of divorce that was infused with Catholic and Protestant ideals.<sup>224</sup>

Unlike the United States, the federal government in Canada has jurisdiction over "marriage and divorce."<sup>225</sup> Despite that grant of power, the provinces retain authority over the "solemnization of marriage."<sup>226</sup> This arrangement resulted in a lack of uniformity in Canadian divorce law during its fault-based era.

Prior to 1968, the majority of provinces allowed divorces only in cases of adultery.<sup>227</sup> Other provinces, however, had varied divorce laws. Nova Scotia, for example, had more permissive divorce laws; it granted divorces on the grounds of cruelty.<sup>228</sup> On the other hand, Newfoundland and Quebec did not grant divorces at all.<sup>229</sup> In 1968, Canada simplified and systematized its divorce law by passing the Divorce Act of 1968.

## 2. The No-Fault Era

The Divorce Act of 1968 did not radically change the means by which couples could obtain divorces, but it was Canada's first step towards no-fault divorce.<sup>230</sup> For the first time Canada, recognized irreconcilable marital breakdown as sufficient grounds for divorce, while retaining fault grounds for divorce.<sup>231</sup> Even when a couple applied for a divorce on the basis of marital breakdown, the Act required stringent proof and a three to five year waiting period.<sup>232</sup> In fact, the requirements for obtaining a divorce establish-

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222. See GOODE, *supra* note 132, at 136.

223. England incorporated Catholic ecclesiastical law into secular law until Henry VIII created the Anglican Church. See *id.* Much of the Catholic ideal of marriage, however, remained a part of the system. See *id.*

224. See *id.*

225. CAN. CONST. (Constitution Act, 1867) § 91(26).

226. *Id.* § 92(12).

227. See CHRISTINE DAVIES, FAMILY LAW IN CANADA 328 (4th ed. 1984).

228. See *id.*

229. See *id.*

230. See GOODE, *supra* note 132, at 140-41.

231. See *id.* at 140.

232. See *id.* at 140-41.

ing marriage breakdown were so rigid, only one-third of divorcing couples followed this route.<sup>233</sup>

To further liberalize Canadian divorce law, the Law Reform Commission of Canada released a Report on Family Law in March 1976 (Report).<sup>234</sup> The Report recommended that the principle of fault be removed from divorce law to eliminate the adversarial nature of divorces.<sup>235</sup> Furthermore, it recommended the adoption of "conciliation measures and the establishment of a unified family court system."<sup>236</sup> Eight years later, the Commission's recommendations were adopted in the 1985 Divorce Act.<sup>237</sup>

The Conservative Government passed the 1985 Divorce Act and implemented it in 1986.<sup>238</sup> The Act reduced the number of grounds for divorce from fifteen to one, marital breakdown.<sup>239</sup> "The new Act provides that a divorce is to be granted upon an application by either or both spouses on the ground that there has been a breakdown of their marriage."<sup>240</sup> Marital breakdown is proven when one of the following criteria is met: (1) the couple separates for one year prior to the determination of divorce; (2) one spouse commits adultery; or (3) one spouse treats the other with physical or mental cruelty.<sup>241</sup>

One obvious change in the new law was the reduction of the five-year waiting period established by the Divorce Act 1968, to the one-year separation period under the Divorce Act 1985. The government hoped this would reduce conflict, while providing couples a period of reflection regarding their decision.<sup>242</sup>

The new divorce law resulted in at-will divorce in Canada.<sup>243</sup>

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233. *See id.* at 141.

234. *See L'Heureux-Dube, supra* note 219, at 456.

235. *See id.*

236. *Id.*

237. *See id.*

238. *See* ALASTAIR BISSETT-JOHNSON & DAVID C. DAY, *THE NEW DIVORCE LAW* 19 (1986).

239. *See id.* at 25.

240. *Id.*

241. *See* Divorce Act, 1985, ch. 4, § 8(2)(a)-(b) 1986 Acts. Parl. Can., 177-78.

242. *See* BISSETT-JOHNSON & DAY, *supra* note 238, at 27.

243. "[I]f the couple can reach an agreement they can get a divorce almost immediately." GOODE, *supra* note 132, at 141.



There was no longer a true determination of marital breakdown; couples who wanted to get divorces could obtain them almost immediately.<sup>244</sup> In fact, the new legislation relaxed the marital breakdown requirement to such an extent that by 1988, eighty per cent of all divorces in Canada were based on a separation of one year or more.<sup>245</sup>

### 3. Effects of the Transition

Similar to the U.S. experience, Canada's adoption of no-fault divorce resulted in increases in divorce and poverty among women and children. Unique to Canada's experience, however, is the inability of its generous social welfare system to prevent these harsh consequences.

#### *a. Increase in Divorce*

Under the fault-based system, Canada possessed the lowest divorce rate of any Anglo nation,<sup>246</sup> at a rate of 1.7 divorces per 1000 women in 1951.<sup>247</sup> Ten years later and still under a fault-based system, Canada had a rate of 1.6 divorces per 1000 married women.<sup>248</sup> At that time, Canada's divorce rate was substantially lower than the U.S. divorce rate.<sup>249</sup>

In 1969, only one year after adopting a no-fault system of divorce, however, Canada no longer had the lowest divorce rate of any Anglo nation.<sup>250</sup> By then, Canada's divorce rate had "more than doubled, rising above that of any other Anglo country (except of course that of the United States)."<sup>251</sup> Moreover, this increase did not result from the release of a backlog of couples desperate to divorce. The Canadian divorce rate has continued to climb. By the 1980's it was nearly ten times what it was in 1950.<sup>252</sup>

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244. *See id.*

245. *See id.*

246. "Canada began the decade of the 1950s with the lowest divorce rate of any of these countries, and remained in that position until 1969." *See id.* at 137.

247. *See id.* at 139.

248. *See id.*

249. In 1961, the U.S. rate was 8.3 per 1000 married women. *See id.*

250. *See id.* at 137.

251. *Id.*

252. *See id.* at 138.

Furthermore, Canada abandoned its tough requirements because the Commission did not believe that the stringent requirements were effectively dealing with marriage breakdown. Similar to the United States, Canada's attempt to prevent no-fault divorce from becoming at-will divorce failed. In the end, both jurisdictions not only were unable to provide therapeutic aid to marriages in trouble, but were also unable to determine which marriages could be salvaged. Thus, Canada's first step toward no-fault divorce evolved into divorce on demand.

*b. Harmful Effects on Women and Children*

The increase in divorce changed the structure of Canadian families. Single-parent families doubled, from 478,000 in 1971 to 955,000 in 1991.<sup>253</sup> In 1991, women headed eighty percent of single-parent families, with fifty-seven percent of those families resulting from divorce or separation.<sup>254</sup> Additionally, forty percent of divorces granted in 1989 involved families with children.<sup>255</sup>

The majority of single-parent families headed by women do not fare well economically.<sup>256</sup> In fact, by 1991 almost sixty-two percent of families below the poverty level were headed by women.<sup>257</sup> As the number of divorces rise, single women and their children continually grow poorer and the feminization of poverty escalates.<sup>258</sup>

*c. The Failure of the Safety Net*

Canada maintains one of the most generous social safety nets in the world, including public assistance, a national pension program, a national medicare system, unemployment insurance, workers' compensation, victims of crimes compensation, and legal aid.<sup>259</sup> Many provinces have introduced enforcement regulations implementing automatic pay deductions from maintenance orders.

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253. See L'Heureux-Dube, *supra* note 219, at 457-58.

254. See *id.* at 458.

255. See *id.*

256. See *id.*

257. See *id.*

258. See *id.*

259. See *id.* at 459.

and reciprocal enforcement.<sup>260</sup> Furthermore, the Divorce Act 1985 "allows the court to 'recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown.'"<sup>261</sup> This provision authorizes claims for "income/pension disadvantage due to time taken out of the labor force, in the past, for family formation activities."<sup>262</sup>

Despite this strong safety net, Canada failed to prevent the social ills that the less communitarian-minded United States encountered. Canada's social welfare programs and strict support enforcement probably *mitigated* the effects of no-fault divorce. Unfortunately, they were unable to *prevent* increased divorce rates and increased poverty among women and children.

## VII. RECOMMENDATION FOR IRELAND

### A. *The Legal Recommendation*

Ireland should adopt a fault-based system of divorce. There are two ways for Ireland to establish such a system. One option is to add fault grounds to the existing system. Thus, to obtain a divorce, one would have to prove marital breakdown, separation for four years, and *fault*. This approach is unacceptable, however, because it would force non-offending spouses to remain in marriages that subject them to mental or physical cruelty.<sup>263</sup>

Furthermore, combining fault-based grounds for divorce with a marital breakdown requirement dilutes the moral message of the purely fault-based system. The core of the fault-based system's message is that marriage is a permanent institution, violable only by a grave moral offense.<sup>264</sup> In contrast, this hybrid approach would require innocent spouses to establish marriage breakdown as well as moral offense. This puts too great a burden on the inno-

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260. *See id.*

261. Peter Ross, *Divorce—Canadian Style: Compensatory Support*, 5 J. LEGAL ECON. 67 (1995).

262. *Id.*

263. "[P]ure nonfault grounds with long waiting periods . . . would not respond to the perceived need to permit people whose marriages have failed to get on with their lives, a need which gave rise to the demand for liberalized divorce in the first place." GLENDON, *supra* note 127, at 75.

264. *See infra* Part V.A.1.

cent spouse, and dilutes the fault system's moral standard.<sup>265</sup>

The best approach for Ireland is to hold another referendum and amend its constitution. Ireland should adopt a new amendment that establishes a fault-based system. In addition, it should repeal the four-year separation and irreconcilability requirements.

Under this new amendment, divorce should only be granted where spouses transgress the moral bonds of the marriage. Ireland should recognize fault grounds that its citizens believe are an offense against the marriage. At a minimum, the grounds for divorce should include adultery, abandonment, and cruelty.<sup>266</sup>

As in other jurisdictions, the party seeking the divorce should have the burden of proving fault. Furthermore, when the plaintiff proves fault, the "guilty" spouse should have the defenses of condonation, connivance, and collusion.<sup>267</sup> These defenses are necessary to discourage couples from using the courts to obtain at-will divorces.

### B. The Rationale

Ireland is a unique nation. It possesses the Catholic heritage of Spain and Italy, which sustain low divorce rates,<sup>268</sup> and the Anglo legal and cultural heritage, that generally maintains high divorce rates. Both traditions should contribute to Ireland's revised system of divorce.

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265. Under a hybrid system, an innocent spouse is not released from the marriage due to a violation of the marriage covenant, but because the marriage cannot survive. There is a shift from the focus on a moral standard to concern over social utility, and the utility message will eventually override the moral standard. Canada's experience with the 1968 Divorce Bill shows that this approach is untenable, it will eventually be supplanted by pure no-fault divorce.

266. These fault grounds are those historically employed by fault-based jurisdictions whose systems were influenced by Catholicism. See Morse, *supra* note 110, at 607-08. For a discussion of early divorce law in England, see DiFonzo, *supra* note 113, at 520. Adultery is the most justifiable element to add as a condition to divorce because the Catholic Church views adultery as an offense to marriage. See CATECHISM OF THE CATHOLIC CHURCH, *supra* note 19, at 572 ("Adultery is an injustice. He who commits adultery fails in his commitment. He does injury to the sign of the covenant which the marriage bond is, transgresses the rights of the other spouse and undermines the institution of marriage.").

267. For a discussion of these defenses, see *supra* notes 116-17 and accompanying text.

268. See GOODE, *supra* note 132, at 78.

### 1. The Moral Heritage

Ireland's adoption of a no-fault system radically departs from its moral tradition. No-fault divorce makes marriage solely the creation of the state,<sup>269</sup> eliminating fault or blame from the equation. Instead of setting a standard of behavior, it seeks to manipulate the institution of marriage to the most utilitarian outcome possible.<sup>270</sup> It infuses the ideal of marriage with the concepts of self-fulfillment and individualism.<sup>271</sup>

This change is a drastic shift from the traditional Irish ideal of marriage, which was stricter than the Catholic Church's view of marriage.<sup>272</sup> No-fault divorce makes Ireland's first step into divorce law a giant leap with far-reaching effects. "[T]he family is so intertwined with other social structures that it is not possible to transform it without reversing a multitude of other trends in modern social life, from the economic to the religious."<sup>273</sup>

Some may prefer a revolutionary pace, but successful reform and modernization should not disregard the core values of the people.<sup>274</sup> This is especially true in the regulation of family life.

While morals and law need not coincide, any law must cope with the way the people it regulates view their moral relations. This is particularly true of family law: moral issues are central to family life and family self-governance, and hence central to the context in which family law operates.<sup>275</sup>

Instead of taking a giant step of lifting the nearly seventy year ban on divorce and implementing a no-fault divorce system, Ireland should take a less drastic step. Ireland's reforms should respect and involve the moral values imbedded in its society, and simultaneously address modern problems.

The fault-based system incorporates familiar moral and religious principles into the law, while allowing the state to grant di-

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269. See Morse, *supra* note 110, at 606.

270. See *id.*

271. See GLENDON, *supra* note 127, at 108.

272. See *supra* note 24 and accompanying text.

273. GOODE, *supra* note 132, at 318.

274. One potential affect of ignoring the religious values of the people is increased domestic violence. See Wardle, *supra* note 111, at 774.

275. See Schneider, *supra* note 112, at 1806.

voces to those in genuine need. First and foremost, the fault-based system views marriage as a sacrament, consistent with the Catholic Church's view of marriage.<sup>276</sup> Under the fault-based system, marriage is administered by the state, but is more than a mere creation of the state. The fault-based system views marriage as a permanent union that cannot be terminated at the will of one party. Instead, one spouse must commit an offense against the marriage before the innocent party can dissolve the marriage.

This fault-based system is not identical to either Catholic doctrine or the modern "Western" view of marriage. Although Ireland is no longer the "guardian of the faith,"<sup>277</sup> this system recognizes that the Catholic tradition is still a vital part of Irish society. Ireland is a nation in transition. As a mixture of Catholic and Anglo heritage the fault based system is uniquely suited for Ireland.

## 2. Social Consequences

The Anglo nations that adopted no-fault divorce experienced dramatic increases in broken families accompanied by a host of social ills.<sup>278</sup> Child-poverty, the feminization of poverty, and increasing rates of divorce-related violence became serious social problems for nations that adopted no-fault systems of divorce.<sup>279</sup> To avoid similar problems, Ireland should avoid implementing unilateral no-fault divorce.

Ireland's current system of divorce is more restrictive than most other Anglo systems because it requires an inquiry into the status of the marriage and a four year waiting requirement. Many jurisdictions in the United States possessed inquiry requirements, but never gave them any effect.<sup>280</sup> Canada also included an inquiry into the survivability of the marriage in its divorce system,

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276. See *supra* note 136 and accompanying text.

277. An old provision in Ireland's Constitution recognized the social position of Catholicism in Ireland. See Macleod, *supra* note 14.

278. See *supra* Part V.A.3 & B.3. "In most parts of the world, however, the rising divorce rates have brought substantial increases in the number of people—especially women and children—who are suffering economically and need state support to survive." GOODE, *supra* note 132, at 318.

279. See *id.*

280. See *infra* 5.A.2.a-b.

but the planned protection was never implemented.<sup>281</sup>

Furthermore, Canada once possessed similarly restrictive separation requirements under the Divorce Act of 1968. These stringent requirements, however, did not prevent surges in the divorce rate in Canada. Likewise, the only comparable Irish example indicates strict requirements would not be effective in Ireland.<sup>282</sup> Since the Judicial Separation Act 1989, judicially sanctioned separations in Ireland have continued to increase.<sup>283</sup>

While some reformers assume that Ireland's strong safety net will protect it from the social ills seen in the United States, Canada's experience speaks strongly against that assumption. Canada, like Ireland, has a strong communitarian bent.<sup>284</sup> Although, Canada provides strong social welfare programs to divorcees and their children,<sup>285</sup> it has been unable to prevent increased divorce rates, the feminization of poverty, and increased poverty among children.<sup>286</sup> There is no reason to believe that Ireland will be able to avoid the pitfalls that similarly situated Canada could not avoid. If Ireland does not reform its divorce regime, it will witness higher divorce rates and a demand for increased social spending to deal with the effects of divorce.

### VIII. CONCLUSION

Ireland was right to remove the constitutional ban on divorce, but wrong to adopt the no-fault system. In their haste to secularize Ireland, reformers moved too far by adopting a divorce system that fails to reflect Ireland's strong moral heritage and ignores the probable negative social effects of "divorce on demand." Instead of ignoring the Catholic values of the Irish people, reformers should employ those values to construct divorce laws that will free spouses caught in destructive marriages, but protect society from the tragic effects of a jolting shift to no-fault divorce law.

Ireland should move forward using both hindsight and fore-

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281. See *infra* 5.B.2.

282. See Carol Coulter, *Points to be Thrashed Out in the Debate*, IRISH TIMES, Sept. 2, 1995, at 6.

283. *Id.*

284. See GOODE, *supra* note 132, at 137.

285. See *supra* note 220 and accompanying text.

286. See *id.*

sight. The fault system can act as a link between Ireland's Catholic heritage that has served it so well, and the development of modern Irish society. Ireland is uniquely suited to respect its strong Catholic heritage while still addressing the problems of a more pluralistic and modern society.

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\* J.D. Candidate, Loyola Law School, 1998; B.S. University of Houston, 1995. This Comment is dedicated to my wife, Jenny. "Many women have done nobly, but you exceed them all." Prov. 31:29.



