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Between 1970 and 1985, the United States experienced an overhaul in divorce legislation.[1] During that time, nearly every state either replaced or supplemented its fault-based system with some form of no-fault divorce, which was indicative of the country's "widespread dissatisfaction" with the outdated notion that a party must prove fault in order to be granted a divorce.[2] Rhode Island was no exception to the trend and followed suit in 1975, adding "irreconcilable differences" as a ground for obtaining an absolute divorce in addition to its already existing fault-based grounds.[3] This new ground was explicitly recognized by Rhode Island courts as "remov[ing] the fault factor from a divorce proceeding and abolish[ing] the necessity of presenting what may be the distasteful details of personal conduct by either party."[4]

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1. *See* Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 79 (1991).

2. *See id.*

3. R.I. GEN. LAWS ANN. § 15-5-3.1 (West 2006); Hamel v. Hamel, 426 A.2d 259, 261 (R.I. 1981) (citation omitted).

4. *Hamel*, 426 A.2d at 261 (citation omitted).

However, in Rhode Island, no-fault divorce is an illusion. While, in theory, a marriage can be dissolved without a showing of fault, fault is still statutorily preserved as a factor for consideration in several of the most important, and most litigated, determinations arising from a divorce: the division of marital assets, awarding alimony and the determination of child custody.[5] It is in these latter portions of the divorce proceeding that either or both parties can provide evidence of fault of the other in an effort to get a "bigger slice of the pie."[6]

Section 15-5-3.1 of the Rhode Island General Laws states that "[a] divorce from the bonds of matrimony shall be decreed, irrespective of the fault of either party, on the ground of irreconcilable differences which have caused the irremediable breakdown of the marriage" and provides that "allegations or evidence of specific acts of misconduct shall be improper and inadmissible."[7] Nevertheless, and quite curiously, the statute goes on to list determinations "pursuant to §§ 15-5-16 [alimony and counsel fees] and 15-5-16.1 [assignment of property]" as well as child custody, as exceptions to the no-fault rule.[8] Besides being blatantly contradictory on its face—making evidence of fault "improper and inadmissible" on the one hand, yet permitting it to aid in determining the most important concerns stemming from a divorce on the other—this construction undermines the underlying goals of the no-fault system and undercuts the reasons why most states shifted to no-fault divorce in the first place. The shift to a no-fault system was, among other things, largely

5. *See* R.I. GEN. LAWS § 15-5-16 (West 2006 & Supp. 2013); Mattera v. Mattera, 669 A.2d 538, 541 (R.I. 1996) (holding that a trial judge did not abuse his discretion in considering that the wife was "a 'good and faithful wife' whose marital conduct was impeccable [while the husband's] marital conduct included the abuse of alcohol and 'a bigamous relationship with another female during the course of the within divorce proceedings.'"); Tarro v. Tarro, 485 A.2d 558, 561 (R.I. 1984) (noting that "'[c]onduct' [within the context of section 15-5-16] is not limited to bad conduct or marital fault but also encompasses good conduct during the term of the marriage").

6. *See, e.g.*, Giammarco v. Giammarco, 959 A.2d 531, 534 (R.I. 2008) (affirming a magistrate's award of 65% of the marital state to the plaintiff where, in addition to presenting other inferior qualities, the defendant was "totally at fault in the breakdown of the marriage") (internal quotation marks omitted).

7. R.I. GEN. LAWS ANN. § 15-5-3.1.

8. *Id.*

thought to dignify the divorce process by reducing hostility between parties, increasing personal dignity, cultivating respect for the law, and respecting the inherent privacy that society believes exists between married couples.[9] By preserving a consideration of fault, *especially* pertaining to the most important aspects of a divorce proceeding, one can easily see how these goals would be seriously undermined. It is almost as if the statute was paying lip service to the no-fault movement, conveying its loyalty, though quite insincerely.

A survey of Rhode Island case law demonstrates how pervasive fault actually is in this supposed no-fault system.[10] Since courts are bound by the "clear and unambiguous" language of the statute and because of the undoubtedly clear and unambiguous language in section 15-5-3.1, Rhode Island courts have in effect been forced to explicitly consider fault.[11] Thus, their opinions are replete with evidence of less than stellar conduct by one or both of the divorcing parties—despite the fact that this is just the type of thing no-fault divorce sought to eliminate.

This comment focuses on a troubling inconsistency in Rhode Island divorce law: namely, how a divorce can be obtained "irrespective of the fault of either party," with "allegations or evidence of specific acts of misconduct" considered to be "improper" pursuant to section 15-5-3.1, yet fault can explicitly be considered when dividing marital property consistent with section 15-5-16.1.[12] It first provides a brief history of divorce in the United States and outlines how and why the move from a fault-based system to a largely no-fault regime occurred. Next, it discusses how moving to a no-fault system requires re-evaluating

9. Wardle, *supra* note 1, at 79, 96.

10. *See, e.g.*, Thompson v. Thompson, 642 A.2d 1160, 1162 (R.I. 1994) (holding that the trial judge did not abuse his discretion in awarding the wife 65% of assets where she suffered emotional and physical abuse during the marriage, even though she was not faultless in its eventual breakdown); Tarro v. Tarro, 485 A.2d 558, 564 (R.I. 1984) (concluding that equitable division of marital property was proper where both parties were at fault).

11. *See* Ruffel v. Ruffel, 900 A.2d 1178, 1192 (R.I. 2006).

12. R.I. GEN. LAWS ANN. § 15-5-3.1; R.I. GEN. LAWS ANN. § 15-5-16.1 (West 2006). This paper does not address considering fault when determining alimony, which is now largely used only as a rehabilitative measure pursuant to section 15-5-16 or child custody because of the extraordinary concerns pertaining to the well-being of children.

how marital property is divided, how Rhode Island considers fault in both the granting of divorces and dividing marital property, and why this is problematic. Finally, it discusses how the goals of the no-fault divorce system would be better served by implementing an equal, or at the very least, equitable division of assets, irrespective of fault.

I. A BRIEF HISTORY OF DIVORCE IN THE UNITED STATES

Under English law, no common law right to a divorce existed: an unhappy couple could seek "only a limited right to a legal separation from the ecclesiastical court," "a court having jurisdiction over matters concerning the Church of England."[13] In the years leading up to the Revolution, most colonists remained largely subject to the laws of England, which permitted divorce only by an act of Parliament.[14] Following the Revolution, the American states drifted away from the strict requirements of England and started passing their own divorce laws.[15]

Early divorce laws differed dramatically by region. New England enacted liberal divorce laws quickly, allowing divorce on a number of grounds, while the Southern states granted divorce only under the strictest requirements, if at all.[16] Mid-Atlantic States passed intermediate divorce laws between these two extremes, allowing for legal divorces, but only on limited grounds, such as New York's 1787 law that only permitted divorce for adultery.[17]

Influenced largely by the principles advanced by the Protestant Reformation, wherein the doctrines and structure of the Roman Catholic Church[18] were rejected in favor of a less

13. 1 MASS. PRACTICE *Family Law and Practice* § 1:5 (4th ed. 2013); BLACK'S LAW DICTIONARY 407 (9th ed. 2009).

14. *See* Michael M. O'Hear, "*Some of the Most Embarrassing Questions": Extratterritorial Divorces and the Problem of Jurisdiction Before Pennoyer*, 104 YALE L.J. 1507, 1511 (1995).

15. *Id.*

16. *Id.* South Carolina, for example, did not grant divorces. *Id.*

17. *Id.*

18. By the ninth century, the Roman Catholic Church had largely gained exclusive control over matrimonial issues throughout Europe. *See* Shaakirrah R. Sanders, *The Cyclical Nature of Divorce in the Western Legal Tradition*, 50 LOY. L. REV. 407, 412 (2004). The Church's view on marriage can be stated quite simply – "a valid celebrated Christian marriage was dissoluble only by the death of one of the spouses." *Id.* at 413 (internal quotation marks

stringent Protestant church,[19] the founders of the Massachusetts Bay Colony were the first to advance the idea of a right to an absolute divorce in the United States.[20] In the absence of religious courts in the New World, the task of determining marital status, by default, fell to the government.[21] Thus, the Massachusetts General Court established the Court of Assistants in 1636, whose jurisdiction included "all Causes of divorce."[22]

Thereafter, in 1674, the Court of Assistants first approved a petition brought by a woman seeking "legal divorcement from hir [sic] husband" because he was "married to another woman in London;" however, it is unclear as to whether, based on the timing of the peripheral marriage, the declaration actually sought a nullity of the marriage versus a divorce.[23] Regardless, others followed suit, seeking a right to divorce for reasons such as adultery and desertion.[24] Following Pennsylvania, in 1786, Massachusetts was the second state to officially pass divorce legislation.[25]

The Massachusetts Court of Assistants also recognized an early version of dividing marital assets between a separating husband and wife. Shortly before the American Revolution, Abigail Fuller, in divorcing her husband, sought the exclusive right to use her own estate and sought support of herself and her child.[26] She was granted the estate and was awarded spousal and child support "in the amount of 25 pounds of sterling a year."[27] It

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omitted). Some alternative remedies existed to dissolve a marriage, such as annulment, a non-consummated marriage, or a grant of separation, however these were rarely utilized. *Id.* at 413–14.

19. *See id.* at 415 ("[F]rom the sixteenth century onward the acceptability of divorce underwent a renaissance as . . . Protestant Reformers denied . . . that marriage was a holy sacrament, as endorsed by the Roman Catholic Church, and advocated the possibility of divorce under certain circumstances.").

20. 1 MASS. PRACTICE *Family Law and Practice* § 1:5 (4th ed. 2013). Divorce still remained largely unheard of in the Mid-Atlantic and Southern colonies at this time because of the more pervasive influence of the Church of England on these regions than in New England. *Id.*

21. *Id.*

22. *Id.* § 1:5 n.5. (internal quotation marks omitted).

23. *Id.* § 1:5 (internal quotation marks omitted); *Id.* § 1:5 n.5.

24. *See id.* § 1:5.

25. O'Hear, *supra* note 14, at 1511.

26. 1 MASS. PRACTICE *Family Law and Practice* § 1:5 (4th ed. 2013).

27. *Id.*

is from these origins that divorce law was created and, ever so slowly, began to evolve.

A. *Fault-based Divorce*

Early divorce law centered on the notion that marriage was "an institution, the maintenance of which in its purity the public is deeply interested."[28] The idea of requiring fault by at least one party to a divorce presumably grew out of a desire to preserve the "institution" of marriage.[29] Traditionally, only an innocent party could petition for a divorce, and divorce laws required that such a party prove his or her significant other committed one of any of the statutorily enumerated offenses constituting fault.[30] Though they varied from state to state, adultery, cruelty, and desertion were among the most common fault grounds.[31]

Several defenses arose in response to fault-based divorce, including a "clean hands" type defense, wherein if both parties were at fault, then neither could obtain a divorce.[32] Other defenses included connivance, which required a showing that the innocent spouse consented to the alleged offense, and condonation, wherein the innocent spouse forgave the marital indiscretion such that the indiscretion was then "nullified."[33] In an effort to get around the fault requirement, some couples seeking a divorce even went so far as to engage in collusion by "alleging false evidence of a marital offense."[34] Collusion, forum shopping (to find the most favorable divorce laws), and marriage recognition issues amongst the states were early indicators of a defective fault-based system and a need for a more uniform approach.[35]

A number of social, economic, and cultural changes beginning in the early twentieth century contributed to creating an environment ripe for divorce reform to surface in the United

28. Maynard v. Hill, 125 U.S. 190, 211 (1888).

29. *See* Adriaen M. Morse, Jr., *Fault: A Viable Means of Re-Injecting Responsibility in Marital Relations*, 30 U. RICH. L. REV. 605, 609 (1996)

30. Laura Bradford, *the Counterrevolution: A Critique of Recent Proposals to Reform No-Fault Divorce Laws,* 49 STAN. L. REV. 607, 610 (1997).

31. *Id.* Other types of fault included "conviction of certain crimes, homosexuality, insanity, and drug addiction." *Id.*

32. *Id.*

33. Morse, *supra* note 29, at 611–12.

34. *Id.* at 612.

35. O'Hear, *supra* note 14, at 1511–12.

States. Herbert Jacob, a political science professor at Northwestern University and author of *Silent Revolution: The Transformation of Divorce Law in the United States*, suggests a number of factors that may have contributed to a shift in attitude towards divorce: an increased life expectancy amongst women (presumably due in part to a consistent decrease in mortality during childbirth), increased participation by women in the labor force (thus making them less financially dependent on their husbands), and the effects of the feminist movement beginning in the 1960s, to name a few.[36] Additionally, the 1980s saw a downturn in "child centered" marriages, with more married couples waiting to have children, or deciding against doing so altogether.[37] Jacob notes:

> These social and economic changes altered the context of married life in the United States. The marriage vow, 'until death do us part,' had new meaning when life extended almost twice as long in the 1980s as in the 1900s. The long period without children and the financial contribution of women modified relationships between wives and husbands. Husbands could no longer automatically claim autocratic dominance and wives more often sought a greater degree of equality. Most significantly, however, the focus of marriages shifted from children and economics to companionship.[38]

These significant changes in the social attitude toward marriage provided an open invitation for legislative reform of divorce laws.

II. THE MOVEMENT TO NO-FAULT DIVORCE

Early efforts to reform divorce law had mixed results, with

36. *See* HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 16–24 (1998).

37. *Id.* at 25. Jacob suggests that the invention of contraception, along with the Supreme Court's decision in *Roe v. Wade*, in 1973, legalizing abortion, made it "possible to separate sexual activity from the probability of procreation," thus resulting in more childless marriages, and contributing to an attitude that marriage was no longer "the only acceptable context for sexual activity." *Id.*

38. *Id.* at 27–28.

New York making the first serious attempt at reform in, 1966.[39] However, because New York had the strictest divorce laws in the country at the time—originally enacted in 1787 and permitting divorce only on the grounds of adultery—the reform sought was nothing groundbreaking; rather, people believed it did "no more than bring the state's law into the twentieth century."[40] Other states also made minor attempts at reform, such as offering, or sometimes requiring, "conciliation procedures" before a final divorce was granted.[41] This approach appears to be an attempt to balance a right to a divorce with an interest in ensuring divorces were only granted to couples who had exhausted all reconciliatory options.[42]

The appropriate context for reform proved crucial to make any serious headway in divorce reform, and California, with its seemingly laidback lifestyle, superficial values, and reputation "as an incubator for novel social ideas" was just the place.[43] In 1969, California became the first state to adopt a purely "no-fault" divorce approach by passing the Family Law Act of 1969 ("the Act"), which became effective the following year.[44] The legislation was enacted as a proposed solution to the rising divorce rate and to promote family stability, which was coupled with the implementation of a state family court system.[45] The Governor's Commission, who was tasked with studying and proposing changes to divorce and family law, and ultimately set forth the Act, which "urged the abandonment of all fault grounds," partially based on the belief that fault grounds promoted "undue stigma" and "antagonism" between married couples.[46] The Act eliminated

39. *Id*. at 30. The 1966 revision added additional grounds for divorce including "abandonment, imprisonment of a spouse in excess of three years, cruel and inhuman treatment, and living separately and apart from one's spouse for a period, originally, of two or more years pursuant to a separation agreement." Meaghan E. Howard, *Modern Reformation: An Overview of New York's Domestic Relations Law Overhaul*, 29 TOURO L. REV. 389, 391 (2013).

40. *Id.*

41. *Id.* at 31.

42. *See id.*

43. *Id*. at 43.

44. Wardle, *supra* note 1, at 83.

45. *Id.* at 83–84.

46. J. Herbie DiFonzo & Ruth C. Stern, *Addicted to Fault: Why Divorce Reform Has Lagged in New York*, 27 PACE L. REV. 559, 583 (2007) (internal quotation marks omitted).

all previous fault grounds for divorce, and allowed for "dissolution of marriage" only upon the ground of "irreconcilable differences which have caused the irremediable breakdown of the marriage" or "incurable insanity."[47] Evidence of marital misconduct was not only unnecessary following the Act, it was inadmissible.[48] Interestingly, the Act was signed into law by then-Governor Ronald Reagan, who later said it was "one of the biggest mistakes of his political life."[49]

Around the same time as the passage of the Act, the highly regarded National Conference of Commissioners on Uniform State Laws ("NCCUSL")[50] voted to propose the Uniform Marriage and Divorce Act ("UMDA"), under which the sole grounds for divorce was to be a no-fault ground.[51] Further, the UMDA proposed that "property division, spousal maintenance, and child support decisions were to be made 'without regard to marital misconduct."[52] Although the American Bar Association ("ABA") declined to endorse the UMDA in its original form for a number of reasons, after some revisions, the ABA approved the UMDA.[53] The NCCUSL and ABA presenting a united front proved vital to

47. *Id.* at 83 (internal quotation marks omitted).

48. *Id.* From 1970 to 1975, evidence of marital misconduct was allowed to be presented to the courts in an effort to assist the court in determining whether irreconcilable differences were present between the couple, however this provision was repealed in 1975, thereby making fault completely irrelevant. DiFonzo & Stern, *supra* note 46, at 583–84.

49. W. Bradford Wilcox, *The Evolution of Divorce*, NAT'L AFFAIRS (Fall 2009), http://www.nationalaffairs.com/publications/detail/the-evolution-of-divorce. Wilcox suggests that one reason Reagan may have supported the bill was because his first wife, Jane Wyman, had "unfairly accused him of 'mental cruelty' to obtain a divorce in 1948." *Id.*

50. The NCCUSL, established in 1892 and now known as the Uniform Law Commission ("ULC"), is a non-profit, non-partisan group made up of "practicing lawyers, judges, legislators and legislative staff and law professors, who have been appointed . . . to research, draft and promote enactment of uniform state laws in areas of state law where uniformity is desirable and practical." *About the ULC*, UNIF. L. COMM'N, http://www.uniformlaws.org/Narrative.aspx?title=About%20the%20ULC (last visited Feb. 19, 2014). ULC members work together to create a model or recommended act, such as the UMDA, and then individual members work to enact the recommended or model acts in their home jurisdictions. *Id.*

51. Wardle, *supra* note 1, at 87.

52. *Id.*

53. *Id.*

the success of nationwide divorce reform.[54]

Following California's lead and the ABA's approval of the UMDA, the no-fault movement began to spread across the country. By 1989, forty-nine states and the District of Columbia had adopted some no-fault ground for divorce, with twenty of the states providing for divorce solely on no-fault grounds.[55] In 2010, New York became the final state to enact a "true" no-fault divorce, adding as a ground for a unilateral (or non-consensual) divorce that "the relationship between husband and wife has broken down irretrievably for a period of at least six months, provided that one party has so stated under oath."[56]

However, California's no-fault legislation was not quite as groundbreaking as it seems. Prior to 1970, several states had a no-fault provision embedded in their fault-based divorce laws, usually based on couples living apart for a proscribed period of time.[57] For example, a Rhode Island law that dates back to 1893,

allowed for divorce of married couples who lived apart for ten or more years, and Wisconsin had a similar law dating back to 1866.[58] So, the seeds of no-fault divorce had been sewn for some time. But, what was unique about California's legislation was that it *eliminated* all prior fault grounds available in divorce actions in favor of an exclusively no-fault system.[59]

Though seemingly counter-intuitive, the legislative intent behind enacting the Family Law Act of 1969 was to counter the rising divorce rates by making it more difficult to obtain a divorce.[60] The emphasis was on "dissolving only the truly hopeless marriages," and the courts were tasked with determining whether "'substantial reasons' for abandoning the marriage" were present, whereby judges would make an independent

54. *S*ee Harvey L. Zuckman, *The ABA Family Law Section v. The NCCUSL: Alienation, Separation and Forced Reconciliation over the Uniform Marriage and Divorce Act*, 24 CATH. U. L. REV. 61, 73–74 (1974).

55. Wardle, *supra* note 1, at 88.

56. *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Working Toward More Uniformity in Laws Relating to Families*, 44 FAM. L.Q. 469, 497 (2011) (internal quotation marks omitted).

57. *See* James Herbie Difonzo, *Customized Marriage*, 75 IND. L.J. 875, 886 (2000).

58. *Id.* at 887.

59. *Id.*

60. *Id.* at 903.

determination as to the status of the marriage.[61] Taking its charge with only dissolving those marriages that were "truly hopeless" very seriously, the California Supreme Court specifically rejected the idea that the parties could consent to dissolving their marriage and have that consent be sufficient to establish irreconcilable differences between the couple.[62]

Additionally, a no-fault divorce scheme was thought to dignify the divorce process and reduce the strain on a family's emotional and financial resources at time when these resources are most crucial.[63] Requiring a finding of fault in divorce proceedings often resulted in "costly, bitter, counterproductive litigation that impeded reconciliation."[64] Jacob, again, sums this notion up nicely:

> [A] widespread cause for dissatisfaction with the divorce law was that is forced family disputes into the adversarial mode of court actions. Most divorce cases already had an uncomfortably high degree of emotional conflict. Many divorce attorneys felt that the requirements of the adversarial system heighted that conflict to unacceptable levels . . . The system seemed designed to promote and exacerbate conflict, rather than to provide a way to find compromises and to get the divorce in as painless a fashion as possible.[65]

Certainly it was also a concern that the children of the parties suffered the most as a result of the hostility brought about by the divorce process.[66] So, it was believed that by sparing the divorcing parties the requirement of proving fault, hostility amongst the separating parties would decrease, and the children, if any, would be better off.[67]

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61. *Id.* at 903–04.
62. *See In re* Marriage of McKim, 493 P.2d 868, 872 (Cal. 1972).
63. Wardle, *supra* note 1, at 92.
64. *Id.*
65. JACOB, *supra* note 36, at 68.
66. Wardle, *supra* note 1, at 92.
67. *Id.* at 92–93. Wardle's article also discusses several other arguments put forth in support of a shift to no-fault divorce, including preserving the integrity of the legal system generally, as well as bridging the gap between "divorce law as written and divorce law as applied." *Id.* at 93–94. She states that no-fault divorces were widely available prior to the 1970s shift in legislation, either through collusion by both of the parties or via migratory

As the idea no-fault divorce began to catch on, though contrary to California's original intent, proponents of the no-fault system used it to promote the "assertion that divorce was a private matter that the state had no legitimate interest to restrict when the marriage was irretrievably broken and the parties had agreed to terminate the marriage."[68] By eliminating a requirement of fault, divorcing parties were protected from having to disclose in a court of law "the most intimate and often embarrassing details of married life."[69] Many believed that the state's interest in protecting the institution of marriage no longer justified "requiring disclosure of the marriage's failings if it was undisputed by the parties that the marriage was irretrievably broken."[70]

III. THE NEW STANDARD

The UMDA suggested that fault grounds for divorce be replaced with a sole standard: the irretrievable breakdown of the marriage. The drafters of the UMDA thought that having one single standard would "redirect the law's attention from an unproductive assignment of blame to a search for the realities of the marital situation."[71] In short, while difficult for some divorcing parties to understand, the single standard approach supported the notion that once a marriage was over, it was futile to try to figure out where to assign blame. Rather, more times than not, determining fault would just "bog the court down into

divorce. *Id.* at 94. Because of the problems with migratory divorce, it was also believed that more uniformity needed to exist amongst the states with regard to divorce law, which in turn led to the proposal of the Uniform Marriage and Divorce Act by the NCCUSL. *Id.* at 96. *See also* Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM L.Q. 269, 270–71 (1997) (Under the fault-based divorce regime, couples in unhappy marriages often fabricated fault based grounds for divorce or resorted to perjury in an effort to obtain a divorce, often with the assistance of counsel. Wealthier couples could bypass the process by obtaining divorces from more lenient states, referred to as "divorce mills," or from various foreign countries that offered "quickie" divorces).

68. *Id.* at 96.

69. *See* Joseph Goldstein & Max Gitter, *On Abolition of Grounds for Divorce: A Model Statute and Commentary*, 3 FAM L.Q. 75, 82 (1969).

70. Wardle, *supra* note 1, at 96.

71. UNIFORM MARRIAGE AND DIVORCE ACT §§ 101–309, prefatory note (amended 1973), 9A U.L.A 159, 161 (1998).

considering emotionally charged factual issues which are often more relevant to the parties themselves than to the attorneys or the court."[72] Additionally, as one can imagine, rarely would it be the case that the deterioration of a marriage was the fault of exclusively one party.

The "irreconcilable differences" standard, which is similar to the "irretrievable breakdown of the marriage" standard that is set forth by the UMDA, is present in several state divorce statutes including Rhode Island.[73] The standard, a popular ground upon which celebrity couples file for divorce (likely because this standard is the relevant one under California law), requires not only a showing that irreconcilable differences exist between the parties, but either explicitly through statute, as is the case in Rhode Island, or through "judicial construction . . . that [the] differences have caused an irremediable breakdown of the marriage."[74] Again, this standard was implemented to "provide a less painful alternative to traditional grounds for divorce . . . by removing from domestic relations litigation the issue of marital fault as a determining factor."[75]

A. *Rhode Island Adds "Irreconcilable Differences"*

Rhode Island followed the nationwide trend and added irreconcilable differences as a no-fault grounds for divorce in 1975, currently codified in section 15-5-3.1 of the Rhode Island General

72. Brett R. Turner, *The Role of Marital Misconduct in Dividing Property upon Divorce,* 15 DIVORCE LITIG. 117, 118 (2003).

73. *See* R.I. GEN. LAWS ANN. § 15-5-3.1 (West 2006). Irreconcilable differences is also an appropriate ground for legal separation, also known as separation from bed and board. *See* Hamel v. Hamel, 426 A.2d 259, 261 (R.I. 1981).

74. *See* 27A C.J.S. *Divorce* § 31 (2005).

75. *Id.* However, when a party proceeds in divorce litigation under the irreconcilable differences standard, this does not preclude the opposing party from proceeding under a fault based standard where such standards are available by statute. *See* Ebbert v. Ebbert, 459 A.2d 282, 284 (N.H. 1983) (holding it was error to require two separate decrees of divorce when husband wanted to proceed on the fault based grounds of adultery and wife wanted to proceed on the no-fault grounds of irreconcilable differences). But, where both irreconcilable differences and misconduct are pleaded, and "it appears that the parties separated as a result of mutual differences before the misconduct occurred," irreconcilable differences is the appropriate grounds upon which to grant the divorce. *See* 27A C.J.S. *Divorce* § 31 (2005) (citing Murano v. Murano, 442 A.2d 597, 601 (N.H. 1982)).

Laws.[76] There is little information about the circumstances surrounding the General Assembly's decision to implement no-fault grounds. Rather, it appears that Rhode Island was simply following the trend, and adding a no-fault ground was the next logical step. But, looking at what was perhaps the Rhode Island Supreme Court's first opportunity to interpret the irreconcilable differences ground suggests that the ground was enacted to comport with many of the same goals of no-fault divorce that other jurisdictions were looking to achieve.[77] In *Hamel v. Hamel*, the court interpreted irreconcilable differences, albeit as it applied to a divorce from bed and board (*i.e.* a legal separation) versus an absolute divorce, as clearly removing the "fault factor from divorce proceedings" and "abolish[ing] the necessity of presenting what may be the distasteful details of personal conduct by either party."[78]

The court in *Hamel* also cited a Texas Court of Appeals case, *Baxla v. Baxla,* for its discussion of the policy goals underlying no-fault divorce.[79] In that case, the court, although recognizing there had not "yet been time for much judicial interpretation" of new no-fault divorce statutes, still stated with ample conviction that it was

> manifestly clear from the legislative history of many, if not all, of the statutes, that the purpose and intent of the legislatures of the various states, including Texas, is to abolish the necessity of presenting sordid and ugly details of conduct on the part of either spouse to the marriage in order to obtain a decree of divorce.[80]

The *Baxla* court went on to say that "legislators believed that removing considerations of fault and eliminating the incentive to present fault evidence would materially reduce the bitterness and acrimony which had attended divorce proceedings."[81] The Rhode

76. *See Hamel,* 426 A.2d at 261; *see also* Ronald J. Resmini, *The Law of Domestic Relations in Rhode Island*, 29 SUFFOLK U. L. REV. 379, 408 (1995). Additional fault-based grounds for divorce remained available to divorcing parties. *See* R.I. GEN. LAWS ANN. § 15-5-2 (West 2006).

77. *See* Turner, *supra* note 72, at 118–19.

78. *See Hamel,* 426 A.2d at 261.

79. *Id.*

80. Baxla v. Baxla, 522 S.W.2d 736, 738 (Tex. Civ. App. 1975).

81. *Id.*

Island Supreme Court's interpretation of the irreconcilable differences standard in *Hamel* and its reliance on the discussion in *Baxla* suggests that the standard was in fact implemented to achieve the frequently cited policy goals underlying no-fault divorce.[82] As I will unearth, however, the current construction and application of section 15-5-3.1, with its explicit preservation of fault, makes it difficult (if not impossible) to achieve these goals.

A. *Applying the New Standard*

It is well settled in jurisdictions using the irreconcilable differences standard that whether the differences between the parties are irreconcilable is a determination to be made by the court.[83] If the court determines that the differences are in fact irreconcilable, a second similar inquiry is performed by the court to determine whether those differences have resulted in the irremediable breakdown of the marriage.[84] The court uses a subjective test to make this determination, using the parties' state of mind as a frame of reference.[85] However, the differences need not be considered irreconcilable by both parties.[86] Unless required by statute, consent by both parties for a divorce on this ground is not required.[87]

Ironically, the inquiry by the court in determining whether the differences between the parties are in fact irreconcilable

82. *See Hamel,* 426 A.2d at 261; *See* Baxla, 522 S.W.2d at 738; *See* Turner, *supra* note 72, at 118–19.

83. *See* 27A C.J.S. *Divorce* § 31 (2005) (citing Tarro v. Tarro, 485 A.2d 558, 560 (R.I. 1984)). As an aside, the husband's attorney in *Hamel* makes an interesting argument that no differences are truly irreconcilable. *See* 426 A.2d at 261. He argued, "[a] perfect example is World War II. We had an irreconcilable difference with Japan, and then 'whammo,' we reconciled the difference." *Id.*

84. 27A C.J.S. *Divorce* § 31 (2005).

85. *Id.*

86. *Id.* Some courts may consider the fact that one spouse wishes to continue the marriage as "evidence of reasonable possibility of reconciliation" but, "if [the] other spouse resolutely refuses to continue marriage and it is clear from passage of time or other circumstances that there is no reasonable possibility of change of heart, there is irremediable breakdown of marriage." *Id*. at n.14; *see* Desrochers v. Desrochers, 347 A.2d 150, 153 (N.H. 1975).

87. *Id.* South Dakota, for example, requires consent by both parties to grant a divorce on the grounds of irreconcilable differences, unless a party fails to appear. *See* S.D. CODIFIED LAWS § 25-4-17.2 (2013); MISS. CODE. ANN. § 93-5-2 (West 2007).

requires some consideration of fault by one or both of the parties. In the oft-cited Rhode Island Supreme Court case *Tarro v. Tarro*, the Court upheld a trial judge's finding of fact that both parties were responsible for the breakdown of the marriage.[88] In reaching this conclusion, the trial judge explicitly considered evidence of the husband's "alleged adulterous relationship."[89] Despite the fact that the Court noted that fault had been "largely eliminated as a factor in Rhode Island divorce proceedings," and applauded its shift to a more modern no-fault system, it held that the trial judge's conclusion that the parties were equally at fault for the breakdown of the marriage was not erroneous.[90] The irony of this decision is apparent given the fact that Rhode Island law not only sought to eliminate a showing of fault by the parties to a divorce proceeding from a policy standpoint, but unambiguously provides that "allegations or evidence of specific acts of misconduct shall be improper and inadmissible."[91] Rather, in light of the goals behind no-fault divorce, the focus should be on the state of the marriage as it currently exists, and not who was responsible for getting it to that state.

IV. DIVIDING MARITAL ASSETS

The actual dissolution of the marriage is only half the battle in divorce litigation. Thus, the backhand consideration of fault in determining whether irreconcilable differences exist between a married couple is of minimal concern when one is alerted to the fact that fault is *explicitly* considered in Rhode Island's law governing the division of marital assets, as well as when awarding alimony and legal costs and fees.[92]

Alimony and property division are the two primary procedures by which property is distributed amongst divorcing parties.[93] Historically, these mechanisms were created as a

88. *Tarro*, 485 A.2d at 561.
89. *Id.*
90. *Id.*
91. *See* R.I. GEN. LAWS § 15-5-3.1 (West 2006); *See also* 27A C.J.S. *Divorce* § 31 (2005) ("the determination whether irreconcilable differences exist should not be controlled by fault of the parties.").
92. *See* R.I. GEN. LAWS § 15-5-3.1. Fault is also considered when determining child custody and visitation; however, that is beyond the scope of this paper.
93. JACOB, *supra* note 36, at 112.

means to support the wife following a divorce.[94] Because marriage was considered a "lifelong obligation," a wife was entitled to receive alimony following a divorce as a means to support herself for the rest of her life, or at the very least, until she remarried and could depend on another husband for financial support.[95] When alimony alone was not enough, a wife could be awarded some of the husband's property upon divorce to make up the difference.[96] Central to both of these concepts of was the idea that following a divorce, most women would be unable to support themselves on their own, and thus, they required some form of continued financial support.[97]

Traditionally, fault was an important consideration in determining alimony and property division following a divorce, with the at-fault spouse often being penalized in the process.[98] For example, in many states, a wife who had committed adultery during the course of the marriage was not eligible for alimony.[99] In some community property[100] states, such as California, the

94. *See id.*
95. *Id.*
96. *Id.*
97. *Id.* In turn, alimony and the transfer of property also decreased the likelihood that divorced women would have to rely on public assistance programs, such as welfare, following divorce. *Id.*
98. *Id.* at 113.
99. *Id.* at 112.
100. In community property states, such as California, "all property acquired after marriage, by either husband or wife" is presumed to be "common property," with the exception of that property acquired by "gift, bequest, devise or descent." Meyer v. Kinzer, 12 Cal. 247, 251 (1859). The presumption can be rebutted by "clear and decisive proof" that the property was purchased using the separate funds of either spouse. *Id.* at 252. Then Chief Justice Stone of the California Supreme Court said about community property:

> The statute proceeds upon the theory that the marriage, in respect to property acquired during its existence, is a community of which each spouse is a member, equally contributing by his or her industry to its prosperity, and possessing an equal right to succeed to the property after dissolution . . . To the community all acquisitions by either, whether made jointly or separately, belong.

Id. at 251. The community property concept was derived from Spanish law, and is mostly present in the Western states, including California, Texas, New Mexico and Arizona. Charles W. Willey, *Effect in Montana of Community-Source Property Acquired in Another State (and Its Impact on A Montana Marriage Dissolution, Estate Planning, Property Transfers, and Probate*), 69 MONT. L. REV. 313, 322–23 (2008).

innocent spouse was eligible for more than the traditional "half" of the community property, and in common law states,[101] an at-fault wife was not eligible for any of the husband's property upon divorce.[102]

As fault was beginning to be eliminated from divorce proceedings, it became necessary for the legislature and the courts to reconsider the relevant facts for determining alimony and property division following a divorce. When the NCCUSL proposed its no-fault system through the UMDA, it also proposed that fault be eliminated from consideration when dividing marital property and awarding alimony.[103] Jacob cites Professor Robert Levy, who pitched his idea to the NCCUSL, to articulate the logic behind removing fault from determining alimony and property division: the purpose of no fault divorce—to remove the need to argue over misbehavior throughout the course of the marriage—could not possibly be achieved if the argument was still preserved for alimony and property division.[104] Professor Levy also recommended that common law states adopt a "marital property" standard, similar to that of community property states, which was to include "all assets acquired during the marriage, regardless of which spouse happened to hold title."[105] Levy alluded to the fact that an equal distribution of the assets would be most appropriate so as to "minimize conflict" throughout the property division process, though, for reasons political or otherwise, he did not explicitly endorse the idea.[106] Yet, Levy's most revolutionary proposal was something no state had really considered before: he suggested that a wife's homemaking services be considered as a contribution to the marital estate in the same way that the husband's wages earned outside of the home had customarily been

101. In common law states, property acquired by one spouse during the course of the marriage does not automatically become property of the marriage; rather, it can be owned by either spouse, and "is held jointly only when one or both spouses elect to take title jointly or property is gifted to spouses as co-owners." *See* Emily Osborn, *The Treatment of Unearned Separate Property at Divorce in Common Law Property Jurisdictions*, 1990 WIS. L. REV. 903, 906 (1990).

102. JACOB, *supra* note 36, at 113.

103. *Id.* at 117.

104. *Id.* at 118.

105. *Id.*

106. *Id.*

considered.[107]

Adjusting property division and alimony law in conjunction with a shift to a no-fault system was easier for some states than others. California, for example, already had a community property standard, wherein all property acquired during the marriage, unless proven otherwise, was joint property that was to be split equally upon divorce.[108] After adopting no-fault divorce, the only adjustment required for California law was a removal of its permission to allow the innocent party in a divorce to receive more than half of the community property.[109] The result is California's current statute, which provides that upon divorce or legal separation of the parties, the community estate is to be divided equally.[110] This statute appears to be a reflection of the true no-fault system that Professor Levy had in mind. Though slower to catch on than no-fault divorce, by the mid-1980s most states had changed their standards pertaining to the division of property upon divorce by adopting the "marital property" idea, and, in many states fault was no longer a consideration when dividing the marital assets.[111]

Today, in most states, the division of marital assets upon divorce is considered much like that of the dissolution of a business partnership, consistent with the UMDA's suggestion.[112] The view that marriage is a "shared enterprise" is the idea that each party is entitled to a share of the assets following dissolution of the marriage, regardless of who holds title to the property, so long as the property was accrued during the course of the

107. *Id.*
108. *Id.* at 113.
109. *Id.* at 120.
110. *See* CAL. FAM. CODE § 2550 (West 2004).
111. JACOB, *supra* note 36, at 121. Additionally, alimony was transformed from a permanent device to support an innocent ex-wife, at least until she re-married, into a temporary payment system until the wife could support herself. *Id.* at 125. Rhode Island's current structure for alimony reflects this idea. *See* R.I. GEN. LAWS ANN. § 15-5-16 (West 2006 & Supp. 2013) ("Alimony is designed to provide support for a spouse for a reasonable length of time to enable the recipient to become financially independent and self-sufficient.").
112. UNIFORM MARRIAGE AND DIVORCE ACT §§ 101–309, prefatory note (amended 1973), 9A U.L.A 159, 161 (1998) ("the distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership.").

marriage.[113] In the majority of jurisdictions, marital misconduct is considered only in circumstances where it has an economic impact on the marital estate.[114] Some courts in jurisdictions that use an equitable division of the assets standard have held that fault is simply not relevant when deciding what property belongs to which party, but rather "each spouse should receive his or her fair share of what has been accumulated during the marriage. The concept of fault is not relevant to such distribution since all that is being [a]ffected is the allocation to each party of what really belongs to him or her."[115] In short, if one party is at fault for the breakdown of the marriage, that does not undermine his or her contribution to the marital estate. Other courts have subscribed to the belief that "[d]ivorce is not a vehicle by which one spouse is compensated . . . for having had to suffer during the marriage."[116] Additionally, consistent with the reasoning for removing fault from divorce is the understanding that fault can be difficult to prove, is highly personal in nature, and can often be traced to both parties.[117]

But, where martial misconduct has a direct effect on the couple's assets, most states have held that such misconduct is in fact relevant.[118] For example, purely economic misconduct, such as dissipation of marital funds by one party, is clearly relevant to a court assigning marital property.[119] However, noneconomic misconduct that has an economic effect on marital assets may also be considered, even when traditional fault grounds have been removed from consideration.[120] So, while a party's infidelity on its own may be irrelevant, the use of marital funds to finance the

113. *See* Lee R. Russ, Annotation, *Divorce: Equitable Distribution Doctrine*, 41 A.L.R.4th 481, § 3 (1985). There are circumstances where property accrued during the course of the marriage is not considered community or marital property; however, the determination of what constitutes marital property to be divided upon divorce is beyond the scope of this article.

114. *See* Turner, *supra* note 72, at 117.

115. *See* Chalmers v. Chalmers, 320 A.2d 478, 483 (N.J. 1974).

116. *See* Hatayama v. Hatayama, 818 P.2d 277, 282 (Haw. App. 1991).

117. *See* Robert D. Lang, *Marital Fault and Equitable Distribution: Two Unrelated Concepts*, 66 N.Y. ST. B.J. 36, 36 (1994).

118. *See* Turner, *supra* note 72, at 119.

119. *Id.*

120. *Id.* at 120.

affair can still be considered.[121] This is consistent with the UMDA's "business partnership" model because, while fault pertaining to the dissolution of the partnership is of no matter, one partner's misuse of the business's funds certainly is.[122]

A. *Equitable Division versus Equal Division*

There is an important distinction between *equitable* division of the assets and *equal* division of the assets that is relevant when considering the goals of no-fault divorce and how a jurisdiction's choice of standard when dividing marital property is significant. Most states, including Rhode Island, follow an equitable division standard.[123] While intuitively an equitable division standard suggests that marital property should be divided based on the contribution of each party to the marital estate (similar to the idea of an equity contribution to a business or personal property, like a mortgage), the idea of an "equitable division" has been interpreted much more broadly and in favor the colloquial definition of the word: "dealing fairly or equally with all concerned."[124] Accordingly, many judges depart from an equal division of the marital property so as to "do the fairest thing given the circumstances."[125]

There is a compelling argument that an equitable division standard, by its very nature, opens the door to a consideration of fault when dividing marital assets. In his article, *Distribution of Marital Assets in Community Property Jurisdictions: Equitable Doesn't Equal Equal*, James Ratner, professor at University of Arizona's James E. Rogers College of Law, addressed these concerns.[126] He stated that equitable division undermines the purpose of the community property approach altogether, the crux of which is that each spouse is entitled to "undivided present

121. *Id.* at 119. "While the mere fact that the husband had an extramarital affair is irrelevant, the fact that the husband spent $10,000 in marital property taking a cruise with his paramour can still be considered." *Id.*

122. *Id.* at 118.

123. *See* R.I. GEN. LAWS ANN. § 15-5-16.1 (West 2006).

124. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 392 (10th ed. 1993).

125. James R. Ratner, *Distribution of Marital Assets in Community Property Jurisdictions: Equitable Doesn't Equal Equal*, 72 LA. L. REV. 21, 23 (2011).

126. *See generally id.*

ownership of all community assets, regardless of which spouse generated the asset and the behavior of the spouse during the marriage."[127] Considering this universally accepted underlying goal, as evidenced by a uniform shift to recognizing marital property as the property of both parties, it is interesting that an equal division of marital assets is the minority approach.[128] In fact, only three states (California, Louisiana, and New Mexico) follow a strict equal division of the marital estate, regardless of who contributed more.[129] An equitable division of the assets, according to Ratner, gives divorce courts "open-ended and largely unreviewable equitable discretion concerning division of community worth [which] undermines horizontal equity, renders property division at divorce a high-stakes judicial lottery, and likely raises the costs of obtaining a divorce"—all things that no-fault divorce and a community property approach, sought to minimize.[130] Of course, these standards and considerations only become relevant if the parties cannot come to an agreement on the division of the marital assets on their own.

B. *Dividing Marital Property in Rhode Island*

In addition to applying an equitable division standard, Rhode Island is among the minority of jurisdictions that permits a consideration of fault in assigning property and awarding alimony without requiring an explicit showing that the misconduct had an adverse economic impact on any marital assets.[131] Rhode Island law provides that while fault is not to be considered when granting a divorce on the grounds of irreconcilable differences, a

127. *Id*. at 34.
128. *Id.*
129. *Id.*
130. *Id*. at 35.
131. *See* R.I. GEN. LAWS ANN. §15-5-16.1 (West 2006). According to a study entitled "The Role of Marital Misconduct in Dividing Property Upon Divorce" done by the National Legal Research Group, which appeared in 15 No. 7 Divorce Litig. 117, seventeen jurisdictions consider any type of marital misconduct when dividing marital property: Alabama, Connecticut, Washington DC, Georgia, Maryland, Massachusetts, Michigan, Mississippi, Missouri, New Hampshire, North Dakota, Rhode Island, South Carolina, Texas, Vermont, Virginia and Wyoming. *Id.* Three states—Arkansas, Kansas, and New York—require that conduct meet a certain threshold (such as "egregious" or "gross and extreme") before it can be considered. *Id.*

consideration of fault *is* preserved for assignment of property, alimony, and legal fees.[132] Rhode Island courts have routinely allowed the admission of marital misconduct in hearings pertaining to property assignment and the shares of the marital estate awarded in light of such conduct suggests a trend: spouses who misbehave (overwhelmingly, the husband) are punished for their conduct with an unfavorable assignment of property or an otherwise unnecessary award of alimony.[133]

A review of Rhode Island case law suggests that a broad range of fault has been considered when assigning marital property and awarding alimony. In assigning marital property, the court must first determine which assets are marital properties; it must then consider the factors set forth in section 15-5-16.1(a); and finally, it will distribute the property.[134] The statute states that one of the twelve factors that the court is to consider when dividing marital property is "the conduct of the parties during the marriage."[135] Although Rhode Island courts have interpreted the term "conduct" to include both good and bad behavior by both parties throughout the course of the marriage,[136] the conduct relied on is, more often than not, bad behavior.

For example, in *Wrobleski v. Wrobleksi*, the Rhode Island Supreme Court upheld the wife's award of 60% of the marital estate (valued at approximately $2.2 million), and an alimony award of $5,000 per month for five years and $2,000 thereafter until a further order, despite the fact that the wife "posses[ed] sufficient earning ability as a teacher."[137] The wife was not in need of rehabilitation, as alimony is intended for; instead, her alimony was awarded based largely on her husband's alleged alcohol problem, extramarital affair, and time spent "at work or out socially away from his family" which led to the deterioration of

132. *See* R.I. GEN. LAWS ANN. § 15-5-3.1 (West 2006).

133. *See, e.g.,* DeAngelis v. DeAngelis, 923 A.2d 1274 (R.I. 2007), Thompson v. Thompson, 642 A.2d 1160 (R.I. 1994).

134. *See* Horton v. Horton, 891 A.2d 885, 889 (R.I. 2006); Koutroumanos v. Tzeremes, 865 A.2d 1091, 1096 (R.I. 2005); Stephenson v. Stephenson, 811 A.2d 1138, 1141 (R.I. 2002). This paper is limited to considering the second step of the process, wherein the factors set forth in section 15-5-16.1(a) are applied.

135. R.I. GEN. LAWS ANN. §15-5-16.1(a)(2).

136. *See* Tarro v. Tarro, 485 A.2d 558, 561 (R.I. 1984) (citations omitted).

137. 653 A.3d 732, 733 (R.I. 1995).

their marriage.[138] Evidence of a husband's extramarital affair, including that he had brought his new romantic partner around the couple's children, was similarly considered by the court in *Vicario v. Vicario*, and the wife was ultimately awarded 60% of the marital estate despite the fact that, even including consideration of the wife's homemaking services, the husband contributed more financially to the value of the estate.[139] Similarly, in *Giammarco v. Giammarco*, the Court upheld a general magistrate's award of only 35% of the marital estate to a wife that was found "to be totally at fault in the breakdown of the marriage."[140] *DeAngelis v. DeAngelis* is yet another example of an inequitable division of assets based largely in traditional fault based notions.[141] In that case, the Court upheld an award of 80% of the marital estate to the wife based on the trial court's finding that the husband was "solely at fault for the deterioration of the marriage."[142] Central to the court's considerations was the husband's alleged alcoholism and infidelity, as well as other "egregious" behavior.[143]

However, the Rhode Island Supreme Court did seem to get the analysis right in *Koutroumanos v. Tzeremes*.[144] There, the Court upheld an equal division of the marital estate, save for $77,000 in debt assigned to the husband that was a result of his "reckless investment practices" achieved "primarily by taking cash advances against credit cards to purchase stocks."[145] In assigning the marital estate, the Court did not appear to consider any type of non-economic fault, including the fact that the husband had pled nolo contendere to domestic assault at one time during the course of the marriage.[146]

Interestingly, the *Koutroumanos* trial was bifurcated, with one hearing as to the dissolution of the marriage and custody of the parties' children and another as to the division of the marital assets.[147] This presents a potentially promising process by which

138. *Id.*
139. 901 A.2d 603, 606, 608 (R.I. 2006).
140. 959 A.2d 531, 534 (R.I. 2008) (internal quotation marks omitted).
141. 923 A.2d. 1274 (R.I. 2007).
142. *Id.* at 1281–82.
143. *Id.*
144. 865 A.2d at 1091, 1099 (R.I. 2005).
145. *Id.*
146. *Id.* at 1095.
147. *Id.* at 1094.

fault can become as far removed as possible when determining division of marital assets. If the determination as to whether the differences between the couple are irreconcilable (thus warranting a divorce) is made at one trial, even if traditional fault-based factors are considered (as precedent suggests they are), they need not be considered when dividing the marital property if that determination is made at a second hearing. This would insulate fault-based considerations from the process as much as is likely possible.

Perhaps where a party opts to plead, and can prove, fault in a divorce pursuant to section 15-5-2 of the Rhode Island General Laws,[148] he or she should get the benefit of using that same fault to his or her advantage when dividing marital assets. That is the approach taken in Texas, though only to a certain extent; an appellate court there has held that although fault is a factor when dividing the marital asset when it is pleaded and proven in a divorce, "an unequal division of the community estate may not be awarded to punish the party at 'fault.'"[149] However, when a party decides on the no-fault route, whatever the motivation, this should foreclose the opportunity to introduce fault for the purposes of dividing marital property. After all, you can't have your cake and eat it too.

C. *Make it Equal, or at Least More Equitable*

The explicit consideration of fault when determining property assignment, alimony, legal fees, and child custody clearly undermines the underlying goals of no-fault divorce. It

148. Section 15-5-2 of the R.I. General Laws states:

> Divorces from the bond of marriage shall also be decreed for the following causes: (1) Impotency; (2) Adultery; (3) Extreme cruelty; (4) Willful desertion for five (5) years of either of the parties, or for willful desertion for a shorter period of time in the discretion of the court; (5) Continued drunkenness; (6) The habitual, excessive, and intemperate use of opium, morphine, or chloral; (7) Neglect and refusal, for the period of at least one year next before the filing of the petition, on the part of the husband to provide necessaries for the subsistence of his wife, the husband being of sufficient ability; and (8) Any other gross misbehavior and wickedness, in either of the parties, repugnant to and in violation of the marriage covenant.

149. *See* Phillips v. Phillips, 75 S.W.3d 564, 567 (Tex. App. 2002) (citations omitted).

incentivizes parties facing separation to keep a score card of poor behavior, vet out details of indiscretions, and further swells the already amplified wave of emotions that parties to a divorce are experiencing. To counter this phenomenon, equal division of marital property, as used in California,[150] Louisiana,[151] and New Mexico,[152] would be the ideal standard. Applying an equal division standard would decrease litigation length and costs in two ways: it would remove unnecessary litigation pertaining to fault, as well as eliminate litigation pertaining to who contributed what percentage to the marital estate. The only necessary determination left to make would be what constitutes marital property. While there would still be some litigation pertaining to this issue, it would be minimal in comparison to that surrounding fault and contribution, and would not directly undermine the goals of no-fault divorce.

If equal division of the assets is too drastic a transformation for the Rhode Island General Assembly, there is still hope: the current equitable division standard can be vastly improved so as to coincide with the goals of no-fault divorce. First, a true equitable division standard can be used—one which considers only the contributions of the parties to the marital estate, without any other consideration of fault. For example, a Michigan case overturned an inequitable award of the marital estate to a husband based largely on the wife's infidelity during the marriage because the court gave too much weight to findings of fault when dividing the marital property.[153] The court reasoned that "[a] woman who was an effective partner through a quarter of a century, assisting in the acquisition of assets, and employed throughout, is entitled to a more equal disposition."[154] Although this court suggests fault may be one of many factors to consider when dividing property, it notes that fault of either party is certainly not "dispositive."[155] Be that as it may, the strong dissent in that case is exactly on point, advocating to remove fault from the process entirely, stating that continuing to allow fault in

150. *See* CAL. FAM. CODE § 2550 (West 2004).
151. *See* LA. REV. STAT. ANN. § 9:2801 (2008).
152. *See* N.M. STAT. ANN. § 40-4-7 (West 2006).
153. *See* Sparks v. Sparks, 485 N.W.2d 893, 903 (Mich. 1992).
154. *Id*.
155. *Id.*

hearings for marital assignments would result in "divorce proceeding[s] [to] again become a forum for finger-pointing and ventilating grievances, and the law return[ing] full circle to where it was immediately before the Legislature enacted the no-fault statute."[156]

One primary concern with the equitable division standard is the idea that parties who don't contribute financially to a marriage (overwhelmingly women) are severely disadvantaged upon separation and divorce where the relevant law divides assets based solely on contribution to the marital estate. However, inclusion of a party's contribution and services as a homemaker in statutes guiding property assignment, present in the Rhode Island statute, helps protect parties whose contributions have been largely, or solely, within the home.[157] Additionally, alimony persists as a rehabilitative measure for parties who were "absent from employment while fulfilling homemaking responsibilities" with specific consideration given to "the extent to which any education, skills, or experience of that party have become outmoded and his or her earning capacity diminished."[158]

Rhode Island law already includes wasteful dissipation of assets as a consideration when dividing property consistent with the UMDA's business model approach.[159] Further, I would be remiss to say that it is unreasonable for courts to consider misconduct when assigning property when the behavior is particularly egregious. New York law provides a promising framework for this standard, considering both economic misconduct and egregious behavior, evincing a very high standard for the latter. In finding that fault would be difficult to determine and unnecessarily time consuming, the New York Court of Appeals ruled in *O'Brien v. O'Brien* that marital fault should not ordinarily be considered in equitable distribution.[160] However, New York courts have preserved the consideration of "egregious fault" and that which has resulted in dissipation of marital assets.[161] New York courts have set a very high bar for egregious

156. *Id.* at 905 (Levin, J., dissenting).
157. R.I. GEN. LAWS ANN. §15-5-16.1(a)(4) (West 2006).
158. R.I. GEN. LAWS ANN. § 15-5-16 (West 2006 & Supp. 2013).
159. *See* R.I. GEN. LAWS ANN. § 15-5-16.1(a)(11) (West 2006).
160. 489 N.E.2d 712, 719 (N.Y. 1985).
161. *See* Blickstein v. Blickstein, 472 N.Y.S.2d 110, 113–14 (N.Y. App.

fault, and have considered only misconduct that "shocks the conscience,"[162] such as a husband attacking his wife with a knife and inflicting numerous serious wounds resulting in surgery and therapy[163] and a husband, who was a practicing attorney, planning a failed attempt in which he bribed a Romanian terrorist to kill his wife,[164] as meeting the threshold. A New York appellate court has indicated that satisfying the "egregious fault" standard is rare, holding that adultery alone is generally insufficient.[165] This heightened standard, while preserving fault to some extent, would flush out a majority of the tireless litigation that no-fault divorce sought to eliminate.

V. CONCLUSION

Certainly there is no perfect solution to divorce litigation. Even if the no-fault system were working flawlessly, evidence of fault and marital misconduct would likely not be absent from the process entirely. Anyone familiar to divorce litigation knows that, regardless of whether it is expressly considered or not, when fault is alleged by either or both of the parties, it will be used as a backhand bargaining chip to gain an advantage in litigation. But, the less that traditional notions of fault are relied on throughout the process, the closer we will be to achieving the material goals of the no-fault system: quicker, more cost-efficient divorce litigation, and, to the extent possible, more harmonious relationships. After all, wouldn't the world be a much better place for everyone if we could just get along with our exes?

Div. 1984).

162. *Id.* at 114.

163. *See* Wenzel v. Wenzel, 472 N.Y.S.2d 830, 834 (N.Y. Sup. Ct. Suffolk Co. 1984).

164. *See* Brancoveanu v. Brancoveanu, 535 N.Y.S.2d 86, 90 (N.Y. App. Div. 1988).

165. *See* Weilert v. Weilert, 562 N.Y.S.2d 139, 141 (N.Y. App. Div. 1990). "While the defendant herein may not have been a model husband or ideal father, this is not one of those rare cases where marital fault should have entered into the equitable distribution equation." *Id.*