THE COST OF FAULT-BASED DIVORCE

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Domestic relations is, unquestionably, the area of the law in which the greatest number of low-income persons are without representation. Fifty years ago, family law litigation was, if not rare, certainly not the norm for most families. Far fewer marriages ended in divorce and the numbers of non-marital children were much lower.[1] Today, an overwhelming number of families are required to navigate a court process that is complex and confusing.[2] Those who cannot afford representation are at a distinct disadvantage, particularly victims of domestic violence. A number of solutions have been proposed to remedy this unfairness, including procedural reform, expanding legal services, and expanding assistance for pro se litigants. This article addresses an additional barrier that is layered onto the problem in Mississippi—the continuation of marital-dissolution laws based on fault.

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[1] Robert B. Yegge, *Divorce Litigants Without Lawyers*, 28 FAM. L.Q. 407 (1994); Joy Moses, *Grounds for Objection: Causes and Consequences of America's Pro Se Crisis and How to Solve the Problem of Unrepresented Litigants*, CTR. FOR AM. PROGRESS 3 (2011), http://www.americanprogress.org/wp-content/uploads/issues/2011/06/pdf/objection.pdf (increased divorce and out of marriage births linked to the increase in pro se representation).

[2] Moses, *supra* note 1, at 3.

I. FAMILY LAW ACCESS ISSUES

A report by the Conference of State Court Administrators in 2000 stated that the rapid increase in pro se litigants is "unprecedented" and "shows no signs of abating."[3] This is nowhere more true than in family law matters. According to researchers for a State Justice Institute project, few litigants appear pro se in courts of general jurisdiction, while pro se appearance is the norm in limited jurisdiction courts, particularly family law courts.[4] A 1991 study commissioned by the American Bar Association (ABA) found that in Arizona the percentage of domestic relations cases involving self-represented litigants had increased from twenty-four percent in 1980 to forty-seven percent in 1985 to eighty-eight percent.[5] A subsequent ABA report similarly described the numbers of unrepresented litigants in domestic relations cases as "striking."[6]

This dramatic increase adversely affects litigants and court systems. Family law judges and court clerks struggle to accommodate unprepared litigants without abandoning neutrality.[7] One study suggests that courts may spend up to four times as much time on cases where the parties are unrepresented.[8] Parties who lack the financial resources for an attorney and the personal resources to self-represent are left outside the system. They may remain married but separated, financially linked in a limbo of joint ownership or, more likely,

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[3] CONFERENCE OF STATE COURT ADMIN'R, *POSITION PAPER ON SELF-REPRESENTED LITIGATION* 1 (Gov't Relations Office ed., 2000), *available at* http://cosca.ncsc.dni.us/WhitePapers/selfreplitigation.pdf (quoted in AM. BAR ASS'N, HANDBOOK ON LIMITED SCOPE LEGAL ASSISTANCE: A REPORT OF THE MODEST MEANS TASK FORCE 8 (2003), *available at* http://apps.americanbar.org/litigation/taskforces/modest/report.pdf).

[4] *Access to Justice: Meeting the Needs of Self-Represented Litigants: Executive Summary*, STATE JUSTICE INST 2 (2002), http://www.ncsconline.org/wc/publications/res_prose_accessjustmeetneedsexecsumpub.pdf.

[5] Yegge, *supra* note 1, at 408.

[6] AM. BAR ASS'N, *supra* note 3, at 8.

[7] *Access to Justice: Meeting the Needs of Self-Represented Litigants*, *supra* note 4, at 2-3.

[8] Moses, *supra* note 1, at 8.

joint debt.[9] Disputes over custody and visitation may go unresolved, leaving one parent without access to children.[10] Their exclusion from the system leads to frustration and disenchantment with the legal system.[11] Victims of domestic violence are particularly at risk. In addition to the status, financial, and custody issues faced by others who cannot access the judicial system, they risk injury and potential death because they lack the resources to obtain protective orders and to exit abusive relationships. [12]

The need for a solution is critical in family law because of the sheer number of unrepresented litigants. But it is important for another reason. Resolution of family law disputes, unlike almost every other area of civil law, requires court-based resolution. Our legal system imposes court oversight over divorced and non-marital families, forcing them to participate in a system that they are unprepared to navigate. A landlord and tenant can resolve their disputes without court intervention. Employer-employee differences can be resolved out of court. In contrast, disputes over marital status, property division, custody, and child support cannot be resolved without court involvement and oversight. And once initial disputes over custody and support have been resolved, families must return to court to vary the terms of the agreement. Voluntary out-of-court agreements are not binding, even if the agreement was otherwise considered fair.[13]

The increase in self-represented litigants in family law matters has led to a variety of proposals to increase access to the court system, including: increasing funding for legal services, enabling self-represented litigants through forms and

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[9] *See* Tackett v. Tackett, 967 So. 2d 1264, 1267-68 (Miss. Ct. App. 2007) (husband denied divorce and ordered to pay separate maintenance).

[10] Moses, *supra* note 1, at 7.

[11] *Access to Justice: Meeting the Needs of Self-Represented Litigants, supra* note 4, at 3-4.

[12] Great strides have been made in facilitating access to courts for protective orders, including simple forms and an expansion of venues for filing. *See* MISS. CODE ANN. §§ 93-5-1 to -23 (2007).

[13] Child support payors have discovered this to their dismay, when sued for substantial arrearages based on an original support order, even though the agreement was modified by the parties out-of-court. *See, e.g.*, Houck v. Ousterhout, 861 So. 2d 1000, 1002 (Miss. 2003).

instructions,[14] increasing the use of non-lawyers or delegalizing certain areas of the law,[15] and overhauling court systems to reduce procedural barriers.[16] Judge Denise Owens, in her related article, has explored procedural barriers that confront pro se litigants in family law matters.[17] All are necessary pieces of the attempt to expand access to the justice system.

This article proposes an additional piece to the patchwork of solutions for Mississippi. Unique rules of marital dissolution in this state contribute substantially to the costs and difficulty of divorce, particularly for victims of domestic violence. These include Mississippi's continued non-recognition of unilateral divorce, the requirement of corroborated evidence of fault-based divorce grounds, and the common law defense of condonation, or forgiveness of marital offenses.

I propose that Mississippi adopt a middle ground between short-term no-fault divorce and the current fault-based system, one that would encourage reconciliation of separated spouses, but allow parties to eventually move on with their lives.

II. "IRRECONCILABLE DIFFERENCES" DIVORCE IN MISSISSIPPI

The modern system of marriage dissolution presents few barriers to divorce.[18] One spouse's testimony that the marriage is irretrievably broken is generally sufficient proof.[19] Most state legislatures have provided for this form of no-fault divorce since

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[14] *See* Vincent Morris, *Navigating Justice: Self-Help Resources, Access to Justice, And Whose Job is it Anyway?*, 82 MISS. L.J. SUPRA 159 (2013).

[15] *See* Brooks Holland, The Washington State Limited License Legal Technician Practice Rule: A National First in Access to Justice, 82 MISS. L.J. SUPRA 75 (2013).

[16] *Access to Justice: Meeting the Needs of Self-Represented Litigants*, *supra* note 4, at 3-4; Moses, *supra* note 1, at 11; Deborah J. Cantrell, *Justice for Interests of the Poor: The Problem of Navigating the System Without Counsel*, 70 FORDHAM L. REV. 1573, 1574-76, 1580 (2002) (arguing for delegalizing no-fault divorce without children or property).

[17] Hon. Denise S. Owens, *The Reality of Pro Se Representation*, 82 MISS. L.J. SUPRA 145 (2013).

[18] In contrast, the financial aspects of divorce have become significantly more complicated. *See* DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW § 6.01[4] at 131 (2d ed. 2011) (discussing adoption of equitable distribution systems of marital property).

[19] *See* IRA MARK ELLMAN, ET. AL., FAMILY LAW 206 (3d ed. 1998) (discussing studies in California, Nebraska, and Iowa; survey of 10,000 divorce cases failed to show a single case where divorce was denied when one spouse desired divorce).

the 1970s.[20] Mississippi is among a small minority of states that still do not permit unilateral no-fault divorce.[21]

In 1976, Mississippi's system of twelve fault-based grounds for divorce was liberalized by adding the ground of irreconcilable differences.[22] The name is misleading—the ground should be labeled "Divorce by Agreement." The statute permits divorce based on irreconcilable differences only if both parties consent. And even if both initially agree to divorce, consent can be withdrawn until a court has acted on the petition.[23] Without consent, the parties are relegated to a fault-based divorce system that has changed very little in the last century.[24] The petitioner must prove one of the twelve traditional fault-based grounds to the court's satisfaction—default judgments are not permitted.[25] A party's testimony about the marriage is not sufficient—the proof must be corroborated by independent evidence or testimony.[26] Arcane common law defenses may be raised to deny divorce even if grounds are proven.[27] All increase litigation costs and make successful self-representation unlikely.

III. THE FAULT-BASED SYSTEM

Proving fault-based grounds is a more complicated divorce process than no-fault divorce. The petitioner must understand the varied, complex fault-based grounds for divorce, the elements of each ground, the evidence that will satisfy each element, and how to present the proof. There are twelve grounds.[28] Two grounds, adultery and a wife's pregnancy by a man other than her husband,

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[20] *See* JOHN DE WITT GREGORY, ET. AL., UNDERSTANDING FAMILY LAW § 8.01 at 224 (2d ed. 2001). The rapid conversion from fault-based to no-fault divorce came in response to social demand for divorce in the post-World War II era. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 12.1 at 409-10 (2d ed. 1988).

[21] *See infra* notes 63-69 and accompanying text.

[22] MISS. CODE ANN. § 93-5-2 (2004).

[23] *Id.*

[24] The last of the twelve fault grounds for divorce—incurable insanity—was added to the statute in 1932. J.W. BUNKLEY & W.E. MORSE, AMIS ON DIVORCE & SEPARATION IN MISSISSIPPI § 3.15 at 134 (1957).

[25] MISS. CODE ANN. § 93-5-7 (2004).

[26] *See infra* notes 39-45 and accompanying text.

[27] *See infra* notes 46-61 and accompanying text.

[28] BELL, *supra* note 18, § 4.02 at 70-99.

involve sexual misconduct. Five involve other misconduct that negatively impacts the marriage relationship—habitual cruel and inhuman treatment, habitual drunkenness, habitual drug use, desertion, and imprisonment. Natural impotency, mental illness or mental disability at the time of the marriage, and institutionalization for mental illness during the marriage allow divorce based on conditions that make the traditional marriage impossible. The remaining two grounds are based on bigamous and incestuous marriages.[29] The most commonly used grounds for divorce are habitual, cruel, and inhuman treatment, adultery, and desertion. The Mississippi Supreme Court insists on strict compliance with the statutory grounds.[30] The burden of proof for all but one of the grounds is clear and convincing evidence.[31]

Habitual cruelty requires proof on two levels—the petitioner must show that the defendant's conduct meets the stringent test for cruelty[32] and prove a causal connection between the conduct and an actual physical or emotional impact on the petitioner.[33] In cases not involving physical violence, medical or psychological testimony may be critical to establish the injury and the connection.[34]

The second most commonly-used ground, adultery, may be difficult to prove if the defendant does not admit the extramarital relationship. Circumstantial proof of adultery requires that the petitioner prove two elements—that the defendant was infatuated with another and that that there was a reasonable opportunity to act on the infatuation, not subject to other reasonable

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[29] *Id.* at 97-98.

[30] *See* Kergosien v. Kergosien, 471 So. 2d 1206, 1210 (Miss. 1985).

[31] Brewer v. Brewer, 919 So. 2d 135, 138 (Miss. Ct. App. 2005) ("Adultery as a ground for divorce must be proved by clear and convincing evidence."). Habitual, cruel, and inhuman treatment may be shown by a preponderance of the evidence. *See* Wires v. Wires, 297 So. 2d 900, 902 (Miss. 1974).

[32] The test, stated in 1930 and still used today, requires proof of conduct that "endangers life, limb, or health, or creates a reasonable apprehension of danger thereto, thereby rendering the continuance of the marital relation unsafe for the unoffending spouse." Russell v. Russell, 128 So. 270, 272 (Miss. 1930).

[33] Bias v. Bias, 493 So. 2d 342, 345 (Miss. 1986) ("proximate cause of harm to the health and physical well being of the plaintiff").

[34] *See, e.g.*, Hoskins v. Hoskins, 21 So. 3d 705, 708-10 (Miss. Ct. App. 2009) (lack of medical proof of wife's sleeplessness and high blood pressure a factor in denying divorce).

explanations.[35] Proof may require discovery of evidence such as social media, phone records, or the use of private investigators, dramatically increasing the costs of litigation.[36]

Desertion, the least complicated of the three grounds, often confuses pro se litigants. Divorce based on desertion may not be granted unless the petitioner remained ready to reconcile with the absent spouse.[37] Pro se litigants whose spouses have been absent for years will be denied divorce if (understandably) they respond that they have no interest in reconciliation with the long-gone spouse.

Proof of fault-based grounds, in many cases, requires financial resources and knowledge of procedural and evidentiary rules beyond the capacity of most laypersons. A low-income spouse is unlikely to be able to afford the high litigation costs of hiring an attorney to present a contested fault-based divorce action. And the procedural and evidentiary hurdles will deter most self-represented litigants from securing a divorce. From the standpoint of self-help assistance organizations, developing forms and instructions to walk pro se litigants through a fault-based divorce is equally daunting.

In contrast, true unilateral divorce is relatively simple. A spouse need only prove, by his or her own testimony—that the marriage is irretrievably broken or that the spouses have lived apart for the requisite period of separation without reconciliation.[38] While financial and child-related aspects of the divorce may be complicated, the grant of the divorce itself is not. Attorney's fees for securing a simple, no-fault divorce will be substantially lower than those required to investigate and present a fault-based divorce. For very low-income litigants who cannot afford even those fees, forms and instructions can be more easily developed to walk literate pro se litigants through the no-fault process.

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[35] *See* Hensarling v. Hensarling, 824 So. 2d 583, 594 (Miss. 2002); McAdory v. McAdory, 608 So. 2d 695, 699 (Miss. 1992); Lister v. Lister, 981 So. 2d 340, 344 (Miss. Ct. App. 2008); Myers v. Myers, 741 So. 2d 274, 279 (Miss. Ct. App. 1998).

[36] *See* BELL, *supra* note 18, at § 4.02[3][c] at 75 (discussing cases denying divorce for lack of evidence).

[37] Criswell v. Criswell, 182 So. 2d 587, 588 (Miss. 1966) (no desertion by wife just because parties separated).

[38] *See supra* notes 18-21 and accompanying text.

IV. THE REQUIREMENT OF CORROBORATING EVIDENCE

In most civil cases, a trier of fact may weigh conflicting testimony of the parties and make a determination of fact based on their demeanor and testimony. Not in divorce. Even in an uncontested fault-based divorce, the petitioner's word is not enough. She must provide independent, corroborating proof that her grounds for divorce are not fabricated.[39] Corroboration may not be provided through hearsay testimony—the facts must be within the witness's personal knowledge. For example, a husband's testimony that friends told him about his wife's affair was inadmissible hearsay.[40]

The need to locate, interview, and present witnesses or gather medical records or other documents to corroborate fault-based grounds adds further to the cost of attorney representation in divorce. And while pro se litigants may understand that they need to provide witnesses to back up their story, they are unlikely to grasp the difference in hearsay testimony and testimony from actual knowledge.

The requirement of corroboration can be a serious barrier to divorce for abused spouses. Domestic violence primarily occurs in private, behind closed doors. An abuser often inflicts violence only on a romantic partner or spouse; a perpetrator of domestic violence is not necessarily violent outside the home, which makes eyewitness testimony virtually impossible.[41] In a 2010 case, the

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[39] *See* Chaffin v. Chaffin, 437 So. 2d 384, 386 (Miss. 1983); Stribling v. Stribling, 215 So. 2d 869, 870 (Miss. 1968) (wife condoned husband's acts of violence, which caused permanent physical damage, by reconciling and resuming cohabitation); Thames v. Thames, 100 So. 2d 868, 870 (Miss. 1958) (husband's conduct prior to separation condoned by reconciliation); Scott v. Scott, 69 So. 2d 489, 494 (Miss. 1954); Kumar v. Kumar, 976 So. 2d 957, 962 (Miss. Ct. App. 2008) (spouse does not condone cruelty by continuing to cohabit but may condone conduct if the parties separate and then reconcile; abuse recurred, so grounds were revived); *cf.* Langdon v. Langdon, 854 So. 2d 485, 490-91 (Miss. Ct. App. 2003) (condonation of two incidents of violence by reconciliation following separation; but divorce granted because violence recurred, removing condonation).

[40] Fleming v. Fleming, 56 So. 2d 35, 39 (Miss. 1952); *see also* Shorter v. Shorter, 740 So. 2d 352, 358 (Miss. Ct. App. 1999) (friend's testimony that husband told him about lack of a sexual relationship with his wife was inadmissible).

[41] *See* Cheryl Hanna, *The Paradox of Hope: The Crime and Punishment of Domestic Violence*, 39 WM. & MARY L. REV. 1505, 1564-66 (1998) (discussing study indicating that only twenty-five percent of batterers exhibit violence outside the home).

Mississippi Court of Appeals reversed a divorce based on physical abuse, even though the wife had obtained an order of protection.[42] Her testimony was not sufficiently corroborated by police reports and the protective order petition because both were based on her statements.[43] Similarly, a wife who testified to physical abuse before and during her short marriage was denied a divorce.[44] Although she provided corroboration of premarital abuse, she could not produce a witness to abuse the during the eighteen-month marriage.[45]

V. COMMON LAW DEFENSES TO DIVORCE

The Mississippi fault-based system includes common law defenses that further complicate divorce litigation. Some of these archaic defenses, however, are no longer *automatic* bars to divorce. The defense of recrimination, based on the idea that divorce requires an "innocent" party, once required judges to deny divorce if both parties proved grounds.[46] Judges now have discretion to disregard the defense.[47]

However, condonation, or forgiveness of marital wrongs, remains a viable defense to divorce. Condonation is most often used as a defense to adultery.[48] A divorce will be denied if the court finds that the petitioner forgave the adulterer.[49] Arguments of condonation can be raised even without express forgiveness if the couple engaged in sexual relations after the innocent spouse learned of the affair. Raising the defense then gives rise to counter-arguments by the plaintiff that the intimacy was not

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[42] Ladner v. Ladner, 49 So. 3d 669, 672 (Miss. Ct. App. 2010).

[43] *Id.* at 672 (also stating that testimony that the son feared his father did not prove abuse of the mother).

[44] Cochran v. Cochran, 912 So. 2d 1086, 1090-91 (Miss. Ct. App. 2005).

[45] *Id.*

[46] BELL, *supra* note 18, at § 4.03[4].

[47] *See* Parker v. Parker, 519 So. 2d 1232, 1236 (Miss. 1988).

[48] Smith v. Smith, 40 So. 2d 156 (Miss. 1949) (reconciliation after cruelty should not be viewed in same way as reconciliation after adultery).

[49] *See* Thames v. Thames, 100 So. 2d 868, 870 (Miss. 1958) (any conduct prior to reconciliation condoned); Fulton v. Fulton, 918 So. 2d 877, 881 (Miss. Ct. App. 2006) (divorce properly denied based on condonation—the wife ended her affair, confessed to her husband, and the couple resumed sexual relations for at least eight months).

accompanied by forgiveness.[50] This adds yet another layer of proof and expense, and increases the chance that a self-represented litigant will fail to properly present their case.[51]

Use of the defense is most troublesome for victims of domestic violence seeking to obtain a divorce. For many reasons—financial, emotional, related to children—victims may leave home and return several times before finally making a break from an abusive relationship.[52] Under Mississippi law, a victim of domestic violence does not condone abusive treatment in an intact marriage.[53] However, if she leaves home and returns, she is considered to have forgiven the earlier abusive conduct.[54] She is not entitled to divorce unless the abuse re-occurs—an untenable position for a victim who has at last summoned the emotional resources to leave. A 1968 case illustrates the absurdity of the doctrine.[55] A wife who sought divorce presented proof that she was physically abused by her husband.[56] Two incidents required medical treatment.[57] In one incident, one of her eyes was

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[50] Lawrence v. Lawrence, 956 So. 2d 251, 258 (Miss. Ct. App. 2006) (just engaging in the act of sex "does not seal the defense of condonation").

[51] *See, e.g.*, Ware v. Ware, 7 So. 3d 271, 274-75 (Miss. Ct. App. 2008); *see also Lawrence*, 956 So. 2d at 258 (just engaging in the act of sex "does not seal the defense of condonation").

[52] AM. BAR. ASS'N COMM'N ON DOMESTIC VIOLENCE, STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING VICTIMS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT AND STALKING IN CIVIL PROTECTION ORDER CASES 18 (2007), *available at* http://www.vaw.umn.edu/documents/standardsofpracticelawyersrepresentingvictims/standardsofpracticelawyersrepresentingvictims.pdf (noting that a victim may leave and return numerous times before finding the "social, economic and emotional resources" to leave).

[53] Manning v. Manning, 133 So. 673, 674 (Miss. 1931) (condonation not usually applicable to cruelty; if condonation does occur, it is conditioned on behavior ending).

[54] *See* Chaffin v. Chaffin, 437 So. 2d 384, 386 (Miss. 1983); Stribling v. Stribling, 215 So. 2d 869, 870 (Miss. 1968) (wife condoned husband's acts of violence, which caused permanent physical damage, by reconciling and resuming cohabitation); *Thames*, 100 So. 2d at 870 (husband's conduct prior to separation condoned by reconciliation); Scott v. Scott, 69 So. 2d 489, 494 (Miss. 1954); Kumar v. Kumar, 976 So. 2d 957, 962 (Miss. Ct. App. 2008) (spouse does not condone cruelty by continuing to cohabit but may condone conduct if the parties separate and then reconcile; abuse recurred, so grounds were revived); *cf.* Langdon v. Langdon, 854 So. 2d 485 (Miss. Ct. App. 2003) (condonation of two incidents of violence by reconciliation following separation; but divorce granted because violence recurred, removing condonation).

[55] *Stribling*, 215 So. 2d at 869.

[56] *Id.* at 870.

[57] *Id.*

permanently damaged.[58] However, because she asked for his forgiveness at one point for her own misconduct (adultery) and resumed the relationship, she "condoned the specific acts of physical violence visited upon her by the husband" and was not entitled to a divorce.[59] The Court agreed with the trial judge that the ruling created an "intolerable situation in that it is leaving married two people, one of whom wants a divorce and one of whom does not."[60] Nonetheless, the Court affirmed the denial of divorce, finding that it did not have the power "to make a decree in a case such as this that would be sufficient to erase the wages of human error."[61]

VI. A PROPOSAL

The current Mississippi system of marital dissolution presents substantive-law barriers to low-income litigants, whether they seek to retain an attorney or whether they attempt a pro se divorce. The system undeniably increases the costs of litigation. An attorney's fee for presenting a petition for unilateral divorce will necessarily be less expensive than the cost of investigating fault-based grounds and potential defenses, gathering evidence through documents, witnesses, investigators, and social media, and locating and presenting corroborating witnesses. Representation in fault-based divorce is beyond the means of many low-income litigants who might be able to afford an attorney for a no-fault divorce. Low-income litigants are left with two choices.

One, they can step unrepresented into a fault-based system that they are unlikely to successfully navigate. They must understand the grounds, the elements, the type of proof required, and the potential defenses. They are unlikely to understand and properly apply the rules of evidence and procedure. Or, two, they can remain outside of the system—married but separated. And the impact of the system on low-income victims of domestic violence is exponentially greater.

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[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 871 (quoting Latham v. Latham, 78 So. 2d 147, 153 (Miss. 1955).

This article is not an argument that divorce is a positive social trend. The negative effects of divorce, its toll on families and children, and its relationship to poverty and financial distress are well documented.[62] States should actively seek to develop systems that encourage strong, nurturing, and financially stable families. The question I pose is whether a fault-based system serves that purpose today. If it does not, given the impact on low-income litigants and domestic violence victims, then we should abandon it and concentrate on other measures to strengthen and preserve families.

For better or for worse, the rest of the country has embraced unilateral divorce. A fifty-state study six years ago found only five states, Arkansas, Delaware, Mississippi, New York, and Tennessee, lacking unilateral divorce, whether through no-fault divorce or after a period of separation.[63] Today, Mississippi stands alone. Arkansas now recognizes unilateral divorce.[64] Delaware appears to have adopted true no-fault divorce.[65] New York adopted unilateral divorce in 2010.[66] Interestingly, the *Wall Street Journal* incorrectly reported that "New York became the last state in the country to pass a no-fault divorce law."[67] Tennessee, the only remaining state partly aligned with Mississippi, permits couples without children to divorce.[68] We live in an era in which spouses expect that they will be able to exit an unhappy marriage.

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[62] One of the groups that consistently show the highest poverty rates are female-headed households with children. Press Release, National Women's Law Center, Women's Poverty Rate Stabilizes, But Remains Historically High (Sept. 12, 2012), *available at* hhttp://www.nwlc.org/press-release/women's-poverty-rate-stabilizes-remains-historically-high (four in ten lived in poverty in 2011).

[63] Betsey Stevenson & Justin Wolfers, *Bargaining in the Shadow of the Law: Divorce Laws and Family Distress,* 121 Q. J. OF ECON. 267, 273 (2006).

[64] ARK. CODE ANN. § 9-12-301 (2009).

[65] DEL. CODE ANN. tit. 13, §§ 1503-5 (2009).

[66] N.Y. DOM. REL. LAW § 170 (McKinney 2010) (providing for divorce when "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").

[67] Sophia Hollander, *Divorces Drag on Even After Reform*, WALL ST. J. (May 6, 2012 9:19 PM), http://online.wsj.com/article/SB10001424052702304811304577368110112622548.html.

[68] TENN. CODE ANN. §§ 36-4-101 to -02 (2010) (offers unilateral divorce for childless couples after a two-year separation period).

Divorce laws did not drive that expectation—they were a response to it.[69]

Ira Ellman, a leading family law scholar, has extensively studied the relationship between divorce rates and no fault divorce. He concludes, "The evidence certainly offers little reason to believe that divorce rates are much affected by divorce laws."[70] Rather, he and other researchers find that rising divorce rates are a function of the social demand for divorce, and that adoption of unilateral divorce merely recognizes an already existing social reality.[71]

Mississippi has taken a strong position in favor of protecting and preserving marriage, including preserving common-law-marriage actions that other states have abandoned.[72] In 2011, Senator Joey Fillingane introduced Senate Bill 2652, which would have allowed divorce upon proof of a five-year separation without reconciliation.[73] The bill also gave chancellors discretion to deny divorce to couples with minor children.[74] The bill passed the Senate but was defeated in the House by a thirty-nine to eighty-one vote.[75] The defeat, one assumes, is based on the assumption that the current system preserves marriage.

There are certainly good arguments to be made in favor of ensuring that parties do not rush into divorce, and in favor of developing rules that preserve salvageable marriages. On the other hand, it may be counterproductive to deny closure to a marriage that is undeniably over and unlikely to be resurrected by insisting on fault-based grounds.

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[69] The rapid conversion from fault-based to no-fault divorce came in response to social demand for divorce in the post-World War II era. HOMER H. CLARK, JR., *supra* note 20, at 409-410.

[70] Ira Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marriage Roles*, 34 FAM. L.Q. 1, 2 (2000).

[71] Ira Ellman & Sharon L. Lohr, *Dissolving the Relationship Between Divorce Rates and Divorce Laws,* INT'L REV. L. &. ECON. 341, 358 (1998).

[72] Mississippi is one of a few remaining states that still recognizes the tort of alienation of affection – an action by a spouse against one who has stolen the affections of his or her spouse. Fitch v. Valentine, 959 So. 2d 1012, 1018-20 (Miss. 2007).

[73] S. B. 2652, Reg. Sess. (Miss. 2011), *available at* http://billstatus.ls.state.ms.us/documents/2011/pdf/SB/2600-2699/SB2652PS.pdf.

[74] *Id.*

[75] S. B. 2652, Reg. Sess. (Miss. 2011), *available at* http://billstatus.ls.state.ms.us/2011/pdf/history/SB/SB2652.xml (last updated Feb. 18, 2011).

Some states, including Mississippi's sister-southern states, have resolved the tension between protecting marriage and providing closure by adopting a ground for divorce based on lengthy separation with no reconciliation. For example, in Louisiana, a divorce may granted if the parties have been living separate and apart for 180 days if they have no children and 365 days if they do have minor children.[76] Arkansas permits divorce when spouses have lived separate and apart from each other for eighteen months, whether the separation was the choice of one or both, and without regard to fault.[77] And, in Tennessee, a couple without children may be divorced if they have lived separate and apart for two years.[78]

I propose adoption of a similar rule in Mississippi, recognizing the state's interest in marriage, but acceding to the reality that preserving marriage status does not revive a relationship or preserve a family unit. It may instead ensure an ongoing broken home and prevent the formation of a household unit based on remarriage.

The financial and personal consequences are significant. One by-product of the Mississippi system is that a spouse who cannot obtain consent to a divorce or prove grounds may live for many years (potentially for life) married but separated, without resolution of financial issues. The court cannot order division of marital assets in this situation—property division is available only upon divorce.[79] The court's only tool for sorting out the couple's finances is to order payment of separate maintenance.

The inability to divorce can leave spouses in a permanent financial limbo of joint ownership and financial uncertainty. In one recent case, a husband of eighteen months was denied divorce and ordered to pay fifty percent of his net income to his wife as separate maintenance.[80] He could not prove cruelty in spite of their admittedly fractious relationship, and she would not agree to

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[76] LA. CIV. CODE ANN. art. 101–103.1 (2012).

[77] ARK. CODE ANN. § 9-12-301 (2009).

[78] TENN. CODE ANN. §§ 36-4-101-02 (2010).

[79] *See* Daigle v. Daigle, 626 So. 2d 140, 146 (Miss. 1993) (error for chancellor to divest husband of real property and profit-sharing funds); Bridges v. Bridges, 330 So. 2d 260, 264 (Miss. 1976) (husband cannot be ordered to sell the existing marital home and build another home for his wife).

[80] Tackett v. Tackett, 967 So. 2d 1264, 1267 (Miss. Ct. App. 2007).

a divorce.[81] Judge Irving, concurring, urged the legislature to "take a fresh look" at the fault-based system of divorce.[82] He stated:

> I can think of no public interest that is served by requiring two people to remain married under circumstances that are likely to lead only to more tension between them, especially in a situation like we have before us where one party has to pay a substantial sum of money to the other yet is unable to move on with his life.[83]

The inability to remarry has an additional financial impact, foreclosing the option of a second marriage, with shared resources and income. Joy Moses has also noted that spouses who remain married but separated experience greater strife because of the ongoing entanglement of their lives and lack of resolution.[84] This tension affects their children who are exposed to their parents' ongoing conflict.[85]

For low-income victims of domestic violence, the stakes are higher, adding physical safety to the issues faced by all low-income litigants. Abusers are more likely to refuse to agree to divorce as a means of control, increasing the likelihood that the victim will be forced into the fault-based system. Corroboration of the often-secret act of spousal abuse may be hard to come by. And the condonation defense, which acts as a bar to divorce, is at direct odds with the state and national emphasis on protecting victims of violence. To further compound the problem facing low-income litigants, attorneys may be reluctant to take on a contested fault-based divorce in an admittedly volatile setting.

Continuing the current system may actually increase the incidence of violence in the state. A 2006 study of the impact of unilateral divorce on spousal violence found "a striking decline in female suicide and domestic violence rates arising from the advent of unilateral divorce."[86] Comparing domestic violence statistics

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[81] *Id.*
[82] *Id.* at 1268 (Irving, J., concurring).
[83] *Id.*
[84] Moses, *supra* note 1, at 6-7.
[85] *Id.*
[86] Stevenson & Wolfers, *supra* note 63, at 286.

before and after states adopted unilateral divorce, the study found that rates of overall and of severe domestic violence fell by one-third.[87] They did not find a similar drop in the states, including Mississippi, which did not adopt unilateral divorce.[88] The availability of unilateral divorce may be one of the most effective weapons against spousal violence that Mississippi could employ.

The fault-based system has outlived its function. It does not prevent divorce for most couples. It just makes it more costly and complicated. For those divorces it does prevent, the parties are most likely forced into personal and economic limbo. Low-income spouses who cannot afford to engage the system may be forced into that state of uncertainty even if they have grounds. And it places victims of violence in danger.

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[87] *Id.* at 269.
[88] *Id.* at 281.