Family Law JD 814 A-1
Professor McClain (Spring 2012)

Class Handout 12: Divorce – Grounds and Procedures: Fault-Based Divorce

I. *The Law of Divorce: How Much of a "Revolution"?:* The law governing divorce is an area of family law that has undergone significant transformation, particularly since the late 1960s and 1970s, when, first, California and, then, the rest of the states adopted some form of "no fault" divorce. This is the often-cited "'no-fault revolution," from a fault-based system of divorce to one not based on fault. However, it bears emphasizing that the law of divorce is, in the majority of states, a blend of the old and the new, perhaps reflecting legislative compromise.

A. On the one hand, a sizeable number of states, that is, about 15 or so, with California leading the way, have completely made the shift from fault-based divorce (the traditional system) to pure "no fault" (as we will see when we read the Kentucky statute at pages 440-441).

B. On the other, the majority of states have "mixed" divorce systems: they retain some fault grounds and add "no fault." (We will see examples of these mixed systems when we look at the Pennsylvania statute (pp. 441-442) and the Massachusetts statute.) Thus, we cannot treat the traditional system of divorce as simply a relic of the past. In addition, fault is relevant, in some states, to property and support issues. What's more, as you will see in the materials on evaluating divorce reform, a bit of a counterrevolution is underway: concern over high divorce rates, the impact on children, and an insufficient degree of commitment to marriages has led some to argue for a return to fault-based divorce or at least to making it tougher to exit marriages.

C. As you study these approaches, ask yourself whether this combined approach found in most states seem better than pure fault or pure "no fault."

D. *Reasons for the "no fault" divorce revolution*: One reason was the perception that there was widespread collusion between parties. Legal historian Lawrence Friedman concludes that, by the mid-20th century, people perceived the divorce system as "a fake," "beneath the dignity of the American court." He contends that, "in theory, a collusive divorce was illegal," yet the "overwhelming majority" of divorces were "collusive and consensual, in fact if not in theory." Was this gap between law on the books and law in everyday lives a good reason to adopt "no fault" divorce? In addition to concern for the integrity of the judicial system, there was an expressed concern for the integrity of the *institution of marriage*: government did not have an interest in keeping "dead marriages" from ending. (For example, these arguments about false allegations and the burden on the court played a role in the enactment, in New York, in 2010, of a "no fault" law, as suggested by the news headline: "Divorce Easier as New York Law Ends Need to Lie," Aug. 16, 2010, www.bloomberg.com, posted online as optional reading.) What other state interests do you find in the statutes and case law?

II. Separation *and the Roots of Divorce Law.* The law of family dissolution has evident roots in ecclesiastical doctrine. The ideal of the indissolubility of marriage (from Christian doctrine) may be seen in the idea of marriage as a "permanent" union, an idea challenged by divorce itself, but

even more so by the advent of no fault divorce. However, even in the English common law, the doctrines of annulment, judicial separation (or divorce "from bed and board"), and legislative divorce allowed parties to separate legally and/or to end their marriages. As the book details, in America, divorce was a matter for the civil – not religious – courts, yet religious influence is evident in the carrying forward of various grounds for fault-based divorce (many of these were a basis for legal separation under ecclesiastical law). The *Das* case, for example, explains that an 1851 Maryland case explained that Maryland courts would interpret "cruelty of treatment" by following the interpretation "given to them by the English Ecclesiastical Courts." (p. 425)

III. *The State as a Third Party to Every Marriage – and Divorce:* Recall from our study of the laws concerning entering marriage the idea that the state is a third party to every marriage. This saying indicates both an important public dimension of and public interest in marriage. How is this idea evident in legal regulation of *exiting* a marriage?

A. Where do you see evidence of the state's interest in the fault-based system? What is the role of the court? How does it advance government's interest?

B. Why would the state want to deny divorce in the *Waldron* case, at page 421, or in some of the old cases described in *Das v. Das*?

IV. *Transformation of Fault-Based Grounds. Das v. Das* illustrates that even as most states have retained fault-based grounds, judicial understandings of grounds such as cruelty have changed in light of changing social and legal norms, including those about family violence. The court explains this shift as part of the "modernization" of family law and a shift in values from an earlier era to "our modern understanding of appropriate family interaction." What is that shift and how does it inform the court's resolution of the fault-based allegations before it?

V. *Adultery:* What do you think accounts for the heightened standard required for proving adultery evident in *Spence v. Spence*? Why, by contrast, does the court use a lower evidentiary threshold in that case for proving cruel and inhuman treatment?

At one time, adultery was the only universally accepted ground for divorce. This led to quite a bit of collusion between parties seeking to divorce in manufacturing evidence of adultery. (This is the topic of a 1934 magazine article, "I Was the Unknown Blonde in 100 New York Divorces.") In terms of the *harm* of adultery, a transformed understanding is suggested in this striking contrast between earlier and more recent case law:

A. In 1838, the N.J. Supreme Court explained: "The heinousness of [adultery] consists in exposing an innocent husband to maintain another man's children, and having them succeed to his inheritance." (State v. Lash, 16 N.J.L. 380 (N.J. Sup. Ct. 1838) The harm of adultery, the court continued, lay not in "the alienation of the wife's affections, and loss of comfort in her company," but in "its tendency to *adulterate* the issue of an innocent husband, and to turn the inheritance away from his own blood, to that of a stranger." (Emphasis added.) Some case law speaks about the wrong of the husband being a "cuckold," that is, having a wife who is unfaithful, or "cuckoldry" as the practice of making cuckolds, with the husband providing support for children he did not realize were not his.

B. In 1992, a New Jersey Court (quoted in part in our casebook at 429) stressed quite a different wrong from adulteration, when it concluded that lesbian sex constituted adultery: "Adultery exists when one spouse rejects the other by entering into a personal intimate sexual relationship with any other person, irrespective of the specific sexual acts performed, the marital status, or the gender of the third party. It is the rejection of the spouse coupled with out-of-marriage intimacy that constitutes adultery." *(S.B. v. S.J.B*, 609 A.2d 124 (N.J. Super. Ct. Ch. Div. 1992))

C. *Food for thought -- Is infidelity an element of "healthy marriage"?* An eye-catching headline of the Sunday magazine of the *New York Times* last year was "Infidelity Keeps Us Together." (I have posted the article, by Mark Oppenheimer, in the folder for Chapter 8 as optional reading.) This magazine story gave prominent attention to the argument by journalist and sex-advice columnist Dan Savage (also founder of the It Gets Better project) that *stability,* not *monogamy*, should be the goal of marriage. Written in the wake of various sex scandals involving married politician, the article floats Savage's idea that the problem is we make "unrealistic demands" on the institution of marriage and on ourselves, because, among other reasons: "Monogamy is not natural, non-monogamy is not natural. Variation is what's natural." Should monogamy continue to be viewed as an "essential" of marriage? What impact would that have on adultery as a fault-based ground or would that ground still be available in cases where parties to a marriage did not consent to a non-monogamous union?

VI. *Fault-based Bars and Defenses:* In the traditional law of divorce, the innocent/injured party could seek a divorce from the guilty party. You see this terminology of innocence in Pennsylvania's statute, for example. On this logic, if both parties were guilty of fault, divorce was not permitted, under the doctrine of "recrimination." Does this doctrine make sense, or is it, as Professor Clark argues, "a rare combination of silliness, futility, and brutality"? How do you think mutual fault should affect whether a divorce is available? Massachusetts (Chap. 208, Section 1) eliminates recrimination ("a divorce shall be adjudged although both parties have cause, and no defense upon recrimination shall be entertained by the court."). Why, by contrast, do you think that condonation remains as a viable defense (asserted, e.g., in *Hightower)?*

VII. *The Divorce Revolution as the Moral Transformation of Family Law?* Family law Carl Schneider has argued that, until the adoption of no-fault divorce law, divorce law "reflected and sought to enforce society's sense of the proper moral relations between husband and wife," and that it was "virtually the only law that spoke directly or systematically to an ideal of marital relations." What was that ideal? Can you discern it, for example, in the fault grounds on which divorce was (and is still) available under a fault-based system of divorce, such as adultery, desertion, and cruelty? Schneider argues while fault based divorce expressed a view of the moral requisites for divorce, no fault divorce shifted much of the responsibility for the moral choice about whether to divorce from the state to the couple. If this is an apt theory, do you think this shift is defensible? As you read the next part of the chapter, on the advent of no fault divorce, consider what moral ideals, if any, no fault divorce reflects.