

Do No-Fault Divorce Laws Matter? A Survey, 1995–2006

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Executive Summary

The literature on no-fault divorce's effect on the divorce rate is long and complicated. Still there is a convergence to the following consensus. No fault laws led to a short run increase in the divorce rate of about 10% for a period of about 10 years. There are many reasons for the limited long term effect, all of which can be summarized as: things adjusted. Laws were changed to stem the tide. Individual marriage behavior changed. Redistribution took place within households. And on and on. The lasting impact of no-fault divorce then, is not just in the added stock of divorced couples, but in the changes felt by other married couples and society in general.

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1. Introduction

It seems like such an easy question. Would the divorce rate be higher if the grounds for divorce required some type of fault or would it be higher if no fault was required to divorce? To put it another way, did the no-fault revolution that swept the western world in the 1970s increase the divorce rate? Not only is it a simple question, it seems to require only a simple answer: yes or no, and maybe by how much? It is a simple question with a simple answer, and furthermore, it has been studied in at least 40 different academic publications. One would think the actual answer arrived at would be relatively straightforward.

Unfortunately, the answer to the question turns out to be quite confusing and complicated. It is confusing because researchers started answering the question back in the early 1970s and they continue to debate it today. Each wave of research uses different methods, economic arguments, data, or legal definitions that are not easily compared to earlier work. Different groups of academics (economists, family specialists, demographers, and lawyers) have focused on different aspects of the question, and often while unaware of the analyses going on in the other disciplines. The answer is complicated because human behavior is fluid and dynamic, unlike falling bodies off a brick wall. There is a causality issue: did divorce laws change the divorce rate, or did divorce rate changes lead to changes in the divorce law? Also, changes in the grounds for divorce lead to changes in other laws, mating behavior, marital behavior, cultural norms, and religious practices. These subsequent changes may mitigate or exacerbate the effects of the initial change. Separating these different effects out from one another is often next to impossible with the data at hand.

That's the bad news. The good news is that there are points of agreement, there is a convergence in empirical estimates, and that the quality of the answers has improved over time. This brief review first outlines the issues in the debate, and suggests how various studies have played a role. Second, it focuses on the very best

studies and considers only the current consensus. Third it considers the most recent work on no-fault divorce which has moved away from divorce rate considerations and worries more about how people respond to the laws in other ways. Finally it finishes with a brief discussion of the economics of no-fault divorce, which is necessary to correctly interpret what the empirical results actually mean.

2. What Is No-Fault Divorce and Why Would it Matter?

Just as there are conditions to be satisfied to get married, there have always been conditions under which a marriage may legally end. These conditions are called the *grounds for divorce*. Within the British common law system these grounds were historically a set of “faults” or “wrongs” that one or both spouses committed. Different legal jurisdictions had different faults, but adultery, cruelty, and abandonment were common. From a legal point of view, Canada’s 1968 Divorce Act was the first instance of a “no-fault” ground when “unilateral separation” was added to its historical list of faults. California, in 1969, became the first no-fault state when it replaced fault provisions with the new ground of “irreconcilable differences.” Virtually every Western country and U.S. state followed with various types of no-fault divorce laws over the course of the next dozen years. The key element that unites the different no-fault laws is the entitlement of one party to *unilaterally* divorce their spouse. Under the system of fault, couples most often conspired over a fault for the satisfaction of the court and so divorces were most often *mutual*.

There are two theoretical reasons given for why no-fault divorce might make a difference to divorce rates. First, some argue it made divorce less costly for a party to initiate. Here researchers consider other aspects of family law that may or may not have changed at the same time as the grounds for divorce, and which may have changed the costs of leaving. For instance, when some jurisdictions moved to no-fault grounds for divorce they also removed grounds as a condition for property settlement, child custody, or support. Thus, if bad behavior doesn’t result in a lower divorce settlement, the argument goes, we might expect there to be more bad

behavior and more divorce. Second, others focus on the unilateral versus mutual character of divorce ground laws. Under the old system of faults, a couple who wanted a divorce would often agree to a fault and commit perjury in court. In order for this to happen they would have to agree to an entire divorce settlement. Thus the divorce was mutual. No-fault provisions never require the consent of a second party, and so no-fault laws are often said to be unilateral. There is a famous theorem in economics that states if bargaining is costless, then it doesn't matter if rules are mutual or unilateral, but as many point out ... divorce is never costless. Hence, the unilateral character of no-fault rules means that someone might leave a marriage because it makes them better off, even if the rest of the family is made worse off.

An important point, often missed by those simply trying to estimate an empirical reaction to the law, is that there is no economic reason for no-fault divorce *by itself* to have any effect on any behavior. It is only when combined with other laws, family circumstances, or social customs, that the switch *may* provide an incentive for *some* spouses to terminate their marriage when it is not in the best joint interests of the couple to do so. I will return to this point later.

3. Empirical Issues in the No-Fault Debate

Whether one considers the costs of divorce or the unilateral character of the law, it still seems straight forward to ask if either difference mattered in terms of divorce. Before dealing directly with the research done in the past 10 years, consider a brief outline of the issues that complicate the matter.

Different Jurisdictions

Canada has no-fault divorce. So does England and Washington state. All three laws are different, and prior to the switch all three countries had different fault laws. In the United States family law, including the grounds for divorce and property law, is regulated by the state governments. In Canada the grounds for divorce are

federal but property division is provincial. Within the United States there is a wide variation in legal definitions of fault and no-fault. Some differences are subtle, while others are distinct. For example, North Carolina always had “separation” as a ground for divorce. Should separation be considered a mutual or unilateral ground? Did the interpretation of separation change over time? Should separation be counted as exactly the same type of no-fault law as irretrievable breakdown or irreconcilable differences? Some states added no-fault grounds to existing fault grounds, while others eliminated all fault grounds. As mentioned, some states changed fault provisions in alimony, property, and custody rules.

How an empirical investigator deals with these questions can have large impacts on the empirical results. Early studies glossed over the legal differences. Later studies have dealt with them one of two ways. Some argue for a specific definition. More recently studies tend to use a number of different sets of definitions and check for robustness in their results. Ironically, about 90% of the no-fault studies have analyzed U.S. divorce rate changes, but this is where the legal definition complications are the greatest, and where there was probably the smallest change in law before and after no-fault.

Different Data Sets

Empirical work is often like the blind men feeling different parts of the elephant. At the beginning of the no-fault debate limited data and computing power greatly restricted the types of questions that could be addressed. Over time both have changed dramatically, but with this often comes conflicting results.

No one would claim a divorce is determined by a legal regime. Some individuals, based on observable and unobservable characteristics, will be more or less likely to divorce than others. With this in mind, many have used *individual level* data sets that sample a group of individuals and identify characteristics like education, family size, residence, and on and on. These data sets are often sampled at a “point in time” which means they can only exploit differences across legal jurisdictions. However, if the states vary in significant ways that are correlated with the legal

regime, any estimate of the legal effect will be biased. For example, no-fault states might have higher divorces in a given year than fault states. But these states may have historically had high divorce rates, and the legal difference may have been caused by the different divorce rate rather than the other way around. To avoid this problem many researchers try to find data on divorces over time and across states. Most often this means using data from census sources or vital statistics. These data are often simply *aggregate state averages* like the number of divorces per 1000 population. For controls, these studies either use state averages on observable variables or simply use “dummy variables” to control for differences between states and across time. The more aggregate the data being used the more often a study is looking at an entire package of legal changes. To statistically separate out all of the legal changes is often impossible. A third option is to use a data set made up of a panel of individuals. That is, follow a set of individuals through time. These data sets tend not to be used in divorce studies because they are rare and generally are not representative of the population. Thus, almost 40 years after the first changes, the ability to answer the simple question remains difficult due to the data required to give an answer.

Different Groups and Techniques

Although there are almost 40 no-fault divorce studies, they have not all been conducted within one field. Broadly speaking three groups have examined the question: economists, lawyers, and family researchers (including demographers). Each group brings a different perspective and objective to the question, and often uses different techniques. Over time the different groups have become more aware of one another, but their different approaches explain part of the variation in outcome. To grossly over generalize, studies by lawyers tend to be very “visual” by graphing divorce rates across time and places. Often the effect is too small to see, but more importantly, marginal effects are impossible to see against a counterfactual. For example, a plot of divorce rates before and after a no-fault change might show a continuous decline, leading the researcher to conclude no effect. But the divorce rate

might have fallen by more had there been no change in the law. Visual techniques can't pick this up. Family and demographic studies are often purely empirical and done independent of any theory of divorce. This often results in inappropriate controls, especially for other legal changes and differences in legal classification. As an economist, I'm biased, but the best studies have been conducted in this literature.

4. Summarizing the Literature 1995-2006

International Studies

There have only been a handful of divorce rate studies in countries other than the United States. These include Canada (Allen 1998), England (Binner and Dnes 2001), Portugal (Coehlo and Garoupa 2006), Sweden (Livia 2001), and Great Britain (Smith 1997). All of these cases differ from the United States in that the grounds for divorce are national. This means the entire country switched from fault to no-fault at the same time, and therefore the only test that can be conducted is to look at divorce rates before and after the legal switch.

These studies have some natural advantages. First, the issue of migratory divorce is eliminated. Second, the legal change is clear and the same for everyone in the population. Furthermore, it is clear not only what the law changed to, but what it changed from. Often the fault laws were quite strict and different from the new no-fault laws, leading to a large change in legal regime. The down side of these studies is that they can only test for changes over time, and it may be impossible to control for other changes that are highly correlated with the legal change. Having said this, the international studies generally find a statistically significant and economically large positive effect on the divorce rate. For example, Binner and Dnes find that the divorce rate increased by 0.8 divorces per 1000 people. Considering the average divorce rate is 1.84 divorces per 1000 people in a given year, this is quite substantial.

Secondary U.S. Studies

In the mid 1990s a third wave of papers were published on the relationship between no-fault divorce and the divorce rate.¹ Although most were an improvement over what came before them, others since then have gone further, and so the third wave is only briefly mentioned here.

Brinig and Buckley (1998) and Nakoneny *et al.* (1995) both found increases in divorce rates after the introduction of no-fault divorce. The Brinig and Buckley paper has become well known for its concern over how no-fault laws are identified. For them, the critical issue was whether or not fault provisions remained in other areas of family law. Thus if a unilateral divorce was more costly because the fault would be considered for a property settlement, Brinig and Buckley argued this should be counted as a fault state. Nakoneny *et al.* is noted for being one of the first empirical papers to appear in a family policy journal. Both papers came under attack by Ellman and Lohr (1998) who disagreed with both the definitions and methods used by both papers. The Nakoneny *et al.* (1995) paper was further attacked by Glenn (1997). This started a series of exchanges between the Nakoneny *et al.* group, and Ellman and Lohr, and Glenn — much of which is inconclusive.² What one learns from this exchange is that i) definitions matter, ii) if no-fault divorce has an impact it is likely marginal, and iii) just “looking at the data” is not very informative.

Friedberg and Wolfers

Much of the debate over no-fault divorce and divorce rates seemed to be over with the publication of Friedberg’s (1998) seminal work in the *American Economics Review*. This paper created a panel data set of every divorce in the United States from 1968 to 1988. It used sophisticated econometric techniques to control for state endogeneity and changes in behavior over time. She tested for different legal

¹ The first wave of papers from 1970-1985 were characterized by small samples and simple test design. The second wave mostly consisted of Peters (1986) seminal study using a large individual data set, and rebuttals to her work by Allen (1992) and Parkman (1992). The fourth wave is made up of the sophisticated papers after Friedberg (1998).

² See Rodgers *et al.* (1997) and (1999), and Glenn (1999).

classifications, and performed a series of robustness tests. In the end she found that no-fault divorce laws led to a 6% higher divorce rate and that they accounted for about 17% of the divorces over the time period studied. She also found that the change was permanent, and exogenous. Differences between states and changes over time, however, accounted for most of the divorce trends. She concluded:

The results above make it clear that unobserved covariates and unobservable divorce propensities — which may include for instance, social attitudes, religious beliefs, and family size — are the main determinants of divorce.

[p. 616, 1998]

This paper stood as the high watermark of the no-fault divorce literature until the arrival of Wolfers (forthcoming). Furthermore, it was corroborated by a number of other paper examining other aspects of no-fault divorce.³

Justin Wolfers forthcoming paper is an extension of Friedberg. He uses the same basic data set over a longer period of time, replicates her results, and then respecifies all of her state trend variables. Wolfers point, which has been made by theorists for the past several years, is that exogenous changes to laws are followed by endogenous changes in behavior. People might be more or less careful in choosing a spouse. They might marry sooner or later. Laws protecting marital property put at risk by no-fault might be changed. When these things are adjusted for Wolfer finds that the divorce rate still increases (although the effect is not as large as with Friedberg), but only lasts for about 10 years. As Wolfers admits, though, his test is not really a test of “no-fault” divorce *per se*, but rather a test of the set of legal changes that took place over the past 30 years. Taken together, divorce rates were higher throughout the 1970s and early 1980s, but then they leveled off and may have fallen after that.

No-Fault and Other Marriage Behavior

Although the major focus of research into no-fault divorce has always been its effect on the divorce rate, inquiry has always examined other types of behavior

³ For example Gruber (2004), Johnson and Mazingo (2000).

that may be effected. For example, consistent findings have shown that women increase their labor force participation, and increase their total number of work hours (domestic and market) in no-fault jurisdictions. Recent studies in this regard follow the reasoning laid out in Wolfers: no-fault divorce should influence other types of family behavior. Allen, *et al.*(forthcoming) examine the effect on the age of marriage. Easy divorce means that some people find marriage less attractive and search longer for a spouse to avoid a divorce. This incentive is found in theoretical models by Bougheas and Georgellis (1999) and Rasul (forthcoming). However, Allen, *et al.* also point out that some people find the easy exit condition makes marriage more attractive (easy in, easy out), and these types will marry sooner. They show that the effect on marriage age is ambiguous, but the variance of marriage age gets smaller. More importantly, the types of people who marry changes, with those who are more concerned about a proper match and less concerned about the institution of marriage being more likely to enter.

Wolfers and Stevenson (2006) find that female suicide rates, domestic violence, and intimate murders of wives all are reduced in states where no-fault divorce is introduced. They attribute these findings to changes in bargaining power within the marriage. On the other hand, Gruber (2004) finds that no-fault/unilateral divorce laws not only increase the divorce rate, they lead to earlier marriage for children, less stable marriages for children, and higher suicide rates for children. These results are also found by Johnson and Mazingo (2000). Taken together these studies might suggest that unilateral divorce was good for wives but bad for children. However, if there is one lesson from the divorce rate studies, it is that much sifting of the evidence is necessary before any strong conclusion can be reached.

The most important contribution of the Wolfers study, along with these other papers on behavior within the household, is the idea that the effect of no-fault divorce laws on the divorce rate *depends* on the environment one is divorce in. although Wolfers thinks internal marriage bargaining best explains the small long run effect of the law, an alternative and complementary explanation is found in

other legal changes. When no-fault laws were first introduced, inadequate marital property laws allowed (mostly husbands) to leave the family and take marriage assets with them.⁴ In both Canada and the United States, courts and legislatures quickly moved to patch the leak. Other issues followed in the areas of definition of property, child support guidelines, custody changes, and the like. In most cases, the legal change tried to prevent a spouse from unilaterally improving their own welfare at the expense of the rest of the family. In doing this these subsequent laws reduced the incentive to inefficiently divorce created by the introduction of the law.

5. What Does It All Mean?

In spite of all the messiness and complication, there are a number of lessons that come out of the research on no-fault divorce laws. These would include:

- Many factors influence whether or not a couple divorces, and whatever the effect of the law, it is not the major factor.
- No-fault divorce laws did increase the divorce rate. The estimates vary, but at least for the short run there is a consensus of an increase in the 10% range.
- These changes in divorce rates are not caused by a lower cost of divorcing, but because the law allows one party to unilaterally leave.
- The effect of no-fault divorce laws on the divorce rate is critically conditional on the legal, social, and cultural environment. Thus the same legal change can have different effects across jurisdictions, and over time the effect is likely to dissipate.
- Individuals respond to no-fault divorce laws in many ways, as do legal institutions. For the most part, these responses mitigate the effect of unilateral divorce.

⁴ Allen (1990) shows how states with property laws based on title quickly switched to common law property rules. Community property states also evolved into common law standards.

- The long term effects of the law are likely to be in the responses to it, rather than the actual changes in divorce rates.

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