

# “These Boots Are Made for Walking”: Why Most Divorce Filers Are Women

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Because of the financial and social hardship faced after divorce, most people assume that generally husbands have instigated divorce since the introduction of no-fault divorce. Yet *women* file for divorce and are often the instigators of separation, despite a deep attachment to their children and the evidence that many divorces harm children. Furthermore, divorced women in large numbers reveal that they are happier than they were while married. They report relief and certainty that they were right in leaving their marriages. This fundamental puzzle suggests that the incentives to divorce require a reexamination, and that the forces affecting the net benefits from marriage may be quite complicated, and perhaps asymmetric between men and women. This paper considers women’s filing as rational behavior, based on spouses’ relative power in the marriage, their opportunities following divorce, and their anticipation of custody.

You’ve been messing where you shouldn’t have been messing, and someone else is getting all your best. . . . These boots are made for walking, and that’s just what they’ll do. One of these days these boots are going to walk all over you. —Nancy Sinatra

## 1. Introduction

Throughout most of American history, wives rather than husbands have filed for divorce. The proportion of wife-filed cases has ranged

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from around 60% for most of the 19th century (Chused, 1994; Friedman and Percival, 1976) to, immediately after the introduction of no-fault divorce (Gunter and Johnson, 1978), more than 70% in some states (Gunter and Johnson, 1978, p. 572 and Table 1; Friedman and Percival, 1976, pp. 71, 75, 81). Today, with some variation among states, it remains slightly above two-thirds. The standard explanations for this behavior include the following: women file because of tradition (Brinig, 1993; Brinig and Buckley, 1998b);<sup>1</sup> women file to assure their innocence in the underlying proceeding;<sup>2</sup> women file to secure rights to custody, support, and attorney's fees (Friedman and Percival, 1976, p. 78; Brinig and Buckley, 1998b; Vernier and Hurlbut, 1939, p. 198); or women file simply because it is more convenient for them to do so. While these explanations have some merit, even in combination they cannot explain the variation in filing rates across states (Table 1), the persistence of the "gender gap" in filing through time, nor the systematic filing behavior we explore later on.

Economic explanations of divorce, beginning with Gary Becker, stress the rational weighing of remaining married over becoming single. When remaining married is no longer attractive, a spouse files for divorce, and on the surface it is unclear why the bias should be toward women filing.<sup>3</sup> What makes the high filing rate for women most puzzling, however, is that it is generally assumed—that overall husbands should be the ones most wanting out of marriage—particularly since the introduction of no-fault divorce. This understanding results from the focus on post-divorce *financial* status. Even by the most conservative accounts, the average divorced woman's standard of living declines from the one she enjoyed during marriage, and it declines relatively more than does the average husband's. Men often have an increase in their material well-being after divorce (Duncan and Hoffman, 1985; Finnie, 1993; Hill and O'Neill, 1994;

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1. Nadine Taub has noted that many of these petitions may be attributable to the chivalrous custom of allowing the wife to file first (Stark, 1991, p. 1514, note 149).

2. *Reid v. Reid* (1989) and *McLaughlin v. McLaughlin* (1986) discuss the standard requiring justification before the wife's desertion barred her from obtaining alimony under a now-amended law (Friedman and Percival, 1976, p. 79).

3. Although we recognize that filing for divorce is not the same as instigating a divorce, for many of the hypotheses we consider, this assumption will be made for reasons we will discuss shortly. We will include some evidence that the two are related, if not identical, when we discuss the Oregon data on long-term separations.

**Table 1.** Historical Filing Rates for Women in the United States

Locale and Year	Percent Where Wife Plaintiff
U.S., 1867*	62
U.S., 1880*	67
U.S., 1890*	66
U.S., 1900*	67
U.S., 1908*	67
U.S., 1922*	68
U.S., 1931*	72.8
U.S., 1960*	70.3
Dade County, Florida, 1962–63**	71
Fulton County, Georgia, 1962–63**	73
U.S., 1965	71.4
California, 1966	78.3
New Jersey, 1966	68.1
Florida, 1969 (Sample)	73.4
Polk County Iowa, 1969	80.7
California, 1970*	71.5
New Jersey, 1970*	70.2
Polk County, Iowa, 1972	78.3
Dade County, Florida, 1972–73**	32
Fulton County, Georgia, 1972–73**	70
California, 1974*	67.3
New Jersey, 1974*	64.1
Florida, 1974 (Sample)*	71.5
Connecticut, 1995	69.4
Connecticut, 1995, with children	71.3

\*Friedman and Percival, 1976

\*\*Gunter and Johnson, 1978

McLanahan and Garfinkel, 1989; McLanahan and Sandefer, 1994, pp. 86–88; Peterson, 1996; Smock, 1994). Furthermore, women face longer terms of low wealth and consumption when they divorce because they are less likely to remarry than their former husbands (Cherlin, 1992; Clarke, 1995; Glick, 1980). This lower remarriage rate is exacerbated when the wife has custody of the children. Part of the reason for this disparity is that a woman's value on the marriage market tends to depreciate with time, while her husband's tends to appreciate (Cohen, 1995; Weitzman, 1985, p. 27). In addition to the other problems, newly divorced women encounter tremendous obstacles performing their role as parents.<sup>4</sup> Studies of

4. For example, they must assume flexible employment in order to accommodate their children's emergencies (Blau and Robins, 1989).

their performance as parents prior to and after divorce reveal weaknesses in consistency and ability to cope with the stress of single parenting (Hetherington et al., 1982; Hochschild, 1997; Wallerstein and Kelly, 1980).

Because of the financial and social hardships faced after divorce, it has been commonplace, in the law and economics world at any rate, to assume that husbands have at least instigated divorce (Parkman, 1992, p. 85; Cohen, 1987, pp. 288–89). This position has also been supported by the tidbit of information suggesting that male filing rates increased with the introduction of no-fault divorce (Gunter and Johnson, 1978, pp. 572–73). The standard view is that the increases in divorce rates brought about by no-fault divorce were the result of husbands unilaterally absconding with disproportionate shares of marital property (Cohen, 1995; Weitzman, 1985; Zelder, 1994). Yet *women* file for divorce more often than men. Not only do they *file* more often, but some evidence suggests they are more likely to *instigate* separation (Braver, Whitley, and Ng, 1993), despite a deep attachment to their children<sup>5</sup> and the evidence that many divorces harm children (Bianchi and McArthur, 1991). Because the connection between filing and initiation of breakup is important to our analysis, we reproduce a table of data taken from the National Survey of Families and Households (Sweet, Bumpass, and Call, 1988) (See Appendix).<sup>6</sup> Furthermore, divorced women in large numbers reveal that they are happier than they were while married.<sup>7</sup> They report relief and certainty that they were right in leaving their marriages (Reissman, 1990, p. 165).

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5. Women more than men seem to bear the burden of their children's suffering, holding themselves responsible for the children's emotional and physical well-being (Whitehead, 1997, p. 63; Fuchs, 1988, p. 72).

6. Later we will supplement this qualitative appraisal with a strictly empirical one, showing how filing that takes place immediately after separation (largely done by women) reveals much more about the reasons for divorce than does filing after lengthy separation.

7. This is not merely just what is reported; clinical studies show a lower prevalence rate of first-onset major depression for women than for men (Baruch, Barnett, and Rivers, 1983, p. 261; Bruce and Kim, 1992; Kurz, 1995, pp. 188–89; Verbrugge and Madans, 1985; Whitehead, 1997, p. 184). Men tend to get more health, sexual, and economic (wage) benefits from marriage, regardless of the quality of the marriage, than do women (Waite, 1995). For health benefits, see Schoenborn and Marano (1988). Women get some psychological benefits from marriage that they do not receive when single. However, divorced and separated women got higher marks for personal autonomy and sufficiency as well as personal growth (Marks, 1996).

This fundamental puzzle (namely, that women on average willingly file for divorce despite higher costs) suggests that the incentives for divorce require a reexamination, that the forces affecting the net benefits from marriage may be quite complicated, and that these forces may be asymmetric between men and women. This paper considers women's filing as rational behavior, based on spouses' relative power in the marriage, their opportunities following divorce, and their anticipation of custody. An examination of recent filing behavior across four states reveals that certain characteristics are excellent predictors of who files for divorce.

## 2. Theories of Filing

The presence of what economists call appropriable quasi-rents has long been known to cause bargaining problems in relationships of all kinds (Buchanan, 1983; Cohen, 1987; Klein, Crawford, and Alchian, 1978; Muris, 1981). Because the concept of quasi-rents is so important to our analysis, we go to some lengths to explain what it means in the context of marriage and divorce. Formally, a quasi-rent is a value over and above one's opportunity cost or next best alternative. According to Klein, Crawford, and Alchian (1978, p. 298), a quasi-rent "is the excess [of an asset's] value over its salvage value." In the case of marriage, a quasi-rent is excess value of a specific marriage over the value of the next best option of not being in this specific marriage. This next best option may be remarriage, separation, or divorce, depending on the preferences and opportunities of the individual spouse. Clearly, since quasi-rents depend on the value held by each spouse, each spouse has a different rent within the marriage. In many marriages, spouses may reap larger or smaller quasi-rents at different times. This is the situation explained by Lloyd Cohen in his "Marriage, Divorce and Quasi-Rents" (1987), where wives receive quasi-rents late in marriage and husbands early on.

The economic importance of quasi-rents stems from the fact that they can potentially be held hostage or appropriated. To earn quasi-rents in any relationship often puts one in a weak bargaining position because the relationship means more than any of the alternatives. This often strikes many as counterintuitive. If one earns large rents, how can this be a bad thing? Yet large rents stem from two sources, the value of the current relationship and the value of alternatives. In the context of marriage, large quasi-rents

simply mean that alternatives to one's specific marriage are poor compared to the value of that specific marriage. For example, although the current relationship may be poor, the alternative may be extreme poverty or complete uprooting of a child, which is simply unacceptable to the given spouse. Alternatively, the relationship may be in a bad state now, but the spouse may feel that things will improve in the future. Those earning large rents want to maintain the existing relationship and are therefore willing to sacrifice to do so. In fact, if they sacrifice up to the amount of the quasi-rent, they are still better off in the current relationship than the alternative. Herein lies the problem with quasi-rents: An exploitative spouse can extract value from the spouse earning quasi-rents because that person would rather give them up than leave.<sup>8</sup>

It should be noted that divorce itself is costly and still carries some stigma. Divorce contains costs in the form of attorneys' fees, harm to children, financial losses, and even today the loss of the comfort of being married. As a result, the divorce event (or process) provides a hurdle that encourages people to remain married even though the union is marginal at best. The marriages that eventuate in divorce are therefore those in which at least one individual believes life is better after divorce in spite of these costs.

Quasi-rents in marriage often arise from the outset (Wax, 1998) and take on two specific forms that are manifested in at least two particular types of divorces. First, quasi-rents may be appropriated within a marriage through renegotiation of marriage shares (exploitation). Second, the quasi-rents may be appropriated through divorce (appropriation). We examine each of these in turn and focus on the cases that are consistent with higher filing rates for wives.

## 2.1. Rent Exploitation During Marriage

Higher filing rates by wives may result from husbands' overexploiting quasi-rents accruing to the wives as they bargain *ex post* over the share of marital gains. If the share is tipped too much in favor of the husband,

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8. Quasi-rents have little to do with whether a marriage is "happy" or not. A happy marriage may have no quasi-rents. Suppose Sam could marry Sally or Judy, either of whom would make a perfect match. If Sam chooses Sally, he's happy, but earns no rents since Judy is a perfect substitute. Second, an unhappy marriage may still earn quasi-rents. Marriage to one person may simply be the least bad option.

then the wife may perceive the divorced state as better because life in their marriage is so hard (Kurz, 1995). Marriage is a relationship in which both spouses are residual claimants and neither spouse “hires” the other. Although most couples might marry with the intention that things will generally be split evenly, the inputs and outputs are different and “lumpy,” or unevenly distributed, so that perfectly delineated sharing is impossible. However, the spouse with better opportunities outside the marriage can often tilt the general share of outputs more in his favor and the share of inputs more to the other partner. The forms these alterations can take are endless. Husbands may reduce or cease housework, forcing the wives to sacrifice too much of their leisure time to complete this work (Hochschild and Machung, 1989; Parkman, 1998), or they may neglect parenting duties, increase their private consumption at the expense of family goods, and spend more time with friends than with the family. A spouse may blatantly commit adultery or other traditional faults, and in the extreme, this form of exploitation may evolve into an abusive situation in which the husband takes advantage of the wife’s worse position through actual or threatened force.

Wives may find themselves in this position more often than husbands because they often make large specific investments when they have children, and wives typically bear a disproportionate cost in rearing children. Not only do children require time and effort, but also the physical changes of childbearing, childbirth, and the sleepless nights of child rearing can take a mental toll (lowering outside marriage opportunities). Because the baby is completely dependent upon the mother, she loses bargaining power relative to her husband because she can no longer devote “ideal worker” days to the paid labor force (Menkel-Meadow, 1989, pp. 304–12; Sanger, 1992, p. 18; Silbaugh, 1996; Williams, 1991, pp. 1611–12). The difference between what a caregiving parent and a supporting parent earn makes up the bulk of the so-called gender gap in wages (Fuchs, 1988, p. 72; Jacobsen and Levin, 1995).<sup>9</sup> Thus Amy Wax and others argue that the

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9. Fuchs concludes that women’s disproportionate responsibility for childcare provides the most powerful explanation of the difference in men and women’s earnings. Although the gap between men and women’s wages closed by 7% between 1980 and 1986, Fuchs (1988, pp. 65–66) explains that the improvement largely was due to the increased percentage of women workers who were born after 1946 and had fewer children, suggesting that for each year out of the labor force, the caretaker permanently loses 1.5% of lifetime earning capacity (Hadfield, 1993; Waite, 1995, p. 496).

labor market and the power derived from it cast a shadow over bargaining within the marriage (Wax, 1998).<sup>10</sup>

The introduction of children into a marriage nearly always leads to some renegotiation of marital roles.<sup>11</sup> Couples may or may not anticipate this, but when children arrive, a husband may try to renegotiate the marriage deal in light of the poorer bargaining position now held by the wife (Cohen, 1987; Fineman, 1995a; Stark, 1991). When he does so, the wife may decide that a divorce is better than remaining married. Divorce, despite its many shortcomings, allows the woman to exercise control over household spending when she is awarded custody (Seltzer, 1996, 1998; Lundberg and Pollack, 1993, pp. 989–90). If the court names her primary custodian, she makes most, if not all, of the major decisions regarding the child (American Law Institute, 1998, § 203[5]). As custodial parent, she will be able to spend the money the husband pays in child support exactly as she pleases—something she may not do during marriage (Lundberg and Pollack, 1993, pp. 992–93).<sup>12</sup> Finally, although the court will usually have ordered visitation, she can exert some control over her former husband by regulating many, although not all, aspects of the time he spends with the child (*Eichelberger v. Eichelberger*, 1986; American Law Institute, 1998, § 2.20, Reporter’s Notes, pp. 377–89; Levmore, 1998). In the extreme, she can even “poison” the child against the father (Fay, 1989; Lobsenz, 1971).

The argument that wives file for divorce to escape bad marriages may hinge on a “mistake” made by the husband. In at least some cases, had he not exploited the good will of his wife too much, she might be unhappy but willing to stay in the marriage. Alternatively, once she had decided to leave, the husband could ease up on his demands at home and settle on

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10. Regan (1992, pp. 65–66) suggests a variety of women why women continue to earn significantly less than men of comparable education and training. See also Starnes (1993).

11. Wallerstein and Blakeslee (1995, pp. 70–73) discuss how these changes in family structure influence marriages.

12. Of course, the non-resident parent may not always pay the support ordered (Brinig and Buckley, 1998a, pp. 420–23; Lerman, 1989, p. 222; Pulkingham, 1994, pp. 73–97).



an arrangement that would, again, convince his wife to stay. Why, then, is the husband either unable or not willing to persuade his wife to stay?<sup>13</sup>

In some cases, by the time he realizes there's a problem, it is likely too late. So much of the wife's trust has eroded that no amount of renegotiating will save the marriage. In other cases, the breakup may be caused by a large asymmetry in the value placed on children by the mother and father. This may be for any number of reasons. Those commonly given include assumptions that women may be socially (Chodorow, 1978, p. 7; Rich, 1986; Sanger, 1996) or even genetically (Rossi, 1977) predisposed to be more nurturing than men (Bartlett, 1988; Fineman, 1995b, pp. 72–73).<sup>14</sup> She may also have spent so much more time with the children that she has become more attached, the same way that a person may acquire an ever greater taste in classical music (Becker, 1993, p. 400; Becker and Murphy, 1988).

For example, consider the presumably rare case where a nurturing woman marries a man with few paternal interests beyond being a biological father. As the wife's stake in the marriage increases due to motherhood, this husband may exploit the situation to the fullest. If the wife decides to file for divorce to gain more control over household resources, the husband may be unwilling to modify his behavior because in his eyes he will have achieved his goal of being a father (*Mullen v. Mullen*, 1948). Failure to renegotiate results from a fundamental difference in the value each spouse puts on his or her respective parental role.

An extension of this argument is found where the husband goes so far in exploiting the quasi-rents of his wife that he explicitly violates the marriage vows or state laws. Wives, of course, may also break the marriage contract. Regardless of who breaches, committing adultery, physical and mental abuse,<sup>15</sup> and desertion are all cases where bargaining to renegotiate

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13. This "Coasian bargaining" (Coase, 1960) is what economists would expect in a situation where the husband's gains from marriage were so great that he could compensate the wife for her desire to leave (Kelman, 1979, p. 688 and note 51).

14. Leving (1997) and Czapanskiy (1991) disagree.

15. We are confining this point to situations in which the wife has decided to permanently leave the abusive relationship. Obviously many abused wives do reconcile with their husbands, and some never leave.

the marriage is not very likely to succeed over the long run, because mutual trust and respect may be destroyed (Gaughan, 1981; Lerman, 1984).<sup>16</sup>

## 2.2. Rent Appropriation Through Divorce

A second means by which quasi-rents may lead to divorce is through the outright confiscation of a specific investment in the marriage. As we noted earlier, quasi-rents, or large differences in the value of the marriage versus the next best alternative, often arise after one spouse has made a specific investment in the marriage; say, by helping the other earn a degree. When the other partner controls this investment, he or she may be able to leave the marriage and take the investment along (Weitzman, 1985, p. 109). This is particularly true when the investment is in the human capital of the spouse who leaves, as is often the case with education (Brinig, 1997; *Mahoney v. Mahoney*, 1982; Parkman, 1995; Weitzman, 1985, p. 141).<sup>17</sup>

Possibilities for appropriating marital assets also arise when there are large differences in the timing of investments in the marriage. For example, in a traditional marriage where the wife makes most of her (human) capital investments in the marriage up front, as she “takes time off” from a career to bear children, the husband is able to enjoy most of these investments and then to leave just when his major contributions are about to begin (*O’Brien v. O’Brien*, 1985; but see, e.g., *Graham v. Graham*, 1987; Cohen, 1987).

This opportunistic appropriation of quasi-rents (or making off with marital assets) through divorce has the opposite implications from the first type of problem mentioned. With rent extraction during marriage, the spouse who has been exploited during the marriage should be the one who files. With rent appropriation through divorce, the spouse who can

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16. Of course, even in such cases, many spouses do reconcile, some of them permanently. In order to avoid scandal, some adulterous spouses may cede tremendous amounts of marital power. In an unfortunately large number of abuse cases, although renegotiation is promised and marital relations resume, the power imbalance remains the same, and abuse recurs. Although historically desertion would have been the typical occasion for women’s filing, contemporary wives would seem particularly likely to file more often than their husbands in abuse cases (Kurz, 1995). Fagan and Browne (1994) recently calculated the percentage of family violence in which women were the victims.

17. The classic case of this type is the “medical school syndrome,” where a fresh doctor leaves a supporting spouse once medical school is finished.

carry off specific marital investments that the other spouse has sunk into the marriage is the one who leaves (and, presumably, files). In this context, filing for divorce is a method of acquiring a disproportionate<sup>18</sup> share of the marital assets. For most financial investments, wives are vulnerable to appropriation because husbands have traditionally been the first to finish their formal education or obtain vocational training. However, husbands can also make specific investments up front and can therefore become vulnerable as well. Next to children, one of the most important forms of early investment by a couple is in education. When one party invests in the education of the other early on, the benefits (rents) are earned once the high-human-capital spouse starts working. As a result, however, the spouse with the lower income may fall victim to the opportunistic divorce. Hence, for example, a wife may leave her husband after he has put her through law school.<sup>19</sup>

### 2.3. Custody

Until now our focus has been on the role of quasi-rents in a marriage. Individuals file when filing stops them from being exploited within the marriage or when filing allows them to exploit the other spouse. Although quasi-rents in marriage can arise from a number of specific investments, children are likely to be the most serious and common source. In addition to this, children are often the most valuable assets in a family. As such, custody is often a critical issue in divorce filing behavior. Property distribution laws that might allow one spouse to appropriate marital investments apply to marital property, not children. For children, the standard isn't strictly measured by investment or even fairness, but by the "best interests of the child" (Altman, 1996). Time spent with children or, even more, money lavished upon them does not necessarily equate to what will be best for them when parents no longer live together.

Because of the differences in attachment we've discussed earlier, having a child in itself makes wives less likely to file for divorce. The presence of children also makes divorce less likely in the first place, as couples stay together "for the sake of the children" (Lacey, 1992; Scott, 1990).

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18. Disproportionate, that is, compared to what the spouse had invested in the marriage.

19. See *Srinivasan v. Srinivasan* (1990) (wife exploited husband through graduate school and a lengthy probationary faculty period).

However, given the presence of children, it is expectations of custody that drive divorce filing. By making a preemptive filing, the wife may be able to secure rights such as child or spousal support that require court enforcement.<sup>20</sup> When the wife files, she is often given temporary custody of the children. Temporary custody, like possession, tends to be “nine-tenths of the law” and plays a role in the assignment of permanent custody, especially when the divorce does not occur for some time.<sup>21</sup>

When a spouse expects custody, filing may act as an appropriation of marital resources. For wives versus husbands, children are an unusual asset because working men are unlikely to receive substantial child support from their wives. Children may hurt the earning potential of wives, but this very fact makes them more likely to seek custody. Mothers are less employable because they have spent the most time with the children, but because they have spent the most time, they probably have closer relationships with them. Some women may also feel that by making career sacrifices, they have “earned” custody. Thus, although the presence of children, and especially more than one child, may be a damper on a wife’s filing, realizing that the marriage is very troubled, she may nevertheless file to secure custody (Grillo, 1991, p. 1547).

### 3. Filing and the Welfare of Wives

A spouse may thus file for divorce because he or she is escaping an exploitative partner, leaving the marriage with the bulk or all of its enhanced human capital, or attempting to establish custody over children. Keeping in mind that wives are more likely to file for divorce, each of these reasons for filing has different implications for the welfare of wives and different implications regarding the policy recommendations for divorce law. Wives who file in an attempt to flee an exploitative relationship resulting from

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20. Again, this makes the most sense in historical periods when husbands owned all the assets, and wives might not even be able to establish their own domiciles without court orders (Brinig and Carbone, 1988, pp. 863–64). A non-biological party unsuccessfully sought child support without such an arrangement (*Larson v. Diveglia*, 1997.)

21. Analogously, temporary child support is now being made under exactly the same guidelines as permanent support (*Va. Code Ann.*, 1998). Strategic motivations would have been particularly important for wives in historical periods when they lacked resources themselves.

the nurturing asymmetry that often arises between them and their husbands are clearly made better off by divorce and should by virtually all accounts be allowed to leave the marriage. Reformers who feel these cases of physical or emotional abuse predominate may consider ways of discouraging the exploitative spouse from profiting from the bad behavior, such as punitive alimony or property shares (Brinig and Crafton, 1994), and, if exploitative behavior dominated, might counsel law reformers to make divorce less difficult (or less painful), with transfer payments to mitigate any financial hardship (Brinig, 1997, pp. 116–18).<sup>22</sup> Furthermore, government should emphasize improving marriage rather than making divorce difficult.

However, wives (and husbands) who file for divorce in order to appropriate marital assets such as enhanced earning capacities are better off after divorce, but only at the expense of the other spouse. In this case, the opposite recommendation for divorce law is forthcoming. When divorce is used to exploit the spouse remaining behind, divorce should be made more difficult to obtain<sup>23</sup> in order to protect the specific investments of each spouse (Cohen, 1987; Ellman, 1989).

If it is custody outcomes that most influence divorce filings, changes in custody rules (or their likely outcomes) rather than in divorce grounds should most shape the patterns of both marriage and divorce (Brinig and Buckley, 1998a).<sup>24</sup> In particular, this could take the form of a presumption of joint custody or a rule that made post-divorce patterns mirror pre-separation time shares as closely as possible, with sole custody only in cases where one party can show the other parent unfit.<sup>25</sup> An appropriate custody rule mitigates the incentive for one-party filing for the purpose of

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22. Some would say to stigmatize the exploiter as well (Golden and Taylor, 1987, pp. 12–13).

23. Apparently this is the view of the law and economics writers who feel that those leaving are by and large men.

24. Chapter 2 of the American Law Institute Marital Dissolution project (1998), which would substantially change substantive child custody rules, may well have this effect.

25. The American Law Institute (1998) proposal rules can be found in Section 2.02(e) (continuity of existing parent-child attachments) and 2.09(1), which provides that unless otherwise resolved by agreement or manifestly harmful to the child, “the court should allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents’ separation.”

gaining unilateral control over the children and, to the extent both parents remain involved through visitation or child support, the other spouse.

The question is, which type of issue drives most divorces? We now turn to an empirical analysis of divorce filing to sort out these theories and conclude that while we see exploitative, appropriative, and custody-related filing behavior, the custody patterns are the most important. We also note that no-fault (unilateral) divorce laws apparently do two things. They increase divorce filing rates generally (Allen, 1992a; Brinig and Buckley, 1998b; Friedberg, 1998), *and* they increase the percentage of women who file. The fact that women, more than men, take advantage of the easier exit suggests that a return to a fault-based system will not advance women's goals.

#### 4. Testable Implications

There are three major individual characteristics that we can use to test our theory that filing behavior is driven by the two forms of quasi-rent appropriation outlined above. First, there are differences in age and age at marriage that generate specific quasi-rents for men and women. Second, the presence of children and their number create asymmetric quasi-rents that we can analyze. Third, there are differences in human capital and, in mixed-race couples, race between husbands and wives. In addition to these characteristics, a number of testable implications arise from specific grounds for divorce, information on the length of separation, and aggregate county-level demographic features.

The hypotheses we develop are tested through data obtained from all the divorce certificates for 1995 (more than 46,000 with complete data) from Connecticut, Virginia, Oregon, and Montana.<sup>26</sup> This data set is unusually good for several reasons. First, it is large and inclusive: divorce law requires that people file where they are domiciled (*Williams v. North Carolina*, 1942), so virtually all the years' divorces in the jurisdictions used are included.<sup>27</sup> The data are relatively accurate, since they are com-

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26. These states were selected based on the availability of data. Although all states except Louisiana collect divorce statistics, very few keep records of who files.

27. The exceptions would be spouses who left the state of their marriage to be divorced elsewhere or those who temporarily moved into one of the jurisdictions we are considering.

piled by judicial personnel from facts alleged by the parties and proven based upon sworn testimony in court hearings. The data gathering process has been standard since 1960 because the National Center for Health Statistics has prepared national statistics based on these submissions.<sup>28</sup> There are no obvious incentives for judicial personnel to exaggerate or distort any of these measures.

Table 2 contains a list of definitions of variables, while Tables 3 and 4 list logit regression results from the four states. (A logit regression estimates the equation that will best produce the actual distribution between 0 and 1 for a two-option dependent variable [Maddala, 1983, pp. 59 et seq.] [here, which spouse is the plaintiff].) The dependent variable in all regressions is 1 when the wife files for divorce. We now turn to each set of predictions in turn.

#### 4.1. Age and Age at Marriage

In a “traditional” marriage where the wife marries young and remains in the home, most of the appropriable quasi-rents are earned by the wife, and this puts her in a vulnerable position. In other words, she has invested more than the husband in the relationship at the beginning and has the most to lose if it ends. The longer these types of marriages last, the more the husband becomes advantaged, since wives are more likely to stay out of the labor force to perform caretaking and other household services (Fineman, 1995a)<sup>29</sup> and will perform such tasks longer. Further, when wives are older, they are relatively unlikely to remarry following divorce. Husbands, whose earning capacities are enhanced by marriage even if their wives do not put them through school, should be more likely to appropriate through divorce in these cases because most of the wife’s contribution is up front. More subtly, the circumstances in which the spouses married reveal how much can be carried away at divorce. The woman who marries very young is unlikely to have a healthy earning capacity (and is more likely to have married because of an unplanned pregnancy). Hence, in these circumstances, husbands are more likely to opportunistically file. If the wife were to file, she would clearly be leaving a bad marriage.

28. The completed data set used here has not been compiled since 1995 because funding for the National Center for Health Statistics was reduced. Since that time, raw divorce rates have continued to be reported. Monthly vital statistics reports contain estimates from samples. For methods, see, for example, Technical Notes (1996, p. 17).

29. They are less likely to remarry (Bumpass, Sweet, and Castro Martin, 1990).

**Table 2.** Definition of Variables

Variable	Definition
PLAINTIFF	1 if wife.
W-MARR-AGE	Ages of husband and wife at the time of marriage.
H-MARR-AGE	
WAGE-YEARSM	Wife's age times years married.
HAGE-YEARSM	Husband's age times years married.
YEARSM	Number of years married until divorce.
CHILD18	Number of children under 18.
NCHILDW	Number of children awarded to wife.
NCHILDH	Number of children awarded to husband.
NCHILDJ	Number of children awarded joint custody.
RELED	Husband's years of education minus wife's years of education.
WEDUC	Years of education for the wife.
WWHITE	The wife in the couple was white.
(CT, OR, VA only)	
HNUMARR	Number of husband's marriage being dissolved.
(Oregon only)	
WNUMARR	Number of wife's marriage being dissolved.
(Oregon only)	
NOFAULT	State law makes fault irrelevant for divorce.
DIVRATE	County divorce rate.
POVERTY	Number of people in poverty divided by population.
POPDENS	Number of people per square mile in county.
PCPI	Per capita personal income for the county.
CRUEL	The divorce was granted on grounds of cruelty.
(Virginia only)	
SEPLENGTH	Length of time the parties were separated prior to the divorce.
(Oregon only)	

On the other hand, wives who hold professional positions or otherwise work outside the home are less likely to have quasi-rents appropriated by their husbands. Women who were older at the time they married will, independent of their education, be more likely to file for divorce because their earnings were higher before they married and they are less likely to have married because they were pregnant.<sup>30</sup> They can take advantage of exit options if not given enough voice during the marriage (Brilmayer, 1989; Hirschman, 1970).

30. According to Becker and his coauthors, a premarital pregnancy is one of the strongest indicators of marital instability because the woman in question does not have the leisure to search for the ideal mate (Becker, Landes, and Michael, 1977; Weiss and Willis, 1997).



We use several variables to isolate and control for age and age at marriage. The coefficients for the variables W-MARR-AGE, H-MARR-AGE, WAGE-YEARSM, HAGE-YEARSM, and YEARSM (see Table 3) are consistent with the opportunistic divorce scenario as laid out by Lloyd Cohen (1987). From Table 3 we see that the older a woman is at the time of marriage, the more likely it is that she files for divorce. Even holding age at marriage constant, WAGE-YEARSM is negative, suggesting that

**Table 3.** Logit Regression Results—Women as Petitioners, 1995: Dependent Variable = Plaintiff

Variable	All states	Three states	Virginia	Oregon
<i>AGE VARIABLES:</i>				
W-MARR-AGE	0.0177 (5.3177)**	0.0147 (4.4380)**	0.0137 (3.050)**	0.0151 (1.7962)*
H-MARR-AGE	-0.0173 (5.4535)**	-0.0151 (4.7868)**	-0.0155 (3.5972)**	-0.0254 (3.1825)**
WAGE-YEARSM	-0.0019 (7.0133)**	-0.0019 (6.563)**	-0.0017 (4.7080)**	-0.0020 (2.4841)**
HAGE-YEARSM	0.0025 (9.2940)**	0.0024 (8.5562)**	0.0020 (5.6911)**	0.0028 (3.4308)**
YEARSM	-0.0384 (6.1570)**	-0.0343 (5.2958)**	-0.0243 (2.8242)**	-0.0381 (2.0923)**
<i>CHILD VARIABLES:</i>				
CHILD18	-0.0565 (5.366)**	-0.0621 (5.7659)**	0.0001 (0.0000)**	-0.0386 (0.9881)**
NCHILDH	-0.5454 (30.6433)**	-0.5371 (28.9189)**	-0.6859 (10.3143)**	-0.7673 (12.7164)**
NCHILDW	0.4780 (34.89)**	0.4884 (33.9654)**	0.3334 (6.0704)**	0.5149 (11.9904)**
NCHILDJ	0.1307 (9.0465)**	0.1252 (8.1261)**	-0.1461 (2.5093)**	0.0205 (0.4382)**
<i>HUMAN CAPITAL VARIABLES:</i>				
RELED	-0.0815 (33.7153)**	-0.0865 (33.5112)**	-0.076 (27.8460)**	-0.2173 (14.5573)**
WEDUC	0.0030 (1.2081)	0.0025 (1.0099)	0.0064 (2.3483)**	-0.0207 (1.3342)
WWHITE		0.2021 (6.8051)**	0.1709 (4.9084)**	0.1906 (1.7263)**
HNUMMARR	0.0281 (1.4670)		-0.004 (0.1466)	0.0930 (2.0662)**
WNUMMARR	-0.0562 (3.0718)**		-0.0515 (1.9912)**	0.0420 (0.9975)**

**Table 3.** Continued

Variable	All states	Three states	Virginia	Oregon
<i>AGGREGATE VARIABLES:</i>				
NOFAULT	0.1277 (3.0988)**	0.0889 (1.7251)*		
DIVRATE	0.0075 (1.0376)	0.0062 (0.8243)	0.0349 (2.5123)**	-0.0250 (2.5814)**
POVERTY	0.0000 (3.3326)**	0.0000 (3.3486)**	0.0068 (3.0375)**	0.0000 (0.6678)
POPDENS	-0.0000 (4.0029)**	-0.0000 (2.7098)**	-0.0000 (4.0073)**	0.0003 (2.1023)**
PCPI			0.0000 (2.9165)**	
<i>FILING/INITIATING:</i>				-0.0380 (3.0067)**
SEPLENG				
<i>BAD MARRIAGE:</i>			1.5604 (5.9783)**	
CRUEL				
Constant	0.4213 (6.0238)**	0.2182 (2.8502)**	-0.0209 (0.1631)	0.9688 (3.7144)**
Correct Estimations	66.43	66.46	64.91	71.181
<i>n</i>	46547	43329	26067	7234

<sup>a</sup>All states = Connecticut, Virginia, Oregon, and Montana.

<sup>b</sup>Three states = Connecticut, Virginia, and Oregon.

\*Significant to .1 level.

\*\*Significant to .05 level.

wives who have been married a long time are less likely to file for divorce. Taken together, they say that women who marry young and who have been married a long time are not likely to file for divorce (Garfinkel and McLanahan, 1986).<sup>31</sup> Our results corroborate the suggestion of Cohen and others that older women at the time of divorce (as opposed to women who were older at the time of marriage) are less likely to remarry and more likely to have made career sacrifices that will be very costly if the marriage ends in divorce (Bumpass, Castro-Martin, and Sweet, 1991; Clarke, 1995; Sweeney, 1997). These divorces, then, are filed by husbands and suggest that husbands engage in exploiting quasi-rents through divorce by leaving their marriages after they have reaped the benefits of the wife's sacrifices and before they must contribute their enhanced earnings.

The data also reveals that opportunistic divorces apparently work in reverse as well. The coefficients for H-MARR-AGE and HAGE-YEARSM

31. Premarital fatherhood apparently hurts men as well (Krantz, 1988).

are the opposite signs to those corresponding to the wife. Husbands who marry late are, like their wives, more likely to have accumulated substantial human capital. As they become older at the time of marriage, independent of the length of the marriage, they are more likely to file. Also, men who have been married a long time and who married younger

**Table 4.** Logit Regression Results—Women as Petitioners, Special Cases, 1995: Dependent Variable = Plaintiff

Variable	Blacks	Oregon Long Separations	Oregon Short Separations
<i>AGE VARIABLES:</i>			
W-MARR-AGE	0.0047 (0.4651)	0.0055 (0.2098)	0.0168 (1.8699)*
H-MARR-AGE	0.0067 (0.7154)	-0.0260 (1.0316)	-0.0271 (3.1900)**
WAGE-YEARSM	-0.0004 (0.6117)	-0.0007 (0.3748)	-0.0024 (2.5654)**
HAGE-YEARSM	0.0007 (1.0084)	0.0022 (1.1806)	0.0031 (3.3935)**
YEARSM	0.0251 (1.2269)	-0.1013 (2.0987)**	-0.0356 (1.7107)*
<i>CHILD VARIABLES:</i>			
CHILD18	-0.1334 (3.3468)**	-0.1309 (0.8939)	-0.0557 (1.3436)
NCHILDH	-0.4680 (6.8645)**	-0.8175 (3.4174)**	-0.7705 (12.1488)
NCHILDW	0.5283 (11.1380)**	0.3862 (2.2581)**	0.5340 (11.8280)**
NCHILDJ	0.0702 (1.1240)	0.0220 (0.1145)	0.0173 (0.3557)
<i>HUMAN CAPITAL VARIABLES:</i>			
RELED	-0.1005 (14.1173)**	-0.2413 (5.9309)**	-0.2134 (13.2361)**
WEDUC	0.0070 (0.8981)	-0.0468 (1.1833)	-0.0145 (0.8535)
WWHITE		0.3210 (1.3711)	0.1658 (1.3139)
WNUMMARR	-0.0367 (0.4824)	-0.0253 (0.2110)	0.0498 (1.1033)
HNUMMARR	-0.1106 (1.4867)	0.0156 (0.1245)	0.1075 (2.2117)**

**Table 4.** Continued

Variable	Blacks	Oregon Long Separations	Oregon Short Separations
<i>AGGREGATE VARIABLES:</i>			
NOFAULT	-0.8486 (0.9081)		
DIVRATE	0.0766 (2.2721)**	0.0113 (0.4192)	-0.0300 (2.8623)**
POVERTY	0.0000 (1.4511)	0.0000 (0.3615)	-0.0000 (2.2487)
POPDENS	-0.0000 (2.1093)**	0.0001 (0.2512)	0.0003 (2.2487)**
<i>FILING/INITIATING:</i>		0.0227 (1.0230)	-0.1122 (2.5078)**
SEPLENGTH			
Constant	-0.0545 (0.2184)	1.2948 (1.9094)**	0.9802 (11.5371)**
Correct Estimations	66.34	67.61	71.90
<i>n</i>	4759	985	6249

\*Significant to .1 level.

\*\*Significant to .05 level.

are less likely to file. These results again are consistent with individuals' filing when they have less specific attachment to the marriage and more non-marriage social capital (Nock, 1995, 1999). This result is interesting because the relative magnitudes of the coefficients between husbands and wives are quite similar, suggesting that wives are just as opportunistic as husbands in this regard.

The findings for the variable *YEARS* are also consistent with the opportunistic divorce, where husbands leave their wives after extracting the value of the wives' earlier investments. The negative sign means that men are more likely to file in long-term marriages. From the woman's point of view, divorcing after lengthy marriages, other things being equal, means leaving after making substantial sunk investments in the relationship (Starnes, 1993)<sup>32</sup> and before reaping all the benefits of the husband's greater earning capacity (Wax, 1998).

32. Women report a U-shaped pattern of happiness with their marriages: prospectively, women seem to find solving marital disputes more difficult over time (Vaillant and Vaillant, 1993).

## 4.2. Children

Children play several critical features in our model. First, they create quasi-rents for the mother—increasing the reliance she has on the husband's income and, to the extent she is very concerned about the children's welfare, the long-term costs of divorce—and as a result contribute to the mother's not filing for divorce. This effect should become stronger the more children that are present, since this implies even more time out of the workforce. Numerous children also dim chances for remarriage. Given at least one child, as the number of children increases, husbands should therefore be more likely to file. Second, however, children are most often the most valuable assets in a marriage and if there is trouble in a marriage and the wife anticipates custody if she files, then she may file to establish a claim to the children. Given that husbands are almost universally in the full-time workforce, this is an option currently nearly exclusively available to wives. Hence, we would predict that wives will tend not to file as often when children are present as when they are not, but, given children, will file more often if they anticipate custody. Because the custody results are so significant, we discuss possible reasons for our findings following this more general section.

The variable CHILD18 is negative and significant, suggesting that the presence of minor children reduces the probability of women filing for divorce. This is consistent not only with the common observation that mothers are more attached to children (Fuchs, 1988, p. 72) but also with our theory of opportunistic divorce. As previously mentioned, children constrain the newly single woman's opportunities in the labor and remarriage markets (Sweeney, 1997)<sup>33</sup> and thus raise the quasi-rents of the existing marriage. The children also create incentives for their mother to stay in the relationship to protect them from the risks of divorce (Brinig and Buckley, 1998a).

The custody variables are all consistent with the notion of appropriation divorces. That is, the person who anticipates custody is the one who files for divorce. This makes sense since other property rules (if custody law is considered a property rule [Woodhouse, 1992]) may well be better defined,

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33. If a dummy variable is used to indicate the presence of children, rather than the number of them, the coefficient is positive and significant: women file more. Other coefficients do not change in sign or significance. Presumably the foregone career opportunities increase as the number of children grows. Table available from authors.

and children are usually the greatest asset, or product, of a marriage.<sup>34</sup> Divorce without custody means giving up a large part of the joy of being a parent—while continuing the financial responsibility for the child (Blankenhorn, 1995, pp. 149–70; Fay, 1989; Goldberg, 1977, p. 48). The interesting feature of the custody variables (NCHILDW and NCHILDH) is how large they are. These variables dominate the regressions and are completely robust to changes in samples. Despite neutrality in the custody laws, it remains true that judges are inclined to award children to women (Garrison, 1996; Pearson and Luchesi Ring, 1983, pp. 718–23). Today, those mothers who are not deserving of custody are likely to have other problems—alcoholism, mental illness, or adultery—that would also affect the quality of the marriage from the husband’s perspective (Cahn, 1997; Sanger, 1996).

The coefficient for joint custody is inconsistent in terms of sign and significance across the different samples of Table 3. This is consistent with our model: when there is no clear assignment of wealth or custody at divorce, there is no systematic filing behavior.<sup>35</sup> On the one hand, women might feel that sharing custody is logistically hard, that it does not reflect the allocation of the parenting work done during the marriage, or that it results in a loss of face (Bryan, 1997, p. 32; Grillo, 1991, p. 1547). Husbands might be more likely to feel that divorce would not be as painful, because they could still play major roles in the children’s upbringing (Arditti, 1992; Emery et al., 1994; Seltzer, 1991). On the other hand, the reduction of the costs of divorce for children (both financial, through increased adherence to child support orders [Brinig and Buckley, 1998a; Seltzer, 1998], and psychological, because children do better if they have substantial contact with both parents [Aquilino, 1994; Emery et al., 1994; Weiss and Willis, 1993; Zill, 1993]) might mitigate the wife’s ambivalent feelings about whether or not to divorce.

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34. If this is a point that needs citation, see Becker (1991, p. 56).

35. See, for example, *Va. Code Ann.* (1992), defining joint custody as either (i) joint legal custody where both parents retain joint responsibility for the care and control of the child and joint authority to make decisions concerning the child even though the child’s primary residence may be with only one parent, or (ii) joint physical custody where both parents share physical and custodial care of the child, or (iii) any combination of joint legal and joint physical custody which the court deems to be in the best interest of the child.

### 4.3. Human Capital and Race

If filing reflects opportunistic behavior, the spouse with the better options outside the marriage should be the one that generally files for divorce. Two variables that we can use to proxy these outside opportunities are race and the relative education of the spouses. Given that whites still earn more than other races and that white wives earn more than black wives relative to white and black men, we would predict that white wives should be more likely to file than their husbands. In a black marriage, the wife's earning capacity is closer to her husband's, and so black wives should file less frequently than white wives. Second, we would predict that when the wife has more education than her husband, then again she should be more likely to file. As a woman's earning capacity increases relative to her husband's, it may be in her interest to seek out another spouse more equal in ability and earning power who will simply be a better companion or more comfortable with her high ambitions for herself (Sweeney, 1997).<sup>36</sup>

Perhaps most consistent with the opportunistic divorce is the variable for relative education, RELED. The more educated of the two spouses will be in a better position and therefore be more likely to file. This difference in education lowers the quasi-rents from marriage for the educated spouse because the education is likely marketable (Becker, 1991; Weitzman, 1985), and transfers well into another relationship. If the wives are highly educated (WEDUC), they should be able to support themselves well outside of marriage and therefore lose less by divorcing (Bianchi and Spain, 1996; Manser and Brown, 1980). A higher level of education for wives would not be consistent with a greater need to file to secure *pendente lite* support, one of the traditional explanations for women's filing. In addition to this, we see in several regressions that WWHITE is highly significant. Again, this is consistent with the idea that individuals file for divorce when they have better options outside marriage.

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36. Women with high educational achievement are more likely to remarry (Chiswick and Lehrer, 1990), as are women with high earnings (Glick and Lin, 1987). Thus, such a woman would follow Becker's strategy of assortative mating (Becker, 1991, pp. 109–16; Allen, 1992b).

#### 4.4. Legal and Other Factors

Two of the states in our sample (Virginia and Connecticut) still use fault grounds as well as no-fault grounds for divorce. Data including grounds for divorce are available only for Virginia, however. These underlying behaviors can explicitly be interpreted as actions to exploit rent in a marriage. When one spouse beats another, commits adultery, or engages in another form of cruelty and expects the marriage to continue, then this spouse is attempting to extract quasi-rents from the other. In this case it is clear that the victim should be the one filing for divorce and that this is direct evidence of filing to flee an exploitive marriage.<sup>37</sup> We can expect that not all couples experiencing marital violence will file using this ground. First, not all will divorce. Second, many of the spouses who would have filed on cruelty grounds will bargain for financial concessions and will actually result in divorces granted on the no-fault separation ground.

In the individual Virginia regressions, a dummy variable was added for divorces granted on grounds of cruelty. Examination of the Virginia column in Table 3 shows that some women take advantage of the fault grounds for cruelty.<sup>38</sup> The variable CRUEL is not only significant but also is quite large. In fact, wives account for virtually all of the filings under this ground. This finding lends some support to the hypothesis that at least some women file to escape bad marriages (Fagan and Browne, 1994). Surprisingly, however, these cruelty divorces only equal about 6% of all Virginia divorces.<sup>39</sup>

Another legal variable of interest is whether or not a state has a no-fault divorce law. No-fault divorce has increased the chance of opportunistic divorces because a given spouse can unilaterally leave the marriage (Brinig and Crafton, 1994; Parkman, 1992). However, both spouses can behave opportunistically. Hence, despite its importance, we can make no predic-

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37. For an extended description of divorce and alimony history, see *Courson v. Courson* (1957).

38. More women obtained desertion-based divorces as well; adultery cases were approximately evenly split between men and women.

39. Going through individual Fairfax County divorce records filed in 1995, Brinig read the first 130 files (by date). In those, she found seven in which the wife had originally asked for a divorce based upon cruelty but in which the final grounds were separation (the no-fault ground) in each case. Eight plaintiffs (about evenly men and women) asked for divorces based upon adultery, again amending in each case to the no-fault ground.



tion on the sign of this variable. On the one hand, wives are more likely to file when a state has a no-fault law perhaps because they are fleeing bad, exploitive marriages. For this reason, feminist writers are particularly concerned with the potential cost of a return to fault-based divorce (Newmark et al., 1995; Singer, 1989). Conceivably, women trapped in unhappy marriages who might be penalized by leaving (through losing the divorce case or through lowered expectations of alimony or property) would have been able to extract themselves under a no-fault system. On the other hand, others have argued that no-fault divorce has led to huge transfers of wealth from wives, as husbands have been able to take particular advantage of the law. In addition, husbands have argued that wives have been able to exploit their husbands by taking the children with them.

The no-fault variable (coded 1 for Montana and Oregon and 0 for Virginia and Connecticut) was positive and significant, supporting the theory that bare restrictions on exit from marriage would be particularly costly to women. This result is particularly interesting because it suggests that wealth transfers from wives to husbands were not the only or necessarily the most important result of the switch to no-fault divorce, as implicitly suggested in much of the law and economic writing on divorce.<sup>40</sup>

#### 4.5. Aggregate Variables

In addition to these legal variables, we have access to a number of county-level aggregate variables. The most important and most studied of these is the divorce rate. Friedman and Percival (1976) noted that women tended to file more as divorce became more common, and the same result was reached for the more recent era by Gunter and Johnson (1978). When there are more divorces, the cost of divorce decreases in terms of social stigma (Brinig and Buckley, 1998b; Thornton, 1985), and a higher divorce rate also lowers the sense of difference between being a divorced

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40. However, it must be kept in mind that we are only testing this using four states, none of which have fault laws that resemble the standard fault laws of a generation ago, since even fault-retaining states such as Virginia and Connecticut allow divorce after no-fault separation periods. Furthermore, none of these states (and, in fact, no modern states) base property division on title, in which most of the transfer of wealth took place (Allen, 1990). The no-fault state rates in our study were Oregon, .674, and Montana, .651. Connecticut and Virginia, which retain fault, had .669 and .601, respectively.

person and everyone else. A larger divorced population suggests more social structures that can aid the divorced woman, from friends who urge divorce when a husband is abusive or even boorish to jobs that are more sensitive to the needs of single parents. Table 5 reflects the state divorce rates in 1995. We find mixed results for the *DIVRATE* variable.

Poverty (*POVERTY*) in itself may cause divorce but should be no reason for women to file as opposed to men.<sup>41</sup> Yet there is evidence that for lower economic groups, marriages are particularly difficult for wives (Kurz, 1995): there is more violence and general “rough living” through “hanging out with the guys,” and more alcoholic behavior. There is less ability to be a part of a stable community that will shore up a troubled relationship, since indigent people move frequently (McLanahan and Sandefer, 1994, p. 94). For these women, single parenthood—and the ability to collect Aid for Dependent Children (*AFDC*)—may not seem too different from their married state (McLanahan and Garfinkel, 1989; McLanahan, Casper, and Garfinkel, 1995). Hence, we might predict a positive relationship between *POVERTY* and female filing; however, we find this to be the case for Virginia, but not for Oregon.

Population density (*POPDENS*) may be connected to filing behavior because of the resulting “thickness” of the remarriage market.<sup>42</sup> On one hand, wives in rural areas—as many of the wives we studied were—may be more involved in their husband’s farming enterprises and simply have fewer outside employment opportunities than their husbands (*Watkins v. Watkins*, 1980; *Murdoch v. Murdoch*, 1973). On the other hand, in more densely populated areas husbands should be more likely to file because in cities, the “thicker” remarriage market will give them more choices of a new spouse (and they, more often than their wives, will remarry soon after divorce). Our data support the latter hypothesis in the first three of the equations.

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41. One of the many studies suggesting low income as an instability-enhancer is Becker, Landes, and Michael (1977). There may be many reasons why income enhances instability. Sociologists suggest that the husband’s sense of self-esteem is strongly tied to his earning capacity. When it decreases, he is less happy and more prone to violence against the family (Kurz, 1995). Divorce is more likely.

42. A “thick” market is one in which there are plenty of suppliers for a buyer to choose from. As Richard A. Epstein (1988, p. 768) says in an article about rent control, “The bilateral holdout problem is effectively controlled by increasing the number of alternative opportunities available. ‘Thick’ markets work more smoothly than ‘thin’ ones.” (See also Haddock, McChesney, and Spiegel, 1990, pp. 21–24).

**Table 5.** Comparative Divorce Rates, 1995

State	Divorces	Population	Divorce Rate
Alabama	25,957	14,253	6.103221
Alaska	2,999	604	4.965232
Arizona	27,633	4,218	6.551209
Arkansas	16,041	2,484	6.457729
California	—	31,589	—99
Colorado	18,795	3,747	5.016013
Connecticut	9,597	3,275	2.930382
Delaware	3,671	717	5.119944
Florida	79,528	14,166	5.614005
Georgia	37,209	7,201	5.167199
Hawaii	5,494	1,187	4.628475
Idaho	6,770	1,163	5.821152
Illinois	38,784	11,830	3.278445
Indiana	—	5,803	—99
Iowa	10,504	2,842	3.695989
Kansas	10,732	2,565	4.184016
Kentucky	22,883	3,860	5.928238
Louisiana	—	4,342	—99
Maine	5,467	1,241	4.405318
Maryland	15,025	5,042	2.979968
Massachusetts	13,453	6,074	2.21485
Michigan	39,910	9,549	4.179495
Minnesota	15,828	4,610	3.433406
Mississippi	13,076	2,697	4.84835
Missouri	26,844	5,324	5.042074
Montana	4,179	870	4.803448
Nebraska	6,256	1,637	3.821625
Nevada	12,355	1,530	8.075163
New Hampshire	4,871	1,148	4.243031
New Jersey	24,293	7,945	3.057646
New Mexico	11,279	1,685	6.693769
New York	55,999	18,136	3.087726
North Carolina	36,978	7,195	5.139402
North Dakota	2,204	641	3.438378
Ohio	48,682	11,151	4.365707
Oklahoma	21,829	3,278	6.659243
Oregon	14,982	3,141	4.769819
Pennsylvania	39,439	12,072	3.266981
Rhode Island	3,654	990	3.690909
South Carolina	14,753	3,673	4.016608
South Dakota	2,888	729	3.9615914
Tennessee	33,081	5,256	6.29395
Texas	98,373	18,724	5.253845
Utah	8,892	1,951	4.557663
Vermont	2,786	585	4.762393

**Table 5.** Continued

State	Divorces	Population	Divorce Rate
Virginia	28,897	6,618	4.366425
Washington	29,677	5,431	5.464371
West Virginia	9,393	1,828	5.138403
Wisconsin	17,522	5,123	3.420262
Wyoming	3,197	480	6.660417

#### 4.6. Black Sub-sample

Table 3 contains a regression using a sub-sample of black husbands and wives from the three states collecting racial information. Generally speaking, the results of this sample are similar to the results in the other regressions. In particular, the children variables are large and statistically significant, suggesting that custody decisions are important for filing. Also, the variable RELED (or relative years of education) remains large and significant. The major difference is in the age related variables. These variables essentially measure the presence of what we call “traditional” marriages, marriages in which the wife marries young and stays home with children. The lack of statistical significance is explained by the male/female earnings difference between blacks and whites. Whereas in 1995 white females still earned only 71% of what white males earned, for blacks this earnings ratio was 85% (U.S. Bureau of the Census, 1998, Table P33). More similar wages means that black women are more likely to be working than their white counterparts because the gains from market and household specialization are smaller. As a result, the age-related variables are not good predictors of divorce filing.

#### 4.7. Filing vs. Instigating Divorces

Finally, we should mention one additional factor that can be used to test our model. Throughout the paper we have assumed that the one who files for divorce also initiates marital breakup. Although this is clearly not always the case (and in cruelty and adultery cases, it is the aggrieved spouse who files), we predict that the filer is the same as the initiator in cases where divorce occurs quickly after breakup. When filing is independent of the marital break-up, because causation is difficult to sort out, there should be no systematic predictors of who files for divorce. Hence, we would expect that any clear indicators of differences in filers’ character-

istics would disappear over time. That is, we should see clear differences between those who file and those who do not for marriages that end after short separations where causation is less murky. For couples who separate for a long time before divorce, the distinction between filers should blur.

Oregon's data contains another variable of interest: the length of separation before divorce was granted.<sup>43</sup> A long period of separation in a no-fault state like Oregon could mean at least two things. The first, and we believe less likely meaning, is that a long separation period indicates a contested divorce, with the procedure dragged out to accommodate discovery, motions, and even a trial. The second, and more interesting, possibility is that a lengthy separation signals that the marriage disintegrated long before the actual divorce. Who filed at this point would be largely a matter of convenience and might be unrelated to the causes we have identified. We therefore separated the Oregon divorces into two separate regressions, one for divorces following a short (less than two-year) separation, and one for divorces following a lengthy (more than two-year) separation. The results are reported in the two Oregon columns of Table 4.

These regressions demonstrate that substantially more information about the reasons for filing appears with shorter separation periods. Not only is the percentage of correct predictions of who filed higher, but also individual variables such as the ages of the spouses (at marriage and at divorce) and the norm-related divorce rate make a difference only for the prompter divorces. Divorce filing, then, does not appear to be simply a matter of convenience, as has been suggested in some of the literature (Brinig and Buckley, 1998b; Parkman, 1992). Probably initiation of marriage dissolution correlates highly with divorce filing, as Braver and his co-authors (1993) suggest.

## 5. The Role of Child Custody in Divorce Filing

Table 6 uses the regression coefficients derived in the "All states" column of Table 3 to provide some intuition for the relative magnitudes of

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43. Oregon, which allows divorces only for "irreconcilable differences," allows them to be filed any time 90 days have passed since the service of the divorce summons. In extraordinary cases the judge may waive even this relatively short time period. *Or. Rev. Stat.* (1998).

**Table 6.** How Much Do the Numbers Matter?

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Case 1: Wife married at 19, husband at 26. They have been married 20 years, and have three kids. The husband gets custody. Husband has 7 years more education than the wife, and they live in a fault state. Wife is white. Probability that wife files = .095.	However, if the wife got custody, the probability that she would file increases to .69.
Case 2: They married when both were 26, and have been married 5 years. They have two children, and the wife will get custody. The husband finished college and the wife a law degree (three more years of education). They live in a no-fault state and wife is white. Probability that wife files = .79.	However, if the husband got custody, the probability that the wife files would decrease to .32.

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the different variables. Table 6 displays the strength of the *custody* coefficients under the conditions where the other variables are at their most extreme. In case 1, we have a situation biased in favor of the husband's filing. Merely switching the anticipation of custody in this case from the husband to the wife changes the probability of the wife's filing from .095 to .69—slightly more than a seven-fold increase. In case 2, the bias is in favor of the wife's filing. Yet switching the anticipation of custody from the wife to the husband results in a fall from .79 to .32 in the probability of the wife's filing for divorce.

As we have stressed throughout the paper, filing behavior can be interpreted as either an attempt to leave a bad situation or an attempt to leave the marriage with a disproportionate share of the marital property. Outside of the custody variables in our regressions, we find little evidence for the exploitation theory and more for the appropriation one. The question is: which theory best explains the remarkably strong custody coefficients we observe?

To understand how custody-related filing might be considered appropriation, we could simply describe children as assets—usually the most valuable and sometimes the only assets produced by the marriage (Zelder, 1994).<sup>44</sup> A variant of this (that might avoid concerns about commodification of children (Mahoney, 1988, p. 82; Radin, 1987, p. 1905; Sunstein, 1994, p. 850) would be that children are not exactly like other assets,

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44. Gary Becker (Becker and Lewis, 1973; Becker and Tomes, 1988) treated children as one of the outputs maximized in the household production function.

but that wives, as a general rule, place higher value upon their offspring than do their husbands (Fuchs, 1988, p. 72). Under either explanation, when a marriage becomes shaky, the party placing the highest value upon the children files. (In an extreme case, ending the marriage may even be beneficial for the children. For example, a loving parent might remove the children even at some financial cost in order to spare them continued contact with an unstable or impaired parent.)<sup>45</sup>

Alternatively, custody outcomes may strongly correlate with divorce filing because the spouse who desires custody upon divorce has been more involved with the children during marriage. Such involvement, which may require some withdrawal from the paid labor force, sets up a dependence relationship (Becker, 1991, p. 43; Fineman, 1995a, 1995b) that is not captured by the human capital (education or age) variables. That is, even though a wife has a college or graduate degree, or even though she is more educated than her husband, she may remain out of the labor force during her children's infancy, suffering a diminished lifetime income. She may thereafter need to make accommodations to childrearing even when she returns to full employment.<sup>46</sup> Once she becomes dependent in this way because of child bearing or child rearing, she is subject to the same exploitation we described earlier in the paper. In this view, she files when the marital situation becomes intolerable, usually for some reason not directly related to custody issues.

Having custody of children may even be a way of asserting control over a noncustodial parent (Driscoll, 1997), either personally (Ezra, 1994; Masters, 1998; Paul, 1989) or through the child support that usually goes along with the children (Weiss and Willis, 1993; Maccoby and Mnookin, 1992). The tremendous quantity (and frequent vindictiveness) of litigation over these post-divorce custody problems suggests that continuing relationships in this way indicates that custody may be a different type of asset, if it is indeed an asset. Modern divorce theory espouses a "clean break" concept (Ellman, 1989; Kay, 1987, p. 313); these post-divorce cus-

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45. Hetherington et al. (1998) supply evidence that children, usually harmed by divorce, are better off following the end of a highly conflicted marriage.

46. This is one of the few bases for compensatory spousal support allowed by the American Law Institute (1998; §5.03[2][b] and §5.06 and Comment [a]). For economic literature, see Fuchs (1998, p. 62), Hadfield (1993), Hersch, (1991), Jacobsen and Levin (1995), and Wright (1991).

tody battles suggest a relationship that continues despite divorce (Brinig, 1996, pp. 421–23; Weiss and Willis, 1985).

Although a number of state legislatures are currently considering some change in divorce grounds (such as “covenant marriage” or even a return to fault grounds), in nearly all states, as well as in the scholarly literature, custody standards and rules are “ground zero in the gender wars” (Carbone, forthcoming).<sup>47</sup> Because there is so much fervor over custody standards and because, whatever the custody rules’ impact upon parents, the outcomes are so important to children (Hetherington et al., 1982), we suggest further study to sort out the most important reasons that filing corresponds so closely to custody. We also suggest that because custody outcomes are so obviously important to who files for divorce, changes in custody rules are likely to have a major impact not only upon divorce filings but upon the conduct of marriage itself (Brinig and Buckley, 1998a; Williams, 1999).

In many modern marriages, men seemingly hold up their parts of a traditional bargain in a world where many, if not most, women have changed their roles dramatically (Nock, 1999). Men who see dual-earner parents divorcing tend to see the wife’s filing (and probably getting custody) as taking the children from the husband and may suggest some sort of joint custody presumption as a remedy (Fay, 1989). Women who view the same situation overwhelmingly see a working mother who files as being pushed out of an apparently bleak and hopeless situation, filing because she is simply exhausted. They prefer a custody pattern more closely mimicking the one set in the marriage, where the husband would have some meaningful parenting opportunities but the wife would remain the primary custodian (American Law Institute, 1998). Such women suggest not only that has she “earned custody” in a way her workaholic husband has not (Grillo, 1991; Kearney, 1996; McLain, 1994), but also that the children would not be as disrupted by such an arrangement.

The implications of whether women with children who file do so to “take assets” or because they are “exploited” might be teased out from a different data set. One could examine work and household patterns of both divorcing spouses at an earlier time (*t*) holding constant race, age, income,

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47. The phrase refers to the exact place where a nuclear device detonates. By this we mean, as Carbone does, that it is by far the most significant issue for most couples, itself driving other possible contributions to divorce as well as labor force differences.



length of marriage, and education. An additional variable would indicate whether each spouse was satisfied with the fairness of the household and labor market arrangements.<sup>48</sup> If the husbands' and wives' working and household patterns were similar at time ( $t$ ), and if they did not see their division of childcare and housework as a big problem in the marriage, a divorce by  $t(1)$  would probably be for other reasons than "exhaustion," and child custody might indeed simply be asset appropriation. If there was strong evidence of inequality in child care and housework and unhappiness about it in the earlier period, a subsequent divorce would seem more likely to be because of a felt exploitation coming out of the way child care and other household responsibilities were handled during the marriage.<sup>49</sup>

## 6. Conclusion

Our results are consistent with our hypothesis that filing behavior is driven by self-interest at the time of divorce. Individuals file for divorce when there are marital assets that may be appropriated through divorce, as in the case of leaving when they have received the benefit of educational investments such as advanced degrees. However, individuals may also file when they are being exploited within the marriage, as when the other party commits a major violation of the marriage contract, such as cruelty. Interestingly, though, cruelty amounts to only 6% of all divorce filings in Virginia.<sup>50</sup> We have found that who gets the children is by far the most important component in deciding who files for divorce, particularly when there is little quarrel about property, as when the separation is long.

What does all this mean for divorce reform and for predictions of future filing behavior? It suggests that as men and women's labor force income becomes more nearly equal, the difference in filing rates should disappear and will likely be determined by custody alone. The legal ramifications of the no-fault variable are perhaps the most interesting. In the jurisdictions we studied, even taking into account the higher divorce filing rates, women take advantage of the no-fault option more than do their

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48. Such a data set exists, in the National Survey of Families and Households (NSFH). The stability of marriages with various labor force and household work patterns and attitudes is being examined by Brinig and Nock.

49. In the NSFH, we don't know who filed, but we do know who got custody.

50. Virginia was the only state surveyed where we had indications of the grounds for divorce. Please note the caution about underreporting in note 44, *supra*.

**Appendix.** Frequency Distribution of Respondents' Reports of Which Spouses Wanted the First Marriage to End, by Sex: National Survey of Families and Households, 1987-88 and 1992-94

Question: "Sometimes both partners equally want a marriage to end, other times one partner wants it to end much more than the other. Circle the number of the answer that best describes how it was in your case."

Item and Response Categories	Women		Men		Total	
	<i>n</i>	Percent	<i>n</i>	Percent	<i>n</i>	Percent
1. I wanted the marriage to end BUT my husband/wife did not	338	27.2	67	9.6	405	20.7
2. I wanted it to end MORE THAN my husband/wife did	239	19.4	70	10.0	309	16.0
3. We both wanted it to end	223	17.8	197	28.1	420	21.6
4. My husband/wife wanted it to end MORE THAN I did	110	9.0	113	16.2	223	11.6
5. My husband/wife wanted it to end BUT I did not	116	9.5	142	20.3	258	13.4
Inappropriate/no answer	211	17.1	111	15.8	322	16.6
Total Responses	1237	100.0	700	100.0	1937	99.9

husbands.<sup>51</sup> From the woman's perspective, repealing no-fault laws may cause harm as compared to passing reforms that will make marriages better.<sup>52</sup> However, if filing behavior is mostly driven by attempts to exploit the other partner through divorce, tougher laws may be socially more

51. This does not mean that no-fault decreases the number of divorces; in fact, the evidence is to the contrary. From the married mothers' perspective, even taking into account the costs to the children, a quick divorce seems the best of unhappy choices. There is some evidence that no-fault has increased the divorce rate (Allen, 1992a; Brinig and Buckley, 1998b; Friedberg, 1998).

52. For some specific suggestions, see Waite (1995, p. 500) (eliminating "marriage taxation penalty"); Staudt (1996) (allowing homemaking women to be taxed for, and receive, Social Security); and Silbaugh (1996) (allowing women to enforceably contract with their husbands over housework).

beneficial. Because the custody coefficients were the largest by far, family law reformers may want to concentrate on formulating custody rules that will alter the spouses' relative gains from marriage. The authors favor custody rules that replicate the patterns in marriage as closely as possible while giving each spouse a meaningful role (i.e., not zero) after divorce, as opposed to either a "winner takes all" rule like "maternal preference" or "primary caretaker" or a presumption of equal joint custody shares. A replication rule would not make either spouse better off divorced than during marriage (Altman, 1996). It might encourage the sharing of child-rearing and other associated tasks, allowing more equal participation in the labor force.

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