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THE NO-BLAME GAME: WHY NO-FAULT DIVORCE IS OUR MOST DANGEROUS SOCIAL EXPERIMENT

By

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The nation is in revolt over marriage. Some 17 states have now passed amendments to protect the definition of marriage, and more will follow. The issue is plausibly credited with creating President Bush's margin of victory in the 2004 election and that of some congressional candidates. Same-sex marriage has also shaken the decades-long loyalty of African-Americans to the Democratic Party. Only a short time ago, few would have predicted such a public uprising in defense of marriage and the family.

And this may be only the beginning. Bill Cosby's celebrated remarks last year on family morality -- and the largely positive response -- has placed a once-taboo subject at the top of the African American agenda. And another ballot result has not received the attention it deserves: In liberal Massachusetts, a whopping 85 percent of voters defied the strident opposition of feminists and lawyers to approve a non-binding referendum giving fathers equality in custody decisions.

All this suggests that not only gay marriage but larger questions of family integrity and parenthood are set to convulse our politics. Those who cast their ballots last November on the basis of "moral values" may have had more in mind than just same-sex marriage, which is

neither the only threat to marriage nor even the most serious. To truly reverse the decline of the family, the momentum must be carried forward to confront the others. And eventually we must grasp a painful nettle: The most direct threat to the family is divorce on demand. Sooner or later, if civilization is to endure, it must be brought under control.

The most forthright marriage advocates recognize that, as Michael McManus of *Marriage Savers* writes, "Divorce is a far more grievous blow to marriage than today's challenge by gays." Predictably, this fact has been seized upon by advocates of same-sex marriage. "The weakening of marriage has been heterosexuals' doing, not gays', for it is their infidelity, divorce rates, and single-parent families that have wrought social damage," opines the *Economist*.

This distinction ignores the fact that the two problems are closely connected. Gay marriage would probably not be an issue in the first place if marriage had not already been weakened by divorce. "Commentators miss the point when they oppose homosexual marriage on the grounds that it would undermine traditional understandings of marriage," writes Bryce Christensen of Southern Utah University. "It is only because traditional understandings of marriage have already been severely undermined that homosexuals are now laying claim to it."

Likewise, though gay activists cite the very desire to marry as evidence that their lifestyle is not inherently promiscuous, Andrew Sullivan acknowledges that that desire arises only because of the promiscuity permitted in modern marriage. "The world of no-strings heterosexual hookups and 50 percent divorce rates preceded gay marriage," he points out in the *New Republic*. "All homosexuals are saying...is that, *under the current definition*, there's no reason to exclude us. If you want to return straight marriage to the 1950s, go ahead. *But until you do*, the exclusion of gays is...a denial of basic civil equality" (emphasis added). Gays do not want marriage in the traditional mold, only the watered-down version that exists today.

Blaming the Victim

While lamenting the high divorce rate is conventional piety among family advocates, most have refused to challenge the divorce laws. The standard rationalization is that to control divorce we must first change the culture. But no one suggests that changing the culture is a prerequisite for preventing, say, abortion. While cultural forces certainly contribute, the divorce epidemic has proceeded directly from a legal system which permits and even encourages it.

No-fault divorce laws were introduced in the United States and other industrialized countries during the 1970s and are being expanded into other regions of the world today. “No-fault” is a misnomer (taken from car insurance), for the new laws did not stop at removing the requirement that grounds be cited for a divorce. But they did create unilateral and involuntary divorce, so that one spouse may end a marriage without any agreement or fault by the other. Moreover, the spouse who divorces or otherwise abrogates the marriage contract incurs no liability for the costs or consequences, creating a unique and unprecedented legal anomaly. “In all other areas of contract law those who break a contract are expected to compensate their partner,” writes Robert Whelan of London's Institute of Economic Affairs, “but under a system of ‘no fault’ divorce, this essential element of contract law is abrogated.”

In fact, the legal implications go further, since the courts actively assist the violator. Attorney Steven Varnis points out that “the law generally supports the spouse seeking the divorce, even if that spouse was the wrongdoer.” “No-fault” did not really remove fault, therefore; it simply allowed judges to redefine it however they pleased. It introduced the novel concept that one could be deemed guilty of violating an agreement that one had, in fact, not violated. “According to therapeutic precepts, the fault for marital breakup must be shared, even

when one spouse unilaterally seeks a divorce,” observes Barbara Whitehead in *The Divorce Culture*. “Many husbands and wives who did not seek or want divorce were stunned to learn...that they were equally ‘at fault’ in the dissolution of their marriages.”

The "fault" that was ostensibly thrown out the front door of divorce proceedings re-entered through the back, but now with no precise definition. The judiciary was expanded from its traditional role of punishing crime or tort to punishing personal imperfections and private differences: One could now be summoned to court without having committed any infraction; the verdict was pre-determined; and one could be found "guilty" of things that were not illegal. Lawmakers created an "automatic outcome," writes Judy Parejko, author of *Stolen Vows*. "A defendant is automatically found 'guilty' of irreconcilable differences and is not allowed a defense."

Though marriage ostensibly falls under civil law, the logic quickly extended into the criminal. The "automatic outcome" expanded into what effectively became a presumption of guilt against the involuntarily divorced spouse (the defendant). Yet the due process protections of formal criminal proceedings did not apply, so involuntary divorcees could become criminals without any action on their part and in ways they were powerless to avoid. In some jurisdictions, a divorce defendant is the only party in the courtroom without legal immunity.

Contrary to the assumptions of "change the culture" thinking, these laws were not enacted in response to public demand: No popular clamor to dispense with divorce restrictions preceded their passage; no public outrage at any perceived injustice provided the impetus; no public debate was ever held in the media. Legislators "were not responding to widespread public pressure but rather acceding to the well-orchestrated lobbying of a few activists," writes Christensen.

"Eclipsed in the media...by other issues -- such as civil rights, Vietnam, Watergate, and abortion" -- the new laws rapidly swept the nation "with little publicity and no mass support."

In retrospect, these laws can be seen as one of the boldest social experiments in history. The result effectively abolished marriage as a legal contract. As a result, it's no longer possible to form a binding agreement to create a family.

Quiet Legal Maneuvers

Though the changes were passed largely by and for the legal business, the ideological engine that has never been properly appreciated was organized feminism. Not generally perceived as a gender battle -- and never one they wished to advertise -- divorce became the most devastating weapon in the arsenal of feminism, because it creates millions of gender battles on the most personal level. Germaine Greer openly celebrates divorce as the foremost indicator of feminist triumph: "Exactly the thing that people tear their hair out about is exactly the thing I am very proud of," she tells the *Australian* newspaper.

This is hardly new. As early as the American Revolution and throughout the 19th century, "divorce became an increasingly important measure of women's political freedom as well as an expression of feminine initiative and independence," writes Whitehead. "The association of divorce with women's freedom and prerogatives...remained an enduring and important feature of American divorce."

Well before the 1970s, it was the symbiosis of law and women's rights that created the divorce revolution. The National Association of Women Lawyers (NAWL) claims credit for no-fault divorce, which it describes as "the greatest project NAWL has ever undertaken." As early as 1947, the NAWL convention approved a no-fault bill. Working through the American Bar Association, NAWL convinced the National Conference of Commissioners of Uniform State

Laws (NCCUSL) to produce the Uniform Marriage and Divorce Act. "By 1977, the divorce portions had been adopted by nine states," NAWL proudly notes, and "the ideal of no-fault divorce became the guiding principle for reform of divorce laws in the majority of states." By 1985, every state had no-fault divorce.

Today, feminist operatives employ similar strategies to encourage divorce worldwide, often inserting it unnoticed and unopposed into programs for "human rights," and unilateral divorce is now one of the first measures implemented by leftist governments. When Spain's socialists came to power last year, their three domestic priorities were legalized abortion, same-sex marriage, and liberalized divorce. Iranian feminist Emadeddin Baghi writes in the *Washington Post* that "a 20 percent increase in the divorce rate is...a sign that traditional marriage is changing as women gain equality." And Turkey was required to withdraw a proposal to penalize adultery to gain acceptance in the European Union, while divorce liberalization counted in their favor.

The High Cost of Divorce

The damage done by family breakdown -- especially to children -- is now so well known that it hardly needs laboring. Children of divorced parents suffer far more emotional and behavioral problems than do children from intact families. They are more likely to attempt suicide and to suffer poor health. They perform more poorly in school and are more inclined to become involved with drugs, alcohol, gangs, and crime. These problems continue into adulthood, when children of divorce have more trouble forming and keeping stable relationships of their own. Through divorce, they in turn pass these traits to their own children. All this entails social costs for the rest of us, giving the public an interest in family preservation.

It might be one thing if parents were colluding to inflict this on their own children, as divorce defenders like to pretend. Even given the social consequences, a case might still be made that divorce is each couple's "private decision," as Michigan Governor Jennifer Granholm recently claimed when she vetoed a mild reform bill. But in the vast majority of cases, only one of the parents imposes divorce on the children *and* the other parent. Astoundingly, the parent who inflicts the divorce on the children is also the one most likely to retain custody of them. In such cases, divorce isn't remotely; it amounts to a public seizure of the innocent spouse's children and invasion of his or her parental rights, perpetrated by our governments and using our tax dollars.

Indeed, civil freedom is perhaps the least appreciated casualty of unilateral divorce. G.K. Chesterton once warned that the family is the most enduring check on government power and that divorce and democracy were ultimately incompatible. The repressive measures being enacted against divorced fathers -- most of whom never agree to a divorce and are legally faultless -- now include incarcerations without trial or charge, coerced confessions, and the creation of special courts and forced labor facilities.

Recognizing the Problem

No one should have any illusions that reversing these trends will be easy. The political interests that abolished marriage in the first place have only grown more wealthy and powerful off the system they created. Thirty-five years of unrestrained divorce have created a multibillion-dollar industry and given vast numbers of people a vested interest in it. Divorce and custody are the cash cow of the judiciary and directly employ a host of federal, state, and local officials, plus private hangers-on. More largely, the societal ills left by broken families create further

employment and power for even larger armies of officials. So entrenched has divorce become within our political economy, and so diabolical is its ability to insinuate itself throughout our political culture, that even critics seem to have developed a stake in having something to bemoan. Hardly anyone has an incentive to bring it under control.

In contrast with gay marriage, abortion, and pornography, politicians studiously avoid divorce laws. "Opposing gay marriage or gays in the military is for Republicans an easy, juicy, risk-free issue," Maggie Gallagher writes. "The message [is] that at all costs we should keep divorce off the political agenda." No American politician of national stature has ever challenged involuntary divorce. "Democrats did not want to anger their large constituency among women who saw easy divorce as a hard-won freedom and prerogative," observes Whitehead. "Republicans did not want to alienate their upscale constituents or their libertarian wing, both of whom tended to favor easy divorce, nor did they want to call attention to the divorces among their own leadership." In his famous denunciation of single parenthood, Vice President Dan Quayle was careful to make clear, "I am not talking about a situation where there is a divorce." The exception proves the rule. When Pope John Paul II spoke out against divorce in January 2002, he was roundly attacked from the Right as well as the Left.

Yet politicians can no longer ignore the issue. For one thing, the logic of the same-sex marriage controversy may force us to confront divorce, since the silence is becoming conspicuous and threatens to undermine the credibility of marriage proponents. "People who won't censure divorce carry no special weight as defenders of marriage," writes columnist Froma Harrop. "Moral authority doesn't come cheap."

There is also evidence that the public is becoming not only aware of, but increasingly impatient with, fallout from broken families. A 1999 NBC News/*Wall Street Journal* poll found

that 78 percent of Americans see the high divorce rate as a serious problem, and a *Time/CNN* poll found that 61 percent believe it should be harder for couples with young children to divorce. David Schramm of Utah State University estimates that divorce costs Americans \$33.3 billion annually. "Taxpayers who have preserved their own marriages through personal integrity and sacrifice," Christensen suggests, "may find it puzzling and offensive that state officials appear so willing to dissolve marriages and to collectivize the costs."

Fighting Back

Thus far, most proposals aimed at addressing the divorce issue have been limited to the least costly -- and least effective. Requirements that divorcing couples undergo waiting periods and counseling have passed in some states (and form the substance of most "covenant marriage" laws). But at best, such provisions merely delay the outcome. At worst, they place psychotherapists on the government payroll or force involuntary litigants to hire them. Either way, the therapists develop a stake in more divorce.

On the other hand, while simply banning groundless divorce shows more determination, it's unlikely to be very effective, since it isn't practical to force people to live together. An Arizona bill introduced in 2003, for example, stipulated that a court "shall not decree a dissolution of the marriage on grounds of incompatibility if: a) the wife is pregnant; or b) the couple has ever had a child." Such measures may discourage break-ups among observant Christians and could provide some legal redress against desertion. But as Chesterton observed, a ban on divorce is mostly, in practice, a ban on re-marriage. Under such a provision a spouse could simply separate (with the children) and live in permanent adultery with a new paramour.

Such schemes lend plausibility to some of the irrelevant arguments of divorce promoters:

"No good can come from forcing people to remain in loveless marriages, even in the misguided belief that somehow it is better for the children," runs an editorial in the *Daily Herald* of Provo, Utah, opposing a mild reform bill recently introduced. "Is it really good for children to be raised in a home by two parents who don't love each other and who fight all the time but who are forced to stay because of the law?"

These questions are red herrings. Divorce today does not necessarily indicate marital conflict and is less likely to be the last resort for a troubled marriage than a sudden power grab. Most divorces are initiated with little warning and often involve child snatchings. In 25 percent of marriage breakdowns, writes Margaret Brinig of Iowa State University, the man has "no clue" there is a problem until the woman says she wants out. A University of Exeter study found that in over half the cases there was no recollection of major conflict before the separation. "The assumption that parental conflict will cease at divorce is not only invalid," writes Patricia Morgan; "divorce itself instigates conflict which continues into the post-divorce period."

Further, as Judith Wallerstein and Sandra Blakeslee found, few children are pleased with divorce, even when severe conflict exists. "Children...can be quite content even when their parents' marriage is profoundly unhappy for one or both partners," they write. "Only one in ten children in our study experienced relief when their parents divorced. These were mostly older children in families where there had been open violence." Divorce and separation almost always have a more detrimental effect on children than even high-conflict marriages. "The misery their parents may feel in an unhappy marriage is usually less significant than the changes [the children] have to go through after a divorce," says Neil Kalter, a University of Michigan psychologist. Surveys of children by Ann Mitchell and J.T. Landis found that most recalled a happy family life before the breakup.

How the Law Can Be Reformed

In any case, limiting no-fault divorce will never force people to live together -- though done properly, it *will* provide strong incentives to work at their marriages rather than dissolve them. Reforming divorce laws, first of all, means re-introducing fault for violating the marital contract. It will, in effect, restore justice to the legal proceedings. "The alternative to liberal or 'no-fault' divorce is not no divorce," writes Whelan, "but divorce which is granted only...after due legal process to establish fault." The obvious counter-argument, that failed marriages often entail imperfections on both sides, does not justify abandoning all standards of justice. "There is fault on both sides in every human relationship," Fred Hanson acknowledged when the laws were enacted. "The faults, however, are far from equal. No secular society can be operated on the theory that all faults are equal." Hanson was the dissenting member of NCCUSL, which designed no-fault laws. "To do justice between parties without regard to fault is an impossibility," he warned. "I wonder what's to become of the maxim that no man shall profit by his own wrong -- or woman either, for that matter."

Tragically, we now have the answer in today's perversion of the criminal justice system by divorce-related accusations of domestic "abuse." Patently fabricated charges are now rampant in divorce courts, mostly to secure child custody and remove fathers, and the cry of "trapping women in abusive marriages" has become the principal argument against fault-based divorce. The irony is telling, since physical violence obviously is and always has been grounds for divorce. The argument also reveals the totalitarian nature of today's feminism. What feminists object to is being held to the same standards of evidence as everyone else by having to prove their accusations. Fault divorce would entail the "burden of proving that abuse had occurred,"

argues the *Daily Herald*. "It's not easy to accumulate medical records detailing injuries, eyewitnesses, and a police record of domestic violence calls to the house." It isn't? But that's precisely what the rest of us must do when we accuse others of vicious crimes. What feminists want -- and already have -- is the power to trample the presumption of innocence and due process of law in order to evict fathers on accusations of ill-defined "abuse" that cannot be proven because, in many cases, it did not take place at all.

This is the inevitable consequence of abolishing objective standards and allowing judges to create infractions out of whatever subjective grievance or "abuse" a tearful spouse invokes. To operate effectively, fault must entail objective, enumerated, and proven grounds that are understood at the time of marriage. These grounds may vary somewhat among jurisdictions, but spouses must have a reasonably predictable expectation of the consequences of specific misbehaviors and violations of the marital contract. This basic principle of justice is required of all other laws in a free society.

Further, to effectively deter divorce, fault must entail substantial consequences. Or stated more positively, innocence must carry substantial protections. While property considerations are not trivial, most important is that marriage must protect an innocent spouse's right to be left in peace with his or her children. Feminists complain that this punishes women for leaving a bad marriage. But strictly speaking (and aside from the question of whose behavior made it a bad marriage), it need entail no punishment at all. It simply allows an innocent spouse to invoke the protections for which he or she originally married.

This is the essential insight provided by the fathers in Massachusetts. Though not all of them question no-fault divorce, their plight illustrates why divorce reform will never succeed unless fault is tied to child custody. Because most divorces are filed by mothers, the fathers'

demands could sharply reduce divorce and the stranglehold of the divorce industry.

Yet even this alone will prove insufficient. Divorce and custody are connected with larger problems of judicial activism and corruption, and judges can readily concoct justifications to rule in the best interests of themselves and their cronies. The Massachusetts same-sex marriage decision has unwittingly created common cause between family advocates and judicial reformers. This alliance must be expanded, since divorce reform and judicial reform are inseparable. As Gallagher writes, "People don't trust the legal system to determine who committed a murder, let alone whose conduct destroyed a marriage."

Today's family crisis is being attacked piecemeal by groups that hardly talk to one another, each hacking at branches that proceed from a common root: pro-family groups trying to forestall same-sex marriage, marriage promoters trying to discourage divorce, fathers demanding equal rights, African-American leaders encouraging family responsibility, and judicial reformers pushing for improvement. Alone, none of these will reverse the decline of the family. But taken together, they wield sufficient political strength to challenge the formidable judicial-divorce machinery.

Something like this coalition is emerging in Virginia, where disparate groups have teamed up to propose a "Family Bill of Rights." In addition to a marriage amendment, legislators have introduced an amendment protecting "the God-given rights of parents" to determine the upbringing of their children. Stronger still, Catholic state senator Ken Cuccinelli proposes tying child custody to marital fault, giving children the security of knowing they cannot be torn from a parent unless that parent has already acted to destroy their home. Together, these measures will give Virginia the strongest family protection provisions in the Western world.

The Religious Dimension

But politicians and interest groups can only achieve so much; a central role remains for churches. Family integrity will be secure only when families are depoliticized and when the church, not the state, is both the first recourse at the advent of conflict and the family's principal guarantor against state encroachment. Our present predicament results partly because churches (with only the partial exception of the Catholic Church) abdicated these roles. Failure to intervene in the marriages it consecrated and to exert moral pressure on misbehaving spouses left a vacuum that has been filled by the state judiciary.

Reforming the family judiciary will therefore will create an immediate demand for the services of morally vigorous pastoral communities, even among those who previously viewed the church's role in their marriages as largely ceremonial. No greater challenge confronts the churches today -- nor any greater opportunity to stem the exodus from them, than to reinvigorate and defend their own sacrament and the families created by it.

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