What Divorce Has Done To America

Session 3

The Origins of the Divorce Culture

Reading 1: The Origins of the Divorce Culture

Jennifer Roback Morse

In 1968, California removed fault from divorce law. At that time, the divorce rate was around 6%. Removing fault from divorce was supposed to reduce the costs, financial, emotional, and social. However, the advocates of this change evidently did not anticipate that this seemingly modest modification in the law changed the incentives for everyone, not just for the relatively few people who would have gotten divorced in any case. Millions of people changed their behavior. The best estimate is that the law changed the divorce rate by about 10%

Removing the fault basis for divorce redefined marriage in two ways. Obviously, no-fault divorce removed the presumption of permanence from the marriage bond. At the same time, no-fault removes the presumption that marriage is a sexually exclusive union. This is because adultery had been considered a marital fault. One party was the ofending party, the other was the innocent party. This was precisely the language that the advocates of no-fault wished to eliminate. Under this new legal regime, the presumption that marriage is a lifelong sexually exclusive union came to an end.

Given the enormity of this change, we might well ask where it came from.

Inside the legal profession, the push for no-fault divorce had been brewing for some time, through the American Law Institute (ALI). Founded in 1923, with support from the Carnegie Foundation, the ALI in efect attempted to nationalize law, by creating model codes and restatements. These publications were the result of the work of numerous experts, summarizing case law pertinent to specific subjects. “The selfdefining professional class of legal experts who established the ALI—predominately Ivy League law professors—pioneered a juristic methodology that would not merely recognize the changing needs of contemporary society, but also “restate” the law in such a way as to accommodate those social realities.”

Notes

Please write any comments or questions for discussion here.

Beginning well before the change in divorce laws, the Institute's Model Penal Code promoted the concept that private sexual acts between consenting adults should be decriminalized. This notion drove a wedge between private acts and public morality, indeed undermining the very idea of public morality. In fact, it is safe to say that this "private sexual acts between consenting adults" image is probably the predominant template most people have in mind when they consider what government's role should be. This concept obscures the fact that private sexual acts might have extensive social and public consequences.

With the private/public dichotomy in place, state legislators had trouble seeing the full implications of losing the presumptions of permanence and exclusivity from marriage. The behavior of married couples toward one another is not entirely private, because their behavior afects their children, and may afect their parents, siblings, and other family members. Nor is the behavior of married couples toward one another entirely public, in the sense that it is a fit subject for detailed government regulation.

A better way to understand the significance of married couples' behavior toward one another is to see it as "social:" a concept that acknowledges inter-personal nature of their actions, without giving the government free reign to regulate it. But this is precisely the point that is obscured by a sharp private/public dichotomy,4 promoted by the American Law Institute.

By 1974, all but five states had adopted some form of no-fault divorce. In 1974, the National Conference of Commissioners of Uniform State Laws, with funding from the Ford Foundation, led an efort toward nationwide simplification of family law. The 1974 promulgation of the Uniform Marriage and Divorce Act, with the endorsement of the American Bar Association, lent national legitimacy to a process that had occurred piecemeal throughout the states, beginning with California in 1968.

More recently, (2002) the American Law Institute published its Principles of the Law of Family Dissolution. One commentator sympathetic to its aims stated bluntly, "by marshaling the considerable powers of the ALI in opposition to the divorce counterrevolution, the Principles declared the second death of marital fault as a limitation upon the freedom to divorce." Note the language: "freedom to divorce."

And what exactly was this "divorce counterrevolution?" Numerous states have attempted to place divorce reform procedures into place. One expert lists the following: 1) mandatory mediation, 2) other forms of alternative dispute resolution, 3) therapeutic jurisprudence, 4) diferent procedures for parties with children than for parties without children, 5) waiting periods, 6) premarital counseling, 7) covenant marriage approaches (now adopted in Louisiana, Arizona, and Arkansas), 8) general marriage education programs, and 9) special assistance for low income or special needs couples such as those provided by the so-"marriage initiatives" of the Clinton and Bush welfare reforms. The people acting through their state and even federal legislatures, have attempted to reign in the excesses of the no-fault revolution. Waiting periods for divorce have had some success in reducing divorce rates. But the ALI retains its staunch opposition to any consideration of marital fault.

Professor Lynn Wardle has shown that the American Law Institute's Principles of the Law of Family Dissolution approach to fault has serious inconsistencies. Their recasting of the marital bond into almost corporate terms allows for consideration of the dissipation of marital assets as part of the property settlement: if one party squanders family wealth, this can be considered in the property settlement. It is almost an "economic fault." Allegations of assault, battery or abuse of the children can be handled as criminal acts. Other problems can be handled by tort law.

So, if the ALI's Principles still efectively permit economic faults and abuse faults, what does no-fault amount to? It means that the major fault removed by "nofault" was adultery or sexual infidelity. Adultery is consistently ranked as one of the most frequent causes of divorce. Sexual betrayal causes enormous pain to the injured spouse. Parental abandonment of the family for a new love interest deeply wounds children. All branches of Christianity and Judaism consider adultery a serious sin. For all these reasons, writing adultery out of the law was a momentous step in redefining marriage.

The reason we no-fault divorce in this country is simple. The Legal Elite, acting through the American Law Institute, and with the support of large foundations, captured the power of the State to impose their values on the rest of the country. Nofault divorce was not instituted because of a widespread demand from ordinary people for new divorce processes and procedures.

Financial misconduct and dissipation of assets ought to be considered in divorce settlements, but "moral" issues like adultery should not. The people, acting through their elected representatives in the states, have attempted to curb the worst excesses of the no-fault divorce revolution. The Managerial Class has doubled down on no-fault, in its 2002 **Principles of the Law of Family Dissolution.**

Recent attempts at divorce reform, and what they demonstrate

Some states have made attempts to reform their divorce laws. Observing the fate of these attempts is most instructive.

Shared parenting

A few states have tried to institute a presumption of shared parenting. This is potentially a valuable reform because the presumption of equal parenting time reduces the incentives to divorce. Equal parenting time allows the child to maintain a close bond with both parents. And the presumption of equal parenting is just that: a presumption. The states that tried to enact this principle included a proviso that the presumption could be overridden under some circumstances.

In 2016, the Florida state legislature passed a custody reform bill. The governor vetoed it, due to extensive lobbying from the Family Law section of the Bar Association. In fact, the Family Law section hired emergency lobbyists to defeat the bill. In 2014, citizens in North Dakota placed a shared parenting bill on the ballot. The bill appeared to have popular support. A committee called "Keeping Kids First" formed to oppose it. The funding for this organization came entirely from the State Bar Association and the Family Law Section of the Bar Association. In fact, the Bar Association was later sued for improper use of member funds for political lobbying. But not before they had defeated the shared parenting measure.

In 2016, the Alabama Family Rights Association defeated a bill that did not have shared parenting. Who had favored, and indeed authored this bill? The Family Law Committee, of the Alabama Law Institute (ALI). 15
Do you see a pattern? The family law bar, which makes money managing postdivorce conflict, opposes divorce reform.

Reading 2: Divorced from Reality

Stephen Baskerville

Notes

Defenders of marriage must face some hard facts or they are going to lose their fight—and with it, quite possibly, their religious freedom as well. Federal judge Vaughn Walker's ruling nullifying Proposition 8 in California illustrates that, unless we can demonstrate very specific reasons why same-sex marriage is socially destructive, it will soon be the law of the land.

With conservatives as prominent as Glenn Beck and Ann Coulter joining those "influential Americans," in the words of the National Review, who "have been coming increasingly to regard opposition to same-sex marriage as irrational at best and bigoted at worst," we can no longer rely on vague assertions that homosexual marriage weakens true marriage in some way—which in itself, actually, it does not.

Considerable nonsense has been written by some opponents of same-sex marriage, while some critical truths are not being heard. Confronting the facts can enable us to win not only this battle but several even more important ones involving family decline and the social anomie it produces.

First: Marriage exists primarily to cement the father to the family. This fact is politically incorrect but undeniable. The breakdown of marriage produces widespread fatherlessness, not motherlessness. As Margaret Mead pointed out long ago—yes, leftist Margaret Mead was correct about this—motherhood is a biological certainty whereas fatherhood is socially constructed. The father is the weakest link in the family bond, and without the institution of marriage he is easily discarded.

The consequences of failing to link men to their offspring are apparent the world over. From our inner cities and Native American reservations to the north of England, the banlieues of Paris, and much of Africa, fatherlessness—not poverty or race—is the leading predictor of virtually every social pathology among the young. Without fathers, adolescents run wild, and society descends into chaos.

The notion that marriage exists for love or "to express and safeguard an emotional union of adults," as one proponent puts it, is cant. Many loving and emotional human relationships do not involve marriage. Even the conservative argument that marriage exists to rear children is too imprecise: marriage creates fatherhood. No marriage, no fathers.

Once this principle is recognized, same-sex marriage makes no sense. Judge Walker's "finding of fact" that "gender no longer forms an essential part of marriage" is rendered preposterous. Marriage between two men or two women simply mocks the purpose of the institution. Homosexual parenting only further distances biological fathers (and some mothers too) from their children, since at least some homosexual parents must acquire their children from someone else—usually through heterosexual divorce.

Here is the second unpleasant truth: homosexuals did not destroy marriage, heterosexuals did. The demand for same-sex marriage is a symptom, not a cause, of the deterioration of marriage. By far the most direct threat to the family is heterosexual divorce. "Commentators miss the point when they oppose homosexual marriage on the grounds that it would undermine traditional understandings of marriage," writes family scholar Bryce Christensen. "It is only because traditional understandings of marriage have already been severely undermined that homosexuals are now laying claim to it."

Though gay activists cite their desire to marry as evidence that their lifestyle is not inherently promiscuous, they readily admit that marriage is no longer the barrier against promiscuity that it once was. If the standards of marriage have already been lowered, they ask, why shouldn't homosexuals be admitted to the institution?

"The world of no-strings heterosexual hookups and 50% divorce rates preceded gay marriage," Andrew Sullivan points out. "All homosexuals are saying C9 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 simply an anomaly—and a denial of basic civil equality."

Feminist Stephanie Coontz echoes the point: "Gays and lesbians simply looked at the revolution heterosexuals had wrought and noticed that, with its new norms, marriage could work for them, too."

Thus the third inconvenient fact: divorce is a political problem. It is not a private matter, and it does not come from impersonal forces of moral and cultural decay. It is driven by complex and lucrative government machinery operating in our names and funded by our taxes. It is imposed upon unwilling people, whose children, homes, and property may be confiscated. It generates the social ills that rationalize almost all domestic government spending. And it is promoted ideologically by the same sexual radicals who now champion same-sex marriage. Homosexuals may be correct that heterosexuals destroyed marriage, but the heterosexuals were their fellow sexual ideologues.

Conservatives have completely misunderstood the significance of the divorce revolution. While they lament mass divorce, they refuse to confront its politics. Maggie Gallagher attributes this silence to "political cowardice": "Opposing gay marriage or gays in the military is for Republicans an easy, juicy, risk-free issue," she wrote in 1996. "The message [is] that at all costs we should keep divorce off the political agenda."

No American politician of national stature has seriously challenged unilateral divorce. "Democrats did not want to anger their large constituency among women who saw easy divorce as a hard-won freedom and prerogative," writes Barbara Dafoe 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." A lengthy article in the current Political Science Quarterly is devoted to the fact—at which the author expresses astonishment—that self-described "pro-family" Christian groups devote almost no effort to reforming divorce laws.

This failure has seriously undermined the moral credibility of the campaign against same-sex marriage. "People who won't censure divorce carry no special weight as defenders of marriage," writes columnist Froma Harrop. "Moral authority doesn't come cheap."

Just as marriage creates fatherhood, so divorce today should be understood as a system for destroying it. It is no accident that divorce court has become largely a method for plundering and criminalizing fathers. With such a regime arrayed against them, men are powerfully incentivized against marrying and starting a family. No amount of scolding by armchair moralists is going to persuade men into marriages that can mean the loss of their children, expropriation, and incarceration.

The fourth point is perhaps the most difficult to grasp: marriage is not entirely a public institution that government may legitimately define and regulate. It certainly serves important public functions. But marriage also creates a sphere of life beyond official control—what Supreme Court Justice Byron White called a "realm of family life which the state cannot enter." This does not mean that anything can be declared a marriage. On the contrary, it means that marriage creates a singular zone of privacy for one purpose above all: it is the bond within which parents may raise their children without government interference.

Parenthood, after all, is politically unique. It is the one relationship in which people may exercise coercive authority over others. It is the one exception to state's monopoly of force, which is why government is constantly trying to undermine and invade it. Without parental and especially paternal authority, legitimized by the bonds of marriage, government's reach is total. This is already evident in those communities where marriage and fathers have disappeared and government has moved in to replace them with welfare, child-support enforcement, public education, and tax-subsidized healthcare.

Marriage is paradoxical in a way that is critical to our political problems—and that causes considerable confusion among conservatives and libertarians. Marriage must be recognized by the state precisely because it creates a sphere of parental authority from which the state must then withdraw. Government today can no longer be counted upon to exercise this restraint voluntarily. We must all constantly demand that it do so. Marriage—lifelong and protected by a legally enforceable contract—gives us the legal authority and the moral high ground from which to resist encroachments by the state.

Notes

Prohibitions on homosexual marriage will not save the institution. As Robert Seidenberg writes in the Washington Times, "Even if Republicans were to succeed in constitutionally defining marriage as a relationship between a man and a woman, some judge somewhere would soon discover a novel meaning for 'man' or 'woman' or 'between' or 'relationship' or any of the other dozen words that might appear in the amendment."

This is already happening. Britain's Gender Recognition Act allows transsexuals to falsify their birth certificates retroactively to indicate they were born the gender of their choice. "The practical effect C9 will inevitably be same-sex 'marriage'," writes Melanie Phillips in the Daily Mail. "Marriage as a union between a man and a woman will be destroyed, because 'man' and 'woman' will no longer mean anything other than whether someone feels like a man or a woman."

So what is the solution? A measure already before Congress may show the way. Though not intended primarily to save marriage, the proposed Parental Rights Amendment is the first substantial step in the right direction. It protects "the liberty of parents to direct the upbringing and education of their children." How does this strengthen marriage?

Reaffirming the rights of parents—married parents particularly—to raise their own children would weaken government interference in the family. Especially if worded so as to protect the bond between children and their married fathers, such a measure could undermine both the divorce regime and same-sex marriage by establishing marriage as a permanent contract conferring parental rights that must be respected by the state. Within the bonds of marriage, it would preserve the rights of fathers, parents of both sexes, and spouses generally, and it would render same-sex marriage largely pointless. Marriages producing children would be effectively indissoluble, and there would be fewer fatherless children for homosexuals to adopt. Men would come to understand that to have full rights as fathers they must marry before conceiving children, and they would thus have an interest in ensuring the institution's permanence.

This is not a small undertaking. It would mean confronting the radical sexual establishment in its entirety—not only homosexuals but their allies among feminists, bar associations, psychotherapists, social workers, and pubic schools. It would raise the stakes significantly—or rather it would highlight how high the stakes already are. It would also focus public attention on the interconnectedness of these threats to the family and freedom. It would foster a coalition of parents with a vested personal interest in marriage and parental rights.

The alternative is to continue mouthing platitudes, in which case we will be dismissed as a chorus of scolds and moralizers—and yes, bigots. And we will lose.

Suggested Questions About the Readings:

1. What struck you about these readings?

2. Did anything especially surprise you about this reading?

3. Does it matter to you who changed the divorce laws and what their motives were? If so, why? If not, why not?

4. Have you encountered the family court system? What was your experience? Was your experience consistent with what Baskerville describes?

5. How can the members of the group support you this week?

6. Whom would you like to invite next week?

> Activity: Check with the Ruth Institute "Sign our Petitions" page to see if there are any legislative efforts for divorce reform. Sign the petitions, and get involved in the activity near you.