Reading 1: The Origins of the Divorce Culture

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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.