

**Divorce American-Style**  
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**Introduction**

James and Janne Hayes were married in 1941 as nineteen-year old college students. They had four children. With one brief exception, Janne Hayes never worked outside the home. After twenty-five years of marriage, she filed for divorce under California's fault-based divorce code and was awarded the family home, custody of the two minor children, \$650 per month in alimony until death or remarriage, and \$175 per month child support until the children reached adulthood.

In 1972, James Hayes filed a petition to end his financial obligations to his wife on the grounds that his financial condition had changed. (He had also remarried.) To bolster his claim, he quoted from the California Assembly Judiciary Committee Report on the 1969 California no-fault statute, enthusiastically signed into law by then-Gov. Ronald Reagan:

When our divorce law was originally drawn, woman's role in society was almost totally that of mother and homemaker. She could not even vote. Today, increasing numbers of married women are employed, even in the professions. In addition, they have long been accorded full civil rights. Their approaching equality with the male should be reflected in the law governing marriage dissolution and in the decisions of courts with respect to matters incident to dissolution.

Hayes prevailed. Child support was ended and alimony cut by more than half. A year later, he was back in court and won another reduction in alimony. The judge told Janne Hayes to get a job.

An oft-told tale, but with a twist: Assemblyman Hayes was the chairman of the California Senate Judiciary Committee that drafted the no-fault statute and wrote the report he subsequently quoted in his brief. His was not an isolated case. A few years earlier, then-Governor Edmund G. Brown established a Commission on the Family, which recommended the elimination of fault as grounds for divorce. Of the fifteen citizens who testified before the commission, fourteen were men; ten were divorced.

The no-fault divorce revolution of the past quarter century was not in any simple sense the product of a male conspiracy. Many women's groups, lawyers, judges, academics, and family-practice professionals strongly favored this change, on the ground that it was needed to end (as one supporter put it) "the hypocrisy of strict divorce laws administered by a lenient process." And starting in the mid-1960s, public opinion began swinging toward more relaxed laws.

Still, the principal beneficiaries of no-fault divorce have been men--especially those seeking easier exit from long-

established marriages. The principal victims have been women in such marriages, along with minor children. There has been, as well, a broader casualty: the idea of marriage as a presumptively permanent relationship--as a structure of incentives for individuals to contribute to the well-being of the family, and a framework of reasonable expectations of reciprocal benefits over the lifetime of the partnership. And pervasive divorce has imposed large costs on society as a whole. For example, children's post-divorce psychological and behavioral problems have multiplied the challenges facing teaching, and jurisdictions at every level of the federal system have had to invest huge sums in child support enforcement.

The benefits of no-fault divorce were immediate; an understanding of its costs emerged more slowly, through painful experience and the gradual accretion of research. Today, these doubts have reached critical mass. Public opinion is swinging back toward more restrictive divorce law. (Support for tougher laws is strong among young adults, many of whom as children directly felt the consequences of divorce.) Proposals to roll back no-fault are already under consideration in the legislatures of Iowa and Michigan, with more states likely to follow suit soon.

### **What's going on?**

We have good reason to be worried about the current state of marriage and divorce in America. To be sure, the rate of divorce has been trending upward fitfully for more than a century. Still, the rate of divorce in 1960 was no higher than it had been in 1940, and not much higher than in 1920. (There was a spike right after World War II, but it quickly subsided.) Then, between 1960 and 1980, the rate of divorce surged by nearly 250 percent. Since then, it has stabilized, but at a rate that is the highest by far in the industrialized world.

About half of all marriages undertaken today are likely to end in divorce. Forty percent of all first marriages will suffer that fate, compared to only 16 percent in 1960. Upwards of 60 percent of all remarriages will not endure.

Three-fifths of all divorces involve minor children. The number of children directly touched by divorce each year has doubled, from 485,000 thirty years ago to about one million today. The percentage of children living in mother-only households (headed by never-married as well as divorced women) has also more than doubled. About 40 percent of children living in such households have not seen their fathers during the past year; only one in six see them more than once a week.

Children typically encounter difficulties in the wake of divorce. The conventional wisdom is that these negative effects are attributable to two factors distinguishable from divorce itself: steep income losses after divorce, and intra-family conflicts before divorce.

This conventional wisdom is not entirely wrong: Pre-divorce

conflict accounts for about half the observed post-divorce difficulties for boys, and somewhat less than half for girls. And correcting for pre-divorce conflict, economic decline accounts for about half the remaining damage.

But the conventional wisdom of the 1970s and 1980s not the whole truth. Since 1990, a number of leading researchers--Frank Furstenberg, Andrew Cherlin, Sara McLanahan, Gary Sandefur, and Nicholas Zill, among others--have assembled large quantities of original data and subjected them to rigorous analysis. Here is the consensus of their findings:

There is a critical distinction between divorces involving physical abuse or extreme emotional cruelty and those that do not.

Minor children in the former category are on balance better off than if their parents had remained married. But the opposite is the case for the children in the latter category, where divorce follows lower-intensity conflict. Correcting for the effects of both income loss and pre-divorce conflict between parents, divorce in these cases has an independent, negative effect on the well-being of minor children along a number of key dimensions: school performance; high school completion; college attendance and graduation; labor force attachment and work patterns; depression and other psychological illnesses; crime; suicide; out-of-wedlock births; and the propensity to become divorced. There is also evidence that the experience of divorce diminishes trust (in other individuals as well as institutions) and impedes the capacity of children, once grown, to form stable, lasting relationships. And there are significant gender differences: boys tend to "act out" their feelings of abandonment and resentment, while girls turn inward and become depressed. The negative effects on boys typically are seen early on; for girls, they are frequently delayed until adulthood.

As Furstenberg and Cherlin summarize the implications of this emerging understanding: "It is probably true that most children who live in a household filled with continual conflict between angry, embittered spouses would be better off if their parents split up--assuming that the level of conflict is lowered by the separation. And there is no doubt that the rise in divorce has liberated some children (and their custodial parents) from families marked by physical abuse, alcoholism, drugs, and violence. But we doubt that such clearly pathological descriptions apply to most families that disrupt. Rather, we think there are many more cases in which there is little open conflict, but one or both partners finds the marriage personally unsatisfying. . . . A generation ago, when marriage was thought of as a moral and social obligation, most husbands and wives in families such as this stayed together. Today, when marriage is thought of increasingly as a means of achieving personal fulfillment, many more will divorce. Under these circumstances, divorce may well make one or both spouses happier; but we strongly doubt that it improves the psychological well-being of the

children."

In a recent interview, Gary Sandefur candidly discusses the reception and implications of his work with Sara McLanahan: "When we first started publishing parts of our research seven or eight years ago, it was surprising to a lot of people because our findings tended to contradict the myth that growing up in a single-parent family is no worse than in a two-parent family. We found it does make a difference; and in a sense, this confirmed the conventional wisdom of an earlier age, which few wanted to accept in the mid eighties. Many people preferred to believe that divorce would not have an adverse effect on their kids. . . ."

Children are not the only victims of divorce. While early no-fault supporter Lenore Weitzman's claim that women suffer a 70 percent decline in their standard of living post-divorce is no longer widely accepted, the Panel Study of Income Dynamics has documented a 30 percent drop, as compared to a 10 to 15 percent increase for divorced men. According to David Larson, for many years a research psychiatrist at the National Institutes of Health, "Divorce and the process of marital breakup puts people at much higher risk for both psychiatric and physical disease. Being divorced and a non-smoker is only slightly less dangerous than smoking a pack or more of cigarettes and staying married." Divorced men are twice as likely to die from heart disease, stroke, hypertension, and cancer as married men in any given year. Divorced women are two to three times as likely to die from various forms of cancer.

### **Law, economics, and culture**

This period of rapid change in the incidence and consequences of divorce has also been a period of rapid change in the law of divorce. As recently as 30 years ago, every state had a fault-based system. The standard grounds for divorce included adultery, physical abuse, mental cruelty, desertion, imprisonment, alcoholism or drug addiction, and insanity. Just five years after the passage of California's no-fault statute in 1969, 45 states had followed suit. By 1985, the last bastions had crumbled; every state had either replaced its old fault system or had added important no-fault options.

These legal changes coincided with a period of pervasive economic change. Women surged into the paid workforce in unprecedented numbers. Male salaries and wages declined, both absolutely and relative to those of women.

It was also a period of profound cultural change. Daniel Yankelovich has recently charted some of the key shifts. Compared to 30 years ago, he finds, Americans today place less value on obligation to others, on sacrifice, and on self-restraint. By contrast, we place more value on individualism, on self-expression and self-realization, and on personal choice.

These shifts are correlated with important changes in attitudes toward children, families, and marriage. Americans are

far more accepting of divorce than we were 30 years ago. We are far more likely to say that marriage is first and foremost a means to personal happiness. And we are far less inclined to believe that parents in a less than fully satisfactory marriage ought to make an effort to stay together for the sake of their children. Up to the mid-1960s, about half of all Americans thought that parents had an obligation to make this effort. By 1994, that figure had declined to about 20 percent.

It is tempting to conclude that the movement toward no-fault divorce is just the product of these economic and cultural changes and that it has had no independent effect on divorce rates or outcomes. This view was largely unchallenged until about a decade ago. But here too the tide is turning. While full scholarly returns are not yet in, evidence is accumulating that once instituted, no-fault laws further accelerated the pace of divorce.

An article recently published in the Journal of Marriage and the Family conducted a 50-state statistical survey and concluded that "the switch from fault divorce law to no-fault divorce law led to a measurable increase in the divorce rate." (This study used a range of statistical techniques to distinguish between long-term trends and temporary surges representing pent-up demand for divorce, on the one hand, and the enduring effects of the shift to no-fault on the other.) The effect of legal change is especially powerful for older couples in marriages of twenty-five years and more. It seems increasingly likely that no-fault divorce laws gave added impetus to the economic and cultural trends already well underway in the 1970s.

Some scholars have argued that no-fault divorce has not worsened the post-divorce economic circumstances of women. This seems intuitively unlikely. In circumstances in which divorce is not consensual, no-fault weakens the bargaining position of the spouse who wants the marriage to continue. The movement from fault to no-fault has been correlated with an increase in male-initiated divorces. In an important 1986 study published in the American Economic Review, Elizabeth Peters showed that wives fare best in states that restrict unilateral no-fault, and worst in states that grant it on demand. Moreover, the egalitarian norm underlying no-fault has led to the presumption (in some states a legal requirement) that marital property be divided equally--in practice, a dramatic shift away from the prior system in which women typically received the bulk of the property.

The now-vanished fault system afforded some protection for women who chose (in economic terms) to "specialize" in household responsibilities. Protection was necessary because the opportunity-cost of this decision is (on average) a permanent reduction of earnings potential in the paid workforce. The adoption of no-fault divorce has had two predictable effects. Older women caught in the transition with no opportunity to adjust found themselves much worse off after divorce. Younger women adjusted by accelerating their movement toward economic

independence. While the growth of real wages accounts for most of the increase in female labor force participation between 1950 and 1980, no-fault divorce has been shown to have an independent effect on women's paid labor since then.

There are theoretical reasons to give weight to such findings. Easier divorce laws are expected to produce an "investment effect"--the diminished propensity to invest time or resources in relationships that don't hold out the promise of security. There is also a "demonstration effect": once a practice becomes pervasive in a community, individuals at the margin--those who might go one way or another--may be pushed in a particular direction by the behavior of those around them.

And finally, there is the "destigmatization effect. There is no question that no-fault divorce laws symbolized the spreading belief that divorce presented no particular moral problem, that there was, in the moral as well as legal sense, no fault. As Lenore Weitzman puts it: In abolishing the concept of fault, no-fault divorce "also eliminated the framework of guilt, innocence, and the law's condemnation of marital misconduct." As Mary Ann Glendon has observed, in moving away from the legal standard of fault, we also set aside the moral standard of responsibility.

There are, I would suggest, three dimensions of law: the declaration of commands, prohibitions, and permissions; the creation of a structure of incentives for bargaining and acting; and the expression of community sentiments and values. No-fault divorce is seriously flawed along each of these dimensions. It permits adults to abandon spouses and children for inadequate reasons; it creates perverse incentives to underinvest in the marital relationship; and it gives pride of place to norms of personal conduct that do not do justice to our best understanding of marriage and family.

### **From social analysis to public policy**

Many leading researchers now espouse the view that children would be better off if there were fewer divorces stemming from lower-intensity conflict between adults. In Marriage, Divorce, Remarriage, for example, Cherlin says that "I don't think a divorce under these conditions helps children." In a recent interview, Sandefur states that "Most parents divorce because of conflict between themselves that doesn't affect the kids that much. In other words, if the mothers and fathers stayed together, they might not particularly enjoy themselves, but the kids would be better off if they could work together as effective parents."

In light of recent research findings, the real issue is not whether children would benefit from lower divorce rates; they would. The issue is whether public policy can help bring about this result at all--or whether it can do so at an acceptable cost.

Many scholars who share my discomfort with the condition of the American family see economic and cultural change as the main causes of higher rates of divorce, and legal change as the

reflection of these deeper shifts. Furstenberg and Cherlin speak for many others when they say, "Although we would support public efforts the strengthen marriage, we are inclined to accept the irreversibility of high levels of divorce as our starting point for thinking about changes in public policy." By contrast, my analysis stresses the extent to which legal change has independently intensified the effects of economic and cultural change. Of course there are limits to what another round of divorce law reform could accomplish. But the evidence now available does not permit us to conclude that law is powerless to affect conduct.

It would be odd if it were. The law of divorce determines the barriers to, and costs of, exit from marriage. Theory predicts what observation confirms: at the margin, lower barriers to exit produces a larger number of departures. Some couples will stay married, regardless of the legal regime; others will get divorced, even at enormous cost; but many in the middle zone of discontent will be influenced by the perceived difficulty of ending an unsatisfying but not disastrous relationship.

Other scholars and activists resist a new round of divorce law reform, not because they believe law is impotent, but rather because they fear it could only achieve its objectives at excessive moral cost: individual freedom, expression, and development would be thwarted; couples would be trapped in loveless relationships; women would be exposed to even higher levels of abuse.

Many of these fears rest on the assumption that the only alternative to the status quo is a return to the law as it existed prior to 1969. This is a false choice: there are many reform possibilities that do not represent a simple reversion to the past.

And I am unaware of any evidence linking no-fault divorce to lower levels of abuse.

There is one real disagreement, however. The recent movement for divorce law reform rests on the belief that in marriage as elsewhere, the past quarter century's emphasis on self-fulfillment has gone too far and that we must seek a new balance between rights and responsibilities. Those who are comfortable with the moral sensibilities of the 1960s and 1970s understandably will resist these changes. The debate over divorce is situated within a broader discussion of limits to individualism that now frames our politics and culture.

Families are systems of individuals with interests that converge only in part. We should divest ourselves of the romantic conception of perfect harmony, in which arrangements that serve the interests of husbands equally serve the interests of wives or of children. What is good for men who have worked outside the home all their adult lives may not be good for those women who have never done so. What is good for one or both parents may not be so good for minor children. And what may seem desirable at the

level of individual families may have negative consequences for society as a whole.

The question before us is how best to deal with these tensions. During the past generation, we have encouraged, or at least tolerated, the development of a divorce law that has favored adults over children, and economically advantaged workers over dependent spouses. The time has come to redress the balance, in a manner that requires individuals to assume greater responsibility for the interpersonal and social costs of their actions.

In the current cultural context, it is hard to make a case for restricting personal choice when the consequences of choice affect only those who are capable of asserting and defending their own interests. There is a stronger case for using law to protect vulnerable individuals and to assert the general interests of society.

Within this framework, I would propose three goals:

First, we should endeavor to reduce the number of divorces, particularly but not exclusively those involving minor children.

Second, when such divorces are unavoidable, we should seek to mitigate their consequences for children.

Third, we should restore a level playing field--and adequate protections--for women who choose to work at home for extended periods.

### **Three points of intervention to reduce divorce**

There are three points at which we may be able to act to reduce the incidence of divorce. The first occurs at or before the threshold of marriage. It is stunning how many schools talk about sex while failing to discuss marriage in any sustained manner. It is a legitimate function of public education to treat marriage seriously as a human and social institution.

The same point may be made, with emphasis, for religious institutions. For the overwhelming majority of Americans, marriage remains a sacrament and still takes place within under the aegis of religion. If every church and synagogue took as one of its principal tasks the thorough preparation of young people for marriage, it could make a significant difference. There is some evidence that this strategy works best when all the religious institutions within a community unite around this objective in a mutually reinforcing way.

Law also has a role to play. In most states it is much harder to get a driver's license than a marriage license. At a minimum, each state should impose a reasonable waiting period (at least one month, preferably three) and require couples to show that they have completed a program of counseling (religious or secular) preparing them for marriage.

The second point of intervention occurs during marriage. At a minimum, we should systematically reexamine our economic and social policies (and our tax code) with an eye to creating a marriage-friendly environment. The private sector can contribute

as well, through flex-time, telecommuting, job-sharing, part-time work with better benefits, and generous leave policies for family emergencies. Religious institutions should offer programs for couples who want to renew their marriages or confront problems that could lead to marital dissolution if left unaddressed.

The third key point of intervention occurs at the threshold of divorce. We should institute significant changes in the current no-fault regime.

As many observers have noted, the American law of divorce lurched from one extreme, where fault had to be demonstrated in nearly all cases, to the other extreme, where in most states either spouse can terminate the marriage without the other's consent. The sensible moderate alternative--no fault-divorce by mutual consent--was all but ignored. Only two states (New York and Mississippi) require mutual consent. In 40 states, divorce may be obtained after a separation of one year or less, regardless of other spouse's opposition.

Given the stated intentions of the reformers, this is especially curious: the "hypocrisy" to which they objected arose when husbands and wives colluded to manufacture fault that would pass legal muster. The mutual consent option would eliminate the need for such manoeuvres, which did indeed call the law into disrespect.

There are moral considerations as well. As Herma Hill Kay, one of the key supporters of the California no-fault bill, puts it: "The no-fault principle is most intuitively appealing when it is invoked to permit the legal termination of a marriage that both spouses agree has ended in fact. . . . [In contrast,] divorce by unilateral fiat is closer to desertion than to mutual separation."

For couples with minor children, states should eliminate unilateral no-fault--where one person can readily obtain a divorce without the other's consent--and return to an updated fault system (one that, for example, takes into account what we've learned over the past two decades about spouse abuse). As an alternative to fault in unilateral cases, states could establish a five-year waiting period before a non-consensual no-fault divorce is allowed to occur. And even in cases where both parties consent, there should be suitable braking mechanisms: a mandatory pause of at least a year for reflection, counseling, and mediation.

States should also provide legal backing for couples who want to create their own frameworks for stabler marriages. Numerous experts--Mary Ann Glendon, Elizabeth Scott, and Maggie Gallagher, among others--have advocated premarital agreements ("precommitments") as ways for couples to bind themselves in advance to extended waiting periods between separation and divorce, mandatory mediation and counseling, and economic deterrents. Such agreements are especially important when state law doesn't build these protections into marriage for all couples.

But in most jurisdictions, Scott points out, the enforceability of such agreements is open to serious doubt. States have the

obligation to define types of premarital agreements that are contrary to public policy and hence will not be enforced--and to enforce all agreements that pass this test.

### **Mitigating the impact of divorce on children**

Even if divorce involving minor children cannot be prevented, there are steps we can take to mitigate its consequences. We have learned a great deal in the past decade about why divorce hurts children. I rely especially on the recent work of McLanahan and Sandefur, who identify three principal sources of damage:

- o **diminished income**--roughly a thirty percent drop for children and the custodial parent;

- o **diminished parenting time**, involving both non-custodial parents (usually fathers) who detach themselves from their children and custodial parents (usually mothers) who have to combine work inside and outside the home and who are very hard pressed; and

- o **disruption of established ties**--to friends, neighborhoods and communities, and educational institutions.

Mitigating the consequences of divorce for children, therefore, means working toward three goals: maintaining an adequate flow of income; maximizing post-divorce parental involvement; and minimizing the disruption of social vital relationships outside the family.

With regard to the economics of divorce, I believe (following Mary Ann Glendon), that we should adopt a "children first" principle. Issues of property division should not even be discussed until adequate provision is made for the economic needs of children. When children opt for post-secondary education and training, child support should cover a reasonable share, at least until age 21. In addition, we need to get far more serious about child support enforcement. Important legislation has been adopted in the past decade to enhance the capacity of states to work cooperatively, but we can and must go farther.

With regard to the second goal--maximizing post-divorce parental involvement--there should be a presumption in favor of joint legal custody whenever feasible. When it is not, non-custodial parents should enjoy the most liberal possible visitation rights, and those rights should be strictly enforced. (Few states are now doing so.)

This is important, in part, because some evidence--anecdotal and statistical-- suggests that many non-custodial parents are delaying or withholding child support payments because they feel that their visitation rights have been impaired by the custodial parent. A 1991 Census Bureau report indicated that 79 percent of fathers with visitation rights were current on child support, versus only 44.5 percent without either visitation or joint custody. Of those with joint custody, more than 90 percent were current. More research is needed to clarify the causal relations underlying these figures. Still, it seems plausible that in

addition to reducing the parenting deficit, maximizing the post-divorce involvement of both parents with their children could help mitigate economic harms as well.

Finally, to minimize disruption of vital social ties, minor children must be allowed to remain in their pre-divorce neighborhoods and communities whenever possible. For many families, the home is the only significant item of property to be divided between the divorcing parties. Nonetheless, the goal of allowing children to remain in their homes during the period of greatest vulnerability should trump the goal of the immediate equal division of property. This means that judges should have the option of excluding the home from the property settlement for an extended period--perhaps until the children have departed for college or entered the paid workforce. A few states have begun moving in this direction; the rest should follow.

### **Restoring fairness for women in longterm marriages**

I noted earlier that no-fault divorce has imposed a new vulnerability on women in longterm marriages. This is morally objectionable. While the law should not create incentives for traditional gender roles, neither should it penalize women who have chosen to spend much of their adult lives working inside the home. Surely such women should not be pushed into straitened circumstances by divorce. But that is what's happening in all too many cases.

No-fault is part of the problem, but issues unrelated to the grounds for divorce also contribute to unfair outcomes. As many experts have observed, the law of divorce has failed long-married women twice over--by allowing men expanded opportunities for non-consensual divorce and by not specifying appropriate terms of financial rectification. The exercise of judicial discretion within the no-fault framework has not always protected the vulnerable. Settlements based on the principle of formal equality have not recognized the fact of structural inequality.

Two changes could help rectify this situation. First, the possibility of long-term alimony (which has all but vanished from contemporary settlements) should be restored for women who have invested heavily in the marriage at the expense of their opportunities outside the home. Deborah Rhode (professor of law at Stanford University) and Martha Minow (professor of law at Harvard University) have stated sensible principles to guide such awards: "Spouses who have sacrificed their own earning potential for the family's well-being or their partner's advancement should have a claim for compensation that is commensurate with their contributions and their sacrifices. The longer the marriage and the less adequate a spouse's independent resources, the greater that claim should be."

Second, even when fault is not legally relevant as grounds for divorce, it may well be appropriate to take it into account in determining fair settlements. As Herma Hill Kay (professor of

law, University of California, Berkeley) puts it, "The fault doctrine may have served to lend emotional vindication to the rejected spouse, as well as a measure of financial protection and status as the preferred custodian of children. If so, greater justification may be required in those cases for eliminating that doctrine from the related areas of support, property distribution, and child custody."

The proposed changes in settlements involving children and women in long-established marriages would directly provide an increased measure of well-being and protection. They would likely have, as well, an important indirect effect. By putting men on notice that the financial responsibilities they will bear after divorce are more severe, these changes will also serve as an added deterrent to divorce. It is not unreasonable to expect that the combination of new limits on no-fault and more stringent settlement principles will reduce the incidence of divorce.

### **Conclusion: the moral challenge**

The law is a limited instrument of social policy. At some point, highly demanding laws become less effective than those that are less restrictive. The identification of the optimal level of legal restraint is a matter of art rather than science. Experience suggests that the optimum will fall well short of our hopes.

In the end, the future of marriage in America hinges on handful of moral questions. Are we willing to put the well-being of children first, even when accepting this responsibility may conflict with adult desires and restrain our current passion for unfettered autonomy? Are we willing to honor claims of justice and fairness in the case of those who have sacrificed personal advancement for the good of the family? And are we prepared to recognize the kind of contentment that stems, not from the gratification of momentary impulse, but from loyalty to commitments that endure? Only when we are able as a society to return affirmative answers to these questions will reforms in the law of divorce have a real chance of success.

