

# An Economic Assessment of Same-Sex Marriage Laws

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## ABSTRACT

This paper argues marriage is an economically efficient institution, designed and evolved to regulate incentive problems that arise between a man and a woman over the life-cycle of procreation. As such, its social and legal characteristics will provide a poor match for the incentive problems that arise in the two distinctly different relationships of gay and lesbian couples. Forcing all three relationships under the same law will lead to a sub-optimal law for all three types of marriage.

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## 1. Introduction

“Marriage.” A word familiar to toddlers, and yet so complicated most adults cannot articulate its real meaning.<sup>1</sup> Marriage is an institution.<sup>2</sup> It is a complex set of personal values, social norms, religious customs, and legal constraints that regulate a particular intimate human relation over a life span.<sup>3</sup> Families are organized around marriage, and marriage provides benefits to families in terms of survival and success. The source of these benefits spring from the incentives created by the rich fabric of characteristics laced throughout the formal and informal marital rules. Social norms on loving sacrifice within the context of marriage encourage husbands and wives to devote their lives and resources to each other and their children. Signaling, self-binding commitments, and third party sanctions (to name a few) are part of the marriage incentives that encourage socially good behavior and punish socially bad behavior, which are necessary because both husbands and wives often have private incentives at odds with the community and the interests of other family members.

Marriage has never been a static, monolithic institution. Over time the roles of men and women within marriage have changed. Social views on multiple wives, inter-racial relations, and divorce have changed. Legal rules regulating everything

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<sup>1</sup> This is hardly a failure of those attempting to defend marriage. As Hayek pointed out:

Many of the institutions of society which are indispensable conditions for the successful pursuit of our conscious aims are in fact the result of customs, habits or practices which have been neither invented nor are observed with any such purpose in view. We live in a society in which we can successfully orientate ourselves .... because [we] are also confined by rules whose purpose or origin we often do not know and of whose very existence we are often not aware.

[p. 11, 1973]

<sup>2</sup> North (p. 3, 1990) defines an institution as the “humanly devised constraints that shape human interaction.” Economists often mischaracterize marriage by calling it a “contract.” Although there are contractual aspects to marriage, its details go well beyond this description.

<sup>3</sup> It is common in the public forum to think of marriage as a creation of the state. However, as an institution marriage is larger and prior to the state, even though state regulation is part of marriage.

from the treatment of children, division of property, to the grounds for divorce have changed. Yet elements of the institution of marriage have remained relatively constant for centuries. For instance, marriage has always been above pure “contract.” Marriage involves not just a couple, but extended family members, non-blood relations, and impersonal third parties like the church, state, or tribe. Marriage has always required an intention for a life long commitment. Marriage has always contained the expectation of fertility. Of course, until very recently, marriage was available only to heterosexual couples.<sup>4</sup>

To some the idea of same-sex marriage is a fundamental departure from other marital changes, while for others it is a natural extension of changes begun long ago. Thus, where same-sex marriage begins is a matter of debate. Some proponents go back to the Old Testament relationship of David and Jonathan. Others start with the Enlightenment concept of freedom of choice in spouse, and the radical idea of the pursuit of happiness in marriage.<sup>5</sup> Still others start with legal changes. Holland, followed by Belgium and Canada became the first modern nations to legalize same-sex marriages at the turn of this century.<sup>6</sup> Other jurisdictions around the world (like Scandinavian countries, Vermont, California, etc.) have developed various types of registered civil unions that recognize and give partial marital rights to same-sex couples, and these often occurred before the current court decisions and legislation on same-sex marriage.

Whether or not same-sex marriages are here to stay, and certainly what form and how they are to relate to traditional marriage is still undetermined. There remains

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<sup>4</sup> Polygamy, though exceedingly rare, stands as an exception. It was, however, always heterosexual. Although marriage as an institution has had these constant characteristics, individual exceptions, when they have imposed no social costs, have existed. The two obvious ones are *ex post* infertile marriages, and marriage by those beyond child bearing years.

<sup>5</sup> See Coontz (2005).

<sup>6</sup> The first Canadian same-sex marriages took place on January 14, 2001 at the Toronto Metropolitan Community Church. These became the basis of a legal challenge which ended at the court of appeal on June 10, 2003. Many Canadian same-sex supporters thus date the arrival of same-sex marriage at the date of the marriages, making it the first country to adopt same-sex marriage laws.

an enormous debate over the issue of same-sex marriage, even in countries well down the path, like Canada where the government passed formal legislation changing the legal definition of marriage in the summer of 2005. Within this context the pressure to change laws in the U.S., where over 30 states have passed some type of “Defence of Marriage Act” including in some cases alterations to state constitutions that prohibit same-sex marriage, will only increase.

This pressure makes a debate over the nature of marriage necessary. However, such a debate is made difficult because of legal inertia, public and academic exhaustion, and the fact that the entire same-sex marriage dialogue takes place within a larger context over the questions of divorce, marriage regulations, and the entire existence of family law. Many argue a return to traditional “covenant” based marriage with difficult exit/entry provisions, while others argue that the concept of marriage should either be eliminated or expanded to include virtually all combinations of human “families” under the general legal regulation of contract law.

The arguments for same-sex marriage are now quite familiar. Couched in a language of civil or human rights, they essentially evolve around constitutional definitions of equality, and interpretations of universal promises of civil rights for all citizens.<sup>7</sup> Same-sex relations are the same as heterosexual relations, the argument goes, and therefore should be regulated the same. By the “same” is usually meant the relationships are based on love.<sup>8</sup> Beyond this argument the case is made that marriage is always changing and same-sex marriage is a natural evolution in the law. Marriage is an institution providing social benefits to loving couples and this should be extended to other loving couples. More marriage will strengthen marriage as an

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<sup>7</sup> “All citizens,” interestingly enough, never includes polygamists. Polygamy is considered immoral by same-sex proponents, no doubt because they have in mind exploitive historical and modern examples where young women are involuntarily matched with older men. Hence, Rollins [p. 462, 2005] classifies polygamy along with other “... abominations such as incest, [and] bestiality ...”. However, this ignores the more modern polyamorous relations that claim triadic matches are more equitable than dyadic ones.

<sup>8</sup> Pro same-sex marriage arguments often attack the issue of procreation, noting that elderly marriages, infertile couples, etc. are allowed to marry.

institution. And finally, in light of the benefits the costs of extending the franchise of marriage should be trivial since the fraction of homosexuals is small.

The arguments against same-sex marriage are also well known. There are faith based arguments: homosexuality is a sin and should not be promoted by the state. Slippery slope arguments: if same-sex marriage, then why not polygamy, incest, and pedofilial marriages?<sup>9</sup> Some arguments work from the premise marriage is defined as dual-gendered, or that the *ability* to have children defines marriage, or that children have the *legal right* to be raised in a “traditional” family. A final brand of argument tends to focus on the importance of marriage in terms of procreation, and the value marriage has in providing incentives for generating human capital in the next generation. What all of the arguments, both for and against, have in common is that they are unacceptable to the other side. The rhetoric of the debate tends to be quite remarkable, with words like “hysterical”, “apocalyptic”, and “lunacy” slung from both sides.

This paper provides an economic assessment of same-sex marriage that opponents will no doubt accept, but which should also cause proponents to pause. The economic case against same-sex marriage, based on new institutional ideas, is that it is likely a bad idea for *both* heterosexual and homosexual couples. The argument is rooted in contracting problems in procreation; however, unlike other arguments, my focus is on the economic role of marriage, the nature of the institutional constraints, and the interaction between legal rules and behavior. I argue that the institutional details of marriage are designed with specific purposes in mind, and that these purposes have little to do with homosexual relations. The fundamental

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<sup>9</sup> Proponents of same-sex marriage are quite hostile to these arguments. Wolfson puts it:

Slippery-slope diversions are what opponents of equality try when they don't have a good reason to justify ongoing discrimination, the equivalent of a lawyer with no arguments and no evidence pounding on the table.

[p. 71, 2004]

point of my paper is that when different human relationships fall under a “one size fits all” law, the result is a bad fit for everyone.<sup>10</sup> Alterations to heterosexual institutions resulting from contracting problems arising in homosexual relations will, indeed, have profound effects on heterosexual marriage, and heterosexual pressures on marriage law will likely be inappropriate for homosexual couples.

The problem with having a set of laws that are inappropriate for the couple is the ultimate effect they will have on the product of marriage: children. Marriages are often sensitive to changes in the law, with divorce a common outcome. The effects of divorce are often ambiguous on the husband and wife, but for children they are ubiquitously negative.<sup>11</sup> Arguing that marriage is efficiently designed to have children raised by both biological parents, and that tampering with this based on false theories of marriage can lead to dire consequences might appear as nothing more than theoretical hot air. However, the same arguments and marriage models used by proponents of same-sex marriage were used by no-fault divorce reformers. After discussing the theoretical issues of same sex marriage I briefly examine the history and effects of no-fault divorce. The purpose of this exercise is to point out that i) the same “love” based view of marriage was used in the earlier debate, ii) no harmful or surprising outcomes were expected, and iii) the eventual reality was exactly the opposite. The no-fault divorce experience refutes the theory that marriage is based on “loving relationships,” but supports the theory that marriage is an institution designed around procreation. In this sense the discussion provides evidence in favor of my argument against same sex marriage.

## **2. An Economic Explanation of Marriage**

### *Institutions and Efficiency*

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<sup>10</sup> This argument is briefly made in Buckley (1999).

<sup>11</sup> See Allen and Richards (1999) for survey articles on these effects.

Institutions do not come into existence *ex nihilo*. Institutions result from intentional actions on the part of collections of humans for the purpose of achieving some objective. How institutions are achieved, how they evolve, and what impacts they have on behavior are the subject matter of the field called new institutional economics (NIE).<sup>12</sup> This body of economic theory has the general hypothesis that institutions are designed to maximize wealth, net of the costs of establishing and maintaining these organizations.<sup>13</sup> In general, economists see individuals coming together to cooperatively exchange and produce, and they do this because together they can generate much more wealth (broadly defined) than they can do on their own. Unfortunately, when people come together they can also behave opportunistically. For example, workers shirk their duties, bad cheques get written, spouses commit adultery, and on and on. To mitigate these bad behaviors successful societies create institutions that constrain private incentives. These institutions are wide ranging, and at a general level include firms, families, laws, customs, and governments. Within each of these there are vast arrays of rules and norms to regulate opportunistic behavior at the relevant level. When societies were successful in adopting the optimal rules for their particular circumstances, they tended to out perform other societies. Eventually, only those societies with optimal rules survive.<sup>14</sup>

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<sup>12</sup> For an early articulation of the main ideas in this field, see Eggertsson (1990) or North (1990). Their work is fundamentally based on Coase (1960). Hayek (1973) articulates a theory of institutions that significantly overlaps these later writers. Hayek would take issue with the claim that institutions are designed. Rather, he would claim they result from human actions, accidental or otherwise. Still, he would fully support the idea that efficient institutions survive.

<sup>13</sup> These costs are called “transaction costs” and Ronald Coase won the Nobel prize for showing how these costs influence the design of the law. For an in depth introduction to the subject of transaction costs, see Allen (1999). In maximizing wealth net of transaction costs economists refer to institutions being efficient in the “second best” sense.

<sup>14</sup> See Alchian (1950) for the classic articulation that efficient institutions survive, while inefficient ones die out. Economists, over the past forty years, have theoretically and empirically shown how institutions are important for economic growth. The interested reader seeking an introduction to the field might refer to Barzel (1999) on a theoretical analysis of the distributions of property rights; Posner (2003) or Friedman (2000) on an explanation of the law; Menard and Shirley (eds) (2005) on general articles of regulation, law, and governance; and DeSoto (2000) or North (1990) on economic development. Of course, how long it takes for inefficient institutions to die out is a matter of debate, and any recent changes may or may not be efficient.

How institutions are actually arrived at is irrelevant for the question of efficiency. Whether constructed with the intention to achieve a specific goal or arrived at by chance, intentions do not matter. In the competitive world of social interactions only the optimal strategies survive. The implication is that surviving, or long-lasting, institutions are economically efficient. In the context of marriage — perhaps the oldest institution — the survival criteria is quite obvious. Societies incapable of replicating themselves in numbers and quality relative to competing societies simply die out or are taken over. In dealing with the legal regulation of marriage, courts and legislatures form laws that either work well or not to some various degree. Poorly designed laws lead to lobby efforts and appeals that result in successful regulation of marriage, or lead to unsuccessful marriages and ultimately to low fertility, low quality offspring, and ultimately a decline in the society. Either way, the Darwinian conclusion is inevitable: the general institutions of marriage we observe today are efficient — the result of centuries of evolution. It is not the purpose of this paper to defend or develop this general hypothesis of the new institutional economics, but rather explain an implication it has to heterosexual marriage and the introduction of same sex couples to the franchise.

*Marriage: An Efficient Institution*

Starting with the idea that long lasting institutions efficiently regulate or constrain behavior begs the question: what is being regulated in the context of marriage, and for what purpose?<sup>15</sup> Many economists have concluded that marriage is primarily (but not exclusively) designed to regulate procreative behavior because the private incentives of men and women at various points in their life cycle are often incompatible with the social objectives of the marriage.<sup>16</sup>

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<sup>15</sup> Within the NIE wealth is defined broadly, so that raising successful children, if this is the desire of the couple, is a form of wealth. To the non-economist, it may be better to rephrase the NIE hypothesis to “marriage maximizes the family objectives net of the costs of organizing.” This hypothesis has proven very successful in generating testable hypotheses about marriage and family life that is supported by the evidence. This empirical literature is enormous. I discuss some of it in the latter section on no-fault divorce.

<sup>16</sup> For example, Cohen (1995) states:



On the surface, this argument seems ridiculous. The alternative, that marriage is based fundamentally on love seems more reasonable. However, the “love” hypothesis is incredibly over and under inclusive. Virtually every human being is involved in several simultaneous loving relationships (eg. siblings, parents/child, friendships, animal companions) that are not married relationships. Many people love one another in both sacrificial and sexual ways (eg. cohabitants, polygamists, same-sex unions), but are not married. At the same time, there are arranged marriages where love is clearly not present at the beginning, and many loveless marriages that continue on. The economic argument also seems lacking because elderly and infertile couples are allowed to marry. However, the presumption of marriage is that it will be procreative, and for reasons noted below this requires legitimate sex to take place within marriage. That, *ex post* a couple remains childless does not challenge the presumption and intention of the institution. In addition, socially encouraging all heterosexual intercourse to take place through marriage ensures that procreative sex necessarily occurs there as well.<sup>17</sup>

Within the context of marriage the conflict between the private and social incentives is often linked to the biology of procreation. For example, because women bear children at a young age they make large, family specific, investments early in the life of a family. Such an investment places them at risk from men who might indicate commitment in exchange for sex, but who later abandon the family. But

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Marriage ... is a marvelous invention. I say again, it is not natural. Marriage is a cultural invention. It is designed to harness men's energies to support the only offspring they may legitimately have, or are likely to have, legitimately or otherwise, in a world in which marriage is the norm.

[p. 7, 1995]

<sup>17</sup> There is a third, public choice, theory of marriage: marriage is a means of transferring wealth from individuals without children to those with legitimate children. Such a theory would predict that the demand for same sex marriage simply reflects the desire of homosexuals to capture these wealth transfers. This hypothesis is refuted by the Canadian case where cohabitating and same sex couples have received every and all benefits of marriage since 1999. The demand for same sex marriage continued after these transfers.

biology cuts both ways. As another example, men seldom know their paternity with certainty. A woman who mates with a given man, might be able to “breed up” by exchanging sexual intercourse with a higher quality male, and allow the mate to unknowingly raise the latter’s child. These are just two examples of how biology could create a conflict between private and social incentives. Rules restricting abandonment, punishing adultery, or restricting male/female interactions are ways to mitigate these problems. In general though, marriage is designed to deal with the myriad of issues that arise between a husband and a wife in order to create incentives to procreate and to invest in their offspring in order for them to be successful in the next generation. An implication of this is that the optimal marriage rules have been remarkably constant across time and cultures, because these issues remain relatively constant across heterosexual couples.<sup>18</sup>

### *Introducing Same-Sex Marriage*

Same-sex marriage means that three different types of relationships will be regulated under the same umbrella of marriage. Within the context of the same-sex marriage debate, gay and lesbian couples are not only portrayed as similar, but both are portrayed as similar to heterosexual couples. All couples love each other, all couples seek the benefit of marriage, all aspire to equality and dignity. However, no one claims they are identical, and on many margins there are differences that could matter for successful legal regulation. In terms of observable behavior, heterosexuals, gays, and lesbians often appear to be three distinctly different relationships. In their early study on couples, Blumstein and Schwartz (1983) found major differences in behavior between the three types. In terms of sexual behavior gay men had sex at very high rates, while lesbian couples had sex on average once

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<sup>18</sup> It also explains a consistency in the evolution of marriage. Marriage has changed over time, but these changes all take place within a procreative setting, and in response to changes in the transaction costs of marriage. Allen (2005) lays out many of these conflicting incentives and have pointed out how marriage rules mitigate or solve the problems.

per month. Heterosexuals, especially during the child bearing years have very similar sexual frequency rates that were closer to the gay male rate.<sup>19</sup> Gay men were more likely to have multiple serial partners than lesbians or heterosexuals. In a study on same-sex registered unions in Sweden and Norway, Andersson et al (2004) found a number of differences between gay and lesbian unions. Surprisingly, almost twice as many gays married relative to lesbians. Gay men were much more likely to have wide age differences in the couple, while lesbians were most likely to be of the same age. Gay men were more educated, and more likely to not have been in a previous heterosexual marriage. Most significantly, they found that gay marriages had dissolution rates 50% higher than heterosexual couples, and lesbian marriages had dissolution rates 300% higher. The lesbian rate of separation was twice that of the gay couples.

But these differences are either symptomatic of a lacking legal regulation or reflect a more primitive difference. The critical fundamental difference in these three types of unions is the biological relationship between parents and children. Within a heterosexual marriage biology is perfectly aligned with the definition of parent. Indeed, the legal notion of “natural” parent *is* the biological parent. Within a properly running heterosexual marriage there are just two parents, they are married, and they are biologically linked to the children; indeed, the institutional apparatus of marriage is designed to produce this effect. Within a same-sex marriage, if there are children, this link is necessarily severed. Children within a same-sex marriage can arrive a number of ways: from a previous marriage by one of the partners; artificial insemination; or adoption. In all cases the biological linkage between at least one parent and child is broken. Furthermore, the relationship is complicated by the non-married biological third party.

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<sup>19</sup> This was one of the remarkable facts found within the monumental Lauman et al. (1994) study. They found that over 90% of married heterosexuals during child bearing years were having sex 2-3 times per week. Baker (1996) argues this is an evolutionary tactic to keep male sperm ever-present within the female to ward off pregnancy by other males given the problem of establishing paternity.

It is not too hard to predict new issues that will arise over same-sex marriages and children. For example, it will be common for children in these marriages to have a different sex than the married pair: lesbians might have sons, gays daughters. No doubt many of these families will seek opposite sex influence and role models for their child — perhaps from the biological parent. Will the legal standing of this third parent evolve over time given the importance of same sex role models?<sup>20</sup> Researchers are discovering that serious child abuse is vastly more likely to happen between adults unrelated to the children.<sup>21</sup> Will the state become more intrusive in regulating the home in light of this increased risk?

Biological problems with same-sex marriage also arise in same-sex *divorce*. Marriage is more than just an set of entry conditions, it includes a set of exit provisions in terms of grounds for divorce, rules for splitting property, support rules, and custody rules. If these rules are based on biological roles of mothers and fathers, then they will *necessarily* be inadequate for same-sex couples. When a same-sex couple divorces specific issues will come up that have never come up before. For instance, of the three or more adults involved in a family with children, who is responsible for child support? Did the non-biologically connected, but legally married spouse, consent to be a parent or just consent to have sex? What are the rights of a child with more than two parents? Which legal parent has the right to decide where to live? Do biological ties deny rights to legal parents?<sup>22</sup>

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<sup>20</sup> Notice this issue does not arise with historical adoption.

<sup>21</sup> For example, Schnitzer and Ewigman (2005) find that “households with unrelated adults were nearly 50 times as likely to die of inflicted injuries than children with 2 biological parents .... In households with unrelated adults, most perpetrators (83.9%) were the unrelated adult household member, and only 2 (6.5%) perpetrators were the biological parent of the child.” (p. e687). See also Cere (2005) for summary evidence. Currently, most children in same-sex marriages come from a previous marriage, not through formal adoption. Although we do not know if unrelated same-sex parents behave the same as unrelated heterosexual adults in the home, these children may be at higher risk of abuse given the lack of biological connection.

<sup>22</sup> A common objection at this point is that “a lacking biological connection” is nothing new — adoption has been common for centuries. True enough, but adoption has always been regulated, and all parental rights to children were transferred to the new parents “as if” they were biological. Children within same sex marriages are different. Many children, if not most, arrive from a previous

Not only will decisions be made on new issues, but old answers might be required to change. For example, many institutional rules within marriage are designed to restrict males from exploiting the specific investments women must make in child bearing.<sup>23</sup> Since same-sex marriages are not based on procreation, and many will involve only gay men, these restrictions are likely to be objected to and challenged in courts and legislation. Second, fidelity would be of *less* concern in same-sex relationships given that the risk of children out of wedlock is eliminated. Homosexuals, especially gay men who demand more sexual partners, will likely seek fewer regulations regarding adultery.<sup>24</sup> Third, given that same-sex relationships are often made up of two financially independent individuals, there will be pressure for even easier divorce since the problem of financial dependency will be reduced. Along the same lines, spousal and child support guidelines that are designed around typical heterosexual household incomes may be inappropriate for same-sex households. Although an incomplete list, it demonstrates the difficulty for the current two-parent model of laws to adequately meet the contractual issues that will arise in these cases.

Once legal decisions on these issues are made, the question is: what impact will they have on the elephant in the room — the vast majority of heterosexual marriages? After all, all three relationships will be regulated by the same law. If we return to the theory that marriage is an efficient institution designed around the needs of heterosexual couples, then only one conclusion follows. To the extent marriage is changed to accommodate the demands of same-sex couples these changes will hurt heterosexual marriages. To the extent changes are not made, same-sex couples will find marriage laws unsatisfactory and inefficient for their needs. As a

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heterosexual marriage. Thus there is no screening as with adoption. How rights are to be divided between the married parents and the biological third party, and whether children in gay households are to be treated the same as lesbian households is yet to be determined.

<sup>23</sup> See Cohen (1987) for the seminal paper on this topic.

<sup>24</sup> The institution of marriage will no doubt bear down on the sexual habits of gay men. Married gay men, therefore, are likely to have fewer sexual partners than unmarried gay men. However, the cost of infidelity for a homosexual is lower than for a heterosexual because the risk of pregnancy is eliminated. Thus, homosexuals will still demand fewer regulations on infidelity.

practical matter, it seems unlikely that same-sex couples would be ignored by the court, and courts will recognize the different types of families along the spectrum of cases.<sup>25</sup>

Once the constraint of a definition of marriage based on biology is removed, these changes will occur with little notice, and minimal immediate effect. Issues will come up, courts will struggle with how to manage them, the common law will evolve, but the sun will still rise the next day. Yet here is the bottom line: the new common laws will apply to heterosexual couples covered under the same family law, and over time the loop-holes and misfits will be exploited by husbands or wives seeking to better themselves at the expense of other members of the family. The value of marriage as an institution will fall, fewer people will marry, more will seek private methods to protect themselves from *ex post* marriage exploitation, and the final result will be lower fertility rates and more children raised in single parent homes. It is this *feedback* which presents the fundamental danger to heterosexual marriage.

The comment is often made that a small number of same-sex marriages cannot possibly have any impact on the general population. However, it is the feedback loop from same-sex marriages to heterosexual ones that causes the problem. Since one size fits all, all are influenced by changes in marriage. Since legal regulations on marriage revolve around children, and since same-sex families are fundamentally different than heterosexual ones in this respect, this area poses the greatest risk of legal misfit. Ironically, evidence for these changes arrives immediately after the introduction of same-sex marriage. For example, in Canada the second half of Bill C-38, the Canadian federal Civil Marriage Act changing the definition of marriage, contains changes to other pieces of federal legislation removing the definition of

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<sup>25</sup> Of course, other non-marriage relations are also effected. Historically couples living together for set periods of time or in a union that resulted in children became automatically “common law marriages,” subject to the same laws of divorce as legally married couples. Pretexts from gay men *not* interested in marriage over whether this should be applied to them have started to arise. Why should rules designed to protect the interests of children be applied to them?

natural parent and replacing it with “legal” parent. A legal parent, like one of the partners within a same-sex marriage, is not biologically linked to the child. Of course, there is no natural limit to the number of legal parents a child may have, and in a same-sex marriage with one child there are at least three adults involved in some role as parent, whether legal or not. The impact of creating “legal” parents will be felt in our culture for many years, and to the extent it is important for the biological connection between a child and parent to be recognized under the law, such a change can only be of harm to heterosexual marriages. A second example is noted by Gallagher (2004). The court in *Goodridge v. Department of Public Health*<sup>26</sup> was faced with the problem of how to deal with the presumption of paternity, and decided to switch it to a “presumption of parentage.” The presumption of paternity is the legal doctrine that no one can challenge a father’s paternity to his legitimate children, not even his spouse. She notes:

What will the presumption of parentage do? Well, no one knows exactly, as this is uncharted legal ground. ... Can these new grounds for contesting parenthood be limited only to same-sex couples? Or will all men (thanks to the new presumption of parentage) have a new legal standing to reject the obligations of fatherhood on the grounds they only consented to sex and not to parenthood?

[p. 57, 2004]

Both examples point to how the introduction of same-sex marriage feeds back to heterosexual marriages.

*It is hard to imagine ...*

The response to the economic–institution case against same-sex marriage is that marriage is a flexible institution, and if it changes or becomes unrecognizable, so be it. Heterosexual marriages will continue as before, and all that will happen is that homosexual couples will receive the benefits of marriage. Any talk otherwise is simply social-science scare mongering. For example, Koppleman (2004) states: “It’s hard to imagine how legal recognition of same-sex marriage would affect even one

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<sup>26</sup> 140 Mass. 309, 798 N.E.2d 941 (2003).

man’s deliberations about whether to marry a woman or to stay with his children.” The phrase “it is hard to imagine ...” is used often in the same-sex marriage debate. If marriage is fundamentally based on loving relationships, then it is hard to imagine how allowing a few hundred or thousand different types of marriage into the fold could make any difference.

In this regard, it is very relevant to consider another marriage revolution in which the phrase “it is hard to imagine ...” occurred as well. Slightly over thirty years ago family law went through a conceptual revolution called no-fault divorce, and thirty years later we know something about the consequences of that paradigm shift. During that debate the case was made that in-tact marriages would be unaffected by the legal change and the social impact would be minimal. It was hard to imagine how releasing dead marriages from bondage could have any negative impact on other loving marriages. It is an interesting exercise to go back over that debate and briefly note that the consequences of that law were unanticipated and subtle. In the end, it turned out marriage was much more fragile than anyone publicly thought. I argue that social commentators at the time got their predictions wrong because they based their arguments on false theories of marriage. In particular, the predictions of no impact stemmed from the view that marriage is an environment to assist adult relationships to be stable and loving. The mistakes made by no-fault divorce reformers are now being made by proponents of same-sex marriage.

### **3. The Intentions of No-Fault Divorce**

Jacob (1988) has referred to the introduction of no-fault divorce as the “silent revolution,” because there was so little debate before its introduction. And why should there have been any debate when no-fault divorce was based on principles that were both noble and well-intended — namely to minimize suffering, prevent perjury, to treat marriage partners as equals, to eliminate the adversarial nature of assigning blame, and maintain the notion of marriage as a social institution. Why should men and women, especially low income men and women, be forced



to remain in a dead marriage? Why should couples be forced to humiliate and compromise themselves by fabricating faults to satisfy the legislated requirements for terminating a marriage? Why should women be treated as dependents in the awarding of alimony? Why not take blame, hostility, and animosity out of divorce proceedings? And why should the courts not represent the interests of society in deciding when to allow a marriage to cease based on the quality of the marriage and not on the existence of a few arbitrary faults? It seemed obvious at the time that no-fault divorce was the right thing to do.

As early as the 1930s North American reformers argued that the fault based law should change. Many felt that in centering on moral faults and guilt the process encouraged couples to become spiteful and more antagonistic towards one another. Others, arguing that law should reflect the current social mores and not be opposed to it, argued that the law should be changed to recognize the rising demand for divorce. But the most common intellectual argument against fault was that it forced individuals to lie and perjure themselves. This is the position taken by Judge Posner, stating that “confining divorce to grounds ... [leads to investing] resources in manufacturing them.... At this point internal goals of the legal system — the goals of economizing on judicial resources and of reducing perjury — become decisive in favor of allowing either consensual divorce or divorce at will.” (p. 252, 1992).

All of the arguments for no-fault divorce were well meaning. Nowhere does one find any hint that no-fault divorce might actually lead to higher divorce rates, and certainly no one anticipated the more subtle impacts. The Church of England’s Canterbury Report was an extremely well argued document on the problems that existed with fault divorce and it made a strong case that no-fault divorce was not “easy” divorce. The report appears to have been instrumental in successfully bringing no-fault to the state of California (the first state to change its law), and played a role in the few discussions in Canada as well. Here was a major religious source of authority, acting independently of North American legislative bodies, drawing

the same conclusions that divorce reformers sought. The Canterbury report viewed marriage as a lifelong commitment that society has a stake in. In order to mitigate suffering, marriages that are no longer functional should be recognized as such and allowed to dissolve. It is the opinion of the report that it is a serious job of the court to make this decision. Courts, it is argued, decide on a careful consideration of all evidence what the outcome of the marriage should be. Given that the Anglican church was promoting divorce reform, that no major churches were actively against it, and that there was no intellectual opposition, it is not surprising that the laws passed quite uneventfully.

In essence the arguments of the time were: a) the current law hurts a group of people (those in “dead” marriages); b) allowing this group freedom to divorce will benefit them and not harm anyone else. Such an argument, when couched in the language of “honesty”, “individual responsibility”, and “non-adversarial”, becomes almost seductive and certainly difficult to object with.

#### **4. The Effects of No-Fault Divorce.**

The actual outcomes of no-fault divorce could hardly have been more different than what was expected and intended. The most obvious outcome was the immediate increase in the divorce rate. In Canada the divorce rate went from 50 per 100,000 people in 1968, to 150 per 100,000 in 1969, and then 300 per 100,000 in 1970. A six-fold increase in just two years after a century of rather stable divorce rates. In the U.S., where divorce laws are state jurisdictions, the transition to no-fault divorce was slower and less dramatic, but still in the same direction. However, the effects of no-fault divorce were much greater than just the direct impacts on the divorce rate. The law influenced the rate at which women entered the workforce, the amount of hours worked in a week, the incidence of spousal abuse, the feminization of poverty, and the age at which people married. It influenced a series of other laws related to spousal and child support, custody, joint parenting, and the definition of marital property. Many of these changes had subsequent impacts on

the stability of marriages. In short, the actual outcomes of no-fault divorce were completely unanticipated and unintended. I will now briefly touch on the evidence on these various effects.

### *Divorce*

The first question asked by lawyers and academics after the switch to no-fault divorce was: did the law change the number of divorces? Early studies were limited by data, and so the first serious study didn't occur until 1986 (Peters, 1986). Since that study there have been nine major published papers and all have concluded that the divorce rate increased with the introduction of no-fault divorce.<sup>27</sup> After almost thirty years of analysis, there is no question that divorce rates were effected by the law, and that they increased.

Some have argued that the rise in divorce was unimportant because it simply reflected the number of dead marriages. However, what makes the rise in divorce so troublesome is that often the divorces are “inefficient” or “opportunistic”; that is, the benefits of marriage exceed the joint benefits of living apart. These divorces occur because one party is able to unilaterally leave and perhaps take a disproportionate share of the marital assets with them. Brinig and Allen (2000) show that both men and women behave in this opportunistic fashion. The problem with opportunistic or inefficient divorces is that they leave behind partners that are more worse off than the benefits derived from those leaving. The most common outcome being a father separated from his children or a wife living in poverty.

Economists and lawyers have only recently shifted their attention away from the divorce rate to empirically estimating the effects of divorce on the various parties involved. The results to date suggest a rather complicated story. From Brinig and Allen (2000) it is clear that both men and women behave opportunistically at the

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<sup>27</sup> The most recent, and unpublished studies, are starting to find reductions in divorce rates 15–20 years after the legal changes.

time of divorce. When these strategic divorces happen, the partner left behind is worse off, but the partner leaving is better off. On the other hand, there are divorces that do make both husband and wife better off because they result from the fact that the marriage was inefficient.

Most spouses who file for divorce are women. The best explanation for this is child custody. Of those women who file for divorce, most claim after the divorce that they do not regret it. On the other hand, women are made poorer by divorce. The actual amount of poverty caused by no-fault divorce is still disputed, although Brinig (1999) argues that seventy-five percent of low income female single parents were not poor when they were married. The general consensus is that divorce is a financial hardship for women, but this is most often offset by control over the children and themselves. For men there is little empirical data on the costs of divorce. Some surveys show that fathers suffer a great deal of emotional stress caused by their separation from their children, with those fathers most attached to their children during marriage becoming the most distant after divorce. The recent increase in father's rights groups suggests that the numbers of disenfranchised fathers is not trivial.

If the effect of divorce on men and women is complicated, the effect on children is straight forward. There has been a tremendous amount of research conducted on the effect of divorce on children. Much of this is discussed in Moir (1999). None of this would appear good news. According to Moir's assessment of the literature, if we consider any social pathology (teen pregnancy, criminal activity, divorce, etc.) and control for the demographic characteristics of the child, then the probability that a child participates in one of these activities increases on average by a factor of 2 if they come from a divorced home. Discussions of the effect of divorce on children during the no-fault debate suggested that at worst the results would be ambiguous if not positive on children. It was argued that children would be better off in single parent homes rather than in homes with dead marriages. Nothing could have been further from the truth. The real negative impact of the no-fault divorce

regime was on children, and increasing the divorce rates meant increasing numbers of disadvantaged children.

### *Age At Marriage*

Increases in divorce rates are not too surprising with hindsight. However, no-fault divorce had more subtle impacts that were nonetheless just as significant in terms of altering the daily life of the average individual. One particular impact is the effect no-fault divorce had on the age at which an individual might marry.

Everyone is different to some extent in terms of the value they place on marriage, and their aversion to a mismatch in their choice of spouse. As a result, any movement towards easy divorce will have different individual effects. Assume there are two types of people those that highly value a marriage and those that place little value on a marriage. A low value type takes marriage lightly and is very concerned about a mismatch. For this type of person easy divorce makes marriage more attractive. On the other hand, a high value type is interested in a relationship that will last for the entire length of procreation or for life, and is less concerned about a mismatch. For this type an easy exit option makes marriage less attractive.

These differences in marriage preferences manifest in the age at which individuals marry. Under a fault divorce regime a high value type will marry sooner than a low value type because he is less worried about mismatches and because the law makes divorce more difficult. The law reduces the demand for search for high value types and as a result he marries early. The opposite is the case for low value types. Under a fault law, low value types search longer because they are more concerned about mistakes and because they place a lower value on marriage. With a switch to no-fault divorce, low value types will risk being less selective in the choice of spouse because a bad choice can be offset by an early divorce. The willingness to be less selective means that low value types will have a reduction in their marriage age after the change in the law. On the other hand, high value types are going to have

to search harder and longer to ensure a higher probability of a more compatible spouse — search substitutes for the prior legal restrictions on divorce. Since search is costly, high value types will experience an increase in their marriage age after the switch to no-fault. Since, under fault divorce, high value types married younger than low value types, with the introduction of no-fault there is a shrinkage in the variance in the distribution of marriage ages. Just looking at the average age at marriage prior and after the adoption of no-fault divorce might show relatively little effect since the different types of people will tend to offset each other. The minor average change, however, masks large offsetting changes at the individual level.

Allen, Pendakur, and Suen (forthcoming) collected individual marriage records for all marriages for approximately 40 states between 1970 and 1996. Using this data they find the variance in marriages does indeed shrink in no-fault states. This shows that the divorce law has the subtle, unintended consequence of altering the marriage ages of everyone, especially those that are in the extremes in terms of high or low values for marriage. The divorce law effected, on this one margin, everyone, not just those who divorced.

Secondly, they also find that no-fault divorce increased the average age at which people get married. This suggests that there are more “high value” types in the population than “low value” types. This is important for two reasons. First, for those that look to marriage as an institution to protect specific investments in procreation, they are now engaged in costly search and this results in postponed family life. Since there are more of these type of people in the population, it suggests that this is a significant social cost. Second, individuals who take marriage lightly are now more likely to marry and to marry sooner. Given the low values to marriage and concern over mismatches, these types are also more likely to divorce at a higher rate than the other types. The increase in the marriage rate of “low value” types lowers the total value of marriage in a society. This in itself feeds back into the divorce rate and influences the way we view marriage culturally.

### *Labor Force Participation of Women*

There is remarkable agreement over the effect of no-fault divorce on the labor force participation of women (LFPR). Women have been increasingly joining the workforce for over a century, with the bulk of the increase coming after the second World War. Until 1970, the bulk of this increase in participation could be attributed to the growth in female real wages. However, a puzzle arose after 1970: female participation in the workforce continued to increase, even though real wage growth was flat.

Robert Michael (1985) was the first to suggest that the rise in the participation rate was caused by increases in divorce. Because divorced women are more likely to work, and because the divorce rate was increasing after 1970, he suggested this could explain the anomaly. To test this he observed a lagged relationship between increases in the divorce rate and the increases in the female participation rate of married women with young children.

Peters' (1986) was the first person to link the no-fault divorce law to the LFPR of women. Peters argued that married women make specific family investments when they stay home and look after the kids. If these marriage specific investments are not accounted for in the divorce property settlement, then the wife is made worse off at divorce, and as a result, she tries to protect herself by working during marriage. She found that labor force participation increased by 2% in no-fault states. Allen Parkman (1992a) also investigated the effect of no-fault divorce on the LFPR. Parkman found that it was not the marriage specific investments that married women worried about, but that by being married and staying home with the kids, married women decreased their human capital, and that this would not be compensated for at the time of divorce. Parkman shows that the increase in LFPR was mostly among married women “who could experience larger reductions in their human capital if they reduced their participation in the labor force.” These were young white women.

Parkman (1998) expands on his earlier work and looks at the total amount of time that women work. He not only looks at the increased workforce participation

of women, he also considers the increases in the household work over all. Parkman uses a times series data set that spans 1975-1981 and contains data on household work. He finds that women living in no-fault states work on average 4 hours more per week than their counter parts in fault based states. In contrast, the husbands in these states actually reduce the amount of hours per week by almost two hours. Parkman argues that this refutes the notion that women work simply to increase the family budget, and argues that the increased work load for women is a mechanism for women to use the labor force as a means of obtaining insurance against the threat of divorce.

One final important study is by Johnson and Skinner (1986). They use a panel study from Michigan to analyze the effect of divorce on the LFPR. They find that women increase their participation in the workforce before a divorce occurs, which begs the question: did the increase occur because the women were trying to insure against divorce, or was the labor force participation destabilizing to the marriage. They test these two hypotheses using a simultaneous model of future divorce probability and current labor supply on married women, and conclude that working has no real impact on divorce probabilities, but that an anticipated divorce has a relatively large impact on working. Their results account for 2.6% of the 15% of the growth in labor force participation that is not explained by real wages and other factors.

The results from changes in female LFPR are similar to those on the age at marriage: the change in the law influenced vast segments of the population that did not experience divorce. Women entering the workforce because they want to improve the quality of their life and the lives of their family members is a good thing. However, women virtually forced to work out of the fear they may be abandoned lowers the welfare of the family. Had there been a law protecting these women, they would choose not to work. The phrase “super-mom burnout” has now entered our vocabulary and is just another one of the many significant costs that resulted from allowing easy divorce.



## *Secondary Legal Changes*

Family law is a complicated body of regulations that are intended, by necessity, to work together to police the private opportunistic incentives of a given family member. Changes in the grounds to divorce led to a series of other changes as individuals exploited what now amounted to “loop-holes.” The saving grace of the old fault system was that it implicitly forced divorcing couples to collude on a fault ground in order to obtain a divorce. Most reformers saw this as a weakness, but the act of collusion led to mutual divorces. No one could be abandoned since divorce required consent from both parties. In practice this meant husband and wife would agree to property, support, and custody arrangements. With the introduction of unilateral divorce, this changed, and individuals who could leave the marriage and take large shares of marital wealth with them, did so.

One of the first areas of family law to change was the definition of marital property. In nine Canadian provinces and ten states, property had been determined by the name on the title — usually the husband’s. The jurisdictions quickly changed to some notion of community property with presumptions of equal contributions, but not before many women were divorced with little but the shirts left on their backs.<sup>28</sup> Laws regulating marital property continue to evolve in band-aid fashion as various issues come before the court.

Support laws and custody laws are also currently in flux. Father’s groups have protested the standard presumption that custody be given to the mother, and have lobbied for more joint custody and parenting rules. Allen and Brinig (2005) found that in the state of Oregon, joint parenting laws increased the time it took to get a divorce because couples use the “abuse clause” to prevent or obtain full custody.<sup>29</sup>

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<sup>28</sup> The most famous case in Canada is *Murdoch v Murdoch* (1975, 1 S.C.R. 423; 1974, 41 P.L.R. (3<sup>d</sup>) 367). Here a couple farmed in Alberta for twenty-five years, during which time Mrs. Murdoch made significant contributions to the farm. However, since she made no financial contribution and property was held by her husband, she walked away with basically the dress on her back. In Canada it is a stylized fact that after this case the lobbies for property distribution reform gained momentum, and that the courts took more liberty in awarding property to wives.

<sup>29</sup> Under the law, joint parenting is mandatory unless one spouse is abusive.

Sometimes changes in these secondary laws cause even more divorce problems. Throughout Canada and the U.S. there has been a movement towards legislated child and spousal support guidelines rather than court determined awards. These guidelines are simply tables of numbers that determine the dollar amount based on a few parameters like the number of children, spousal income, length of marriage. They give the impression of being “scientific” and they are couched in a rhetoric of mathematical rigor. The problem is that families are always more complicated than a few measurable dimensions, and therefore the guidelines can be exploited in certain circumstances. Allen (2004) points out this problem with Canada’s child support guidelines that do not adjust for the costs of children when income changes. As a result, he estimates divorce rates increase by as much as 10% when the potential non-custodial parent’s income hits \$100,000 per year.

*The Divorce Culture*

Barbara Dafoe Whitehead, in her book states:

...divorce is not simply a legal mechanism for dissolving marriages but a social and cultural force that opportunistically reproduces itself everywhere. A high divorce society is a society marked by growing division and separation in its social arrangements, a society of single mothers and vanished fathers, of divided households and split parenting, of fractured parent-child bonds and fragmented families, of broken links between marriage and parenthood. The shift from a family world governed by the institution of marriage to one ruled by divorce has brought a steady weakening of primary human relationships and bonds. Men’s and women’s relationships are becoming more fleeting and unreliable. Children are losing their ties to their fathers. Even a mother’s love is not forever, as the growing number of throwaway kids suggests.

[p. 182]

Perhaps the most unexpected result of the no-fault divorce revolution was the creation of a divorce culture. Advocates of same-sex marriages point to the increase in common law unions, single parenthood, and blended families as evidence of a “growing acceptance.” Rather, these are the consequences of, in part, legal changes that have contributed to the divorce culture. By inadvertently allowing for opportunistic divorce the law created a whole new class of inequality as many

women and children entered poverty through divorce. The sheer size of this group over the span of 30 years has influenced everything from greeting cards to day care centers. Whitehead argues that the divorce culture has led to a society with more coercion, individualism, and less commitment. Schools now teach “life skills”, “job counseling”, and “secular ethics”, rolls that at one time were universally done by families.

Parkman, in his 1992b book, makes the following conclusion regarding the effects of no-fault divorce:

It [no-fault divorce] contributed to the deterioration in the financial condition of many divorced women and the children of divorced parents. In response to the deteriorating conditions of divorced women, married women increased their labor market participation and education and unmarried women delayed marriage. It might appear that no-fault divorce only made women worse off, but no-fault also reduced the incentive for married women to specialize in domestic production and thus may have reduced the quality of life for their entire family.

[p. 104, 1992]

One must wonder: if these outcomes had been anticipated in 1968, would there have been the divorce revolution and would it have been so silent a debate?

## **5. Why Were The Effects of No-Fault Divorce Unexpected?**

### *Unintended and Unanticipated Consequences*

Clearly the move to no-fault divorce caused outcomes that were unanticipated and unintended. Many of the outcomes were surprises, and these surprise outcomes were often negative. The question is: why was this so? What is the fundamental reason for why such a policy could have outcomes so different from what was intended, and what are the implications for the current same-sex debate? The answer is that unintended/unanticipated outcomes are the result of false theories of human behavior. When legal or public policy decisions are made on the basis of false theories the results will be unanticipated. To the extent the status quo was efficient,

and to the extent that the public policy was based on intentions to improve welfare, the results will be unintended.

An unanticipated consequence is simply another way of saying that one's theory of the world has been refuted. The agents making the decision, simply have the wrong theory. For example, an individual driving down the road has a number of theories in mind. The driver believes that other drivers will obey the rules of the road, the driver believes he knows the rules of the road, that the car will obey the laws of physics, etcetera. An inobservant American driver in New Zealand, quickly discovers that his standard theories of driving are wrong through a series of unintended consequences. For example, driving on the right-hand side of the road in Auckland leads to a head on collision. The driver did not intend to have an accident, but his theory of driving was incorrect. False theories, if they are testable, eventually lead to unanticipated consequences.

An unintended consequence is slightly different than an unanticipated one. Unintended consequences may be good or bad. Some one who drills for oil, but discovers gold receives an unintended good outcome. A policy that intends to reduce illegal drug use, but ends up increasing it results in an unintended bad outcome. One might think that most laws and public policy are driven by good intentions. We have laws that attempt to reduce crime, encourage competition, prevent poverty, and the like. To the extent negative outcomes happen from policies that had positive intentions, we can say the results were unintended.

### *False Theories of Marriage*

It is easy to understand why the effect of no-fault divorce was unintended: the results have been so bad that no one would have wished them on future generations. However, why were the results unexpected? The answer must be: no one had a proper theory of marriage because false theories of marriage lead to unexpected outcomes. Contemporary documents, like the Canterbury Report, demonstrate

that proponents of no-fault divorce had an inadequate theory of marriage on a number of dimensions. First, there was a general failure to consider the incentives that would significantly change with a new divorce law. Reformers painted married men and women as either compatible or not, and therefore, the marriage as either good or bad.<sup>30</sup> Thus, most divorce law reformers advocated a change in divorce law because they simply thought that they were freeing a fixed number of bad marriages that were bad independent of the law. However, it is more useful to think of a spectrum of marriages; some healthy, generating large positive amounts of surplus utility to each spouse, others unhealthy, generating large negative amounts of utility, and a continuum of marriages in between. Critical is the notion of a “marginal” marriage. This is a marriage where the couple is, jointly speaking, indifferent to staying together or apart. Marginal marriages, however, depend on the costs and benefits of staying together, and changes in these costs and benefits can lead good marriages into marginal ones and marginal ones into bad ones. There is no exogenously given number of good marriages.

Second, there was a general failure to understand the true role of marriage institutions. Marriage is designed to regulate individual selfish behavior that gets in the way of producing successful children. Divorce reformers felt that marriage was the domain of lovers. Issues of specific investments, paternity, and the like simply were not considered. Lovers should be married, and haters should not be. It was that simple. Taken together, this view of marriage fails to account for the economic realities of marriage, and as a result was unable to predict the subsequent changes in behavior.

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<sup>30</sup> Sentiments like these are commonplace in the pro-no-fault literature. Whitehead (p. 19, 1997) quotes an early century advice writer as saying “no good purpose is achieved by keeping people together who have come to hate each other.” As if “hatred” were exogenously imposed on the couple by the gods. Sheppard, in defending the no-fault system states: “The idea, embraced by the no-fault separation ground, that unhappy marriages are not worth retaining .... It seems to me self-evident that an unwanted marriage ... can be a source of enormous family harm.... Surely the state has no principled interest in refusing to recognize this... ”[pp. 148-149, 1990] Or we have the following: “there are relationships which cannot easily be altered to make the marriage smoother. Divorce provides a quick and unequivocal termination of such marriages” [Zuckman and Fox . p. 536].”

This same form of argument is found today in the debate over same-sex marriage. Proponents claim that adding a small fixed number of same sex marriages into the fold benefits homosexuals with no costs to heterosexuals. Furthermore, arguments in favor of same-sex marriage are based on normative models of the way families should be, not based on the way families actually are. The role of biology, and the different way it effects men and women are downplayed. Issues of “social responsibility”, “loving partnerships” and “spousehood” are promoted over concepts of husband, wife, and parent. If these views of the family were true, all would be fine. But the no-fault divorce experience tells us they are not true, and therefore movements towards same-sex marriage will have different consequences than proponents claim.

## 6. Conclusion

Laws, if they are to have value, must necessarily come down on one side or another. As Coase (1960) pointed out over 40 years ago, the question is not how to eliminate harm, but rather whom should be allowed to hurt whom? And so, over time the franchise and regulation of marriage has evolved whenever the benefits have exceeded the costs. Consider an objection raised by John Rauch:

An off-the-cuff list of fundamental changes to marriage would include not only divorce and property reform but also the abolition of polygamy, the fading of dowries, the abolition of childhood betrothals, the elimination of parents right to choose mates for their children or to veto their childrens choices, the legalization of interracial marriage, the legalization of contraception, the criminalization of marital rape (an offense that wasnt even recognized until recently), and of course the very concept of civil marriage. Surely it is unfair to say that marriage may be reformed for the sake of anyone and everyone except homosexuals, who must respect the dictates of tradition.

[Rauch, 2005]

Man of these changes were not legal changes, and marital laws have not changed for “anyone and everyone,” but his point appears well taken until costs and benefits are considered. Inter-racial marriages are exactly the same in terms of contracting

issues between parents as marriages within a race. Thus there are no costs to allowing interracial marriages into the franchise — only the private benefits. Geddes and Lueck (2002) show how changes in the market value of women led to increasing costs of coverture and other restriction on female liberties. These changes ultimately led to the decline of those marital laws.

If same-sex couples are allowed to marry they hurt heterosexuals. If they are denied this right, then they are hurt. I have argued that the potential anticipated costs of same-sex marriage would be large. I've made this argument based on the feedback mechanism different types of marriages would have on legal heterosexual marriage, on the small number of homosexuals in the population, the impact widening the definition would have on divorce, and on the impact divorce has on the rest of the population. The key to my argument is that marriage laws in existence for thousands of years exist for a reason: to efficiently regulate incompatible incentives between husbands and wives that mostly arise over differences in biology. Large discrete changes to bed-rock aspects of marriage are likely to be inefficient. I have used the example of the switch to no-fault divorce to make the case that marriage is efficient and that the unintended negative outcomes refute theories of marriage based on the concept of loving relationships. The same arguments used to bring in no-fault divorce are, at a fundamental level, now being used to alter the definition of marriage. At both times the advocates are ignoring the fact that institutions are designed to police the private individual incentives that may be incompatible with the objectives of the institution.

If not marriage for gays and lesbians, then what? One possible option would be to create a separate legal structure called “homosexual marriage.” This would begin as identical to heterosexual marriage, but would be allowed to evolve independently of heterosexual marriage. Further changes to entry or exit conditions would have no binding impact on traditional marriage. The problem with this solution is that it opens the door for essentially private contracting in marriage as other types of relationships demand their own type of legal marriage. To the extent a separate body

of law regulating same sex marriage generates this response the ultimate outcome of customized marriage may not provide the same social status for homosexuals as traditional marriage currently does. Still, this solution would break the feedback loop of “one size fits all,” and marriage between a man and woman would remain the principle institutional vehicle by which fertility is intended to take place. Same sex marriage would evolve along lines compatible with same sex issues without constant pressure from heterosexuals to resist the change. Two types of marriage may not be ideal, but it may be better than one.



## References

- Alchian, Armen. "Uncertainty, Evolution, and Economic Theory." *Journal of Political Economy*, 1950.
- Allen, Douglas. "No-Fault Divorce in Canada: Its Cause and Effect" *Journal of Economic Behavior and Organization* October 1998.
- . "No-Fault Divorce and the Divorce Rate: Its History, Effect, and Implications. In *It Takes Two: The Family in Law and Finance*. Douglas Allen and John Richards (eds). (Toronto: CD Howe, 1999).
- . "An Inquiry Into the State's Role in Marriage," *Journal of Economic Behavior and Organization* 13(2) 1990.
- . "Marriage and Divorce: Comment," *American Economic Review* June 1992a.
- . "What Does She See In Him: The Effect of Sharing on the Choice of Spouse." *Economic Inquiry*, 30 January 1992b.
- . "Transaction Costs" *Encyclopedia of Law and Economics* (Volume One: The History and Methodology of Law and Economics) Bouckaert, Boudewijn and De Geest, Gerrit (eds.) (Cheltenham: Edward Elgar Press, 2000).
- . "Marriage as an Institution: A New Institutional Economic Approach" (SFU working paper, 2005).
- . and M. Brinig. "Sex, Property Rights and Divorce" *European Journal of Law and Economics* 5 June 1998.
- , K. Pendakur, and W. Suen. "No-Fault Divorce and the Contraction of Marriage Ages" *Economic Inquiry*, (forthcoming).

- Andersson, G., T. Noack, A. Seierstad, and H. Weedon-Fekjaer. “Divorce Risk Patterns in same-sex Marriages in Norway and Sweden.” (working paper, Max Planck Institute, 2004).
- Archbishop of Canterbury’s Group on the Divorce Law *Putting Asunder: A Divorce Law for Contemporary Society*. (London: society of the Promotion of Christian Knowledge, 1966).
- Barzel, Y. *Economic Analysis of Property Rights* (Cambridge: Cambridge University Press, 1999).
- Blumstein, Phillip and Pepper Schwartz. *American Couples: Money, Work, Sex* (New York: William Morrow, 1983).
- Brinig, M. “The Effect of Divorce on Wives” in *It Takes Two: The Family in Law and Finance*. Douglas Allen and John Richards (eds). (Toronto: CD Howe, 1999).
- . and D. Allen. “These Boots Are Made For Walking: Why Most Divorce Filers Are Women” *American Law and Economics Review* Vol.2(1) Spring 2000.
- . and Frank Buckley. “No-Fault Laws and At-Fault People.” *International Review of Law and Economics* 1998.
- . and Steve Crafton. “Marriage and Opportunism.” *Journal of Legal Studies*, 23 1994.
- Buckley, Frank. “Homosexuality and Marriage” in *It Takes Two: The Family in Law and Finance*. Douglas Allen and John Richards (eds). (Toronto: CD Howe, 1999).
- Cere, Daniel. *The Future of Family Law: Law and the Marriage Crisis in North America* (New York: Institute for American Values, 2005).
- Coase, Ronald. “The Problem of Social Cost” *Journal of Law and Economics* 1960.

- Cohen, Lloyd. “Rhetoric, The Unnatural Family, and Women’s Work” *Virginia Law Review* 81 November 1995.
- . “Marriage, Divorce, and Quasi Rents: or, ‘I Gave Him the Best Years of My Life’” *Journal of Legal Studies* XVI June 1987.
- Coontz, Stephanie. *Marriage, a History: From Obedience to Intimacy, or How Love Conquered Marriage*. (New York: Viking, 2005)
- De Soto, Hernando. *The mystery of capital : why capitalism triumphs in the West and fails everywhere else* (New York: Basic Books, 2000)
- Eggertsson, Thrainn. *Economic Behavior and Institutions* (Cambridge: Cambridge University Press, 1990).
- Gallagher, Maggie. “(How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman” *University of St. Thomas Law Journal* 2 Fall 2004.
- Geddes, R. and D. Lueck. “The Gains from Self-Ownership and the Expansion of Women’s Rights.” *American Economic Review* 92(4) September (2002).
- Hayek, F. A. *law, Legislation and Liberty* (Chicago: The University of Chicago Press, 1973).
- Jacob, Herbert. *Silent Revolution: The Transformation of Divorce law In the United States* (University of Chicago Press, 1988).
- Johnson, William, and Jonathan Skinner. “Labor Supply and Marital Separation” *American Economic Review* 76(3) 1986.
- Koppelman, Andrew. “The Decline and Fall of the Case Against Same-Sex Marriage” *University of St. Thomas Law Journal* 2, Fall 2004.

- Laumann, Edward, John Gagnon, Robert Michael, and Stuart Michaels. *The Social Organization of Sexuality: Sexual Practices in the United States* (Chicago: The University of Chicago Press, 1994).
- Menard, C., and M. Shirley. *Handbook of New Institutional Economics* (New York: Springer, 2005).
- Michael, Robert. “Consequences of the Rise in Female Labor Force Participation Rates: Questions and Probes.” *Journal of Labor Economics* 3 1985.
- Moir, Donald. “A New Class of Disadvantaged Children: Reflections on ‘Easy’ Divorce.” In *It Takes Two: The Family in Law and Finance*. Douglas Allen and John Richards (eds). (Toronto: CD Howe, 1999).
- North, Douglass. *Institutions, Institutional Change, and Economic Performance* (Cambridge: Cambridge University Press, 1990)
- Parkman, Allen, M. *No-Fault Divorce: What Went Wrong?* (Westview Press, 1992a).
- . “Unilateral Divorce and the Labor-Force Participation Rate of Married Women, Revisited” *American Economic Review* 82(3) 1992b.
- . “Why Are Married Women Working So Hard?” *International Review of Law and Economics* 18 1998.
- Peters, H. Elizabeth. “Marriage and Divorce: Informational Constraints and Private Contracting,” *American Economic Review* June 1986.
- Posner, Richard. *Sex and Reason*. (Cambridge: Harvard University Press, 1992).
- Rauch, John. “Objections to These Unions: What Friedrich Hayek can teach us about gay marriage” (<http://www.reason.com/0406/fe.jr.objections.shtml>, accessed December 12, 2005.)

- Rollins, Joe. "Same-Sex Unions and the Spectacles of Recognition" *Law and Society Review* Vol. 39, June 2005.
- Schnitzer, Patricia G., and Bernard G. Ewigman. "Child Deaths Resulting From Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics" *PEDIATRICS* Vol. 116 No. 5 November 2005.
- Sheppard, Annamay. "Women, Families and Equality: Was Divorce Reform A Mistake?" *Women's Rights Law Reporter* 12 Fall 1990.
- Weitzman, Lenore. *The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America*. (New York: The Free Press, 1985).
- Wolfson, Evan. *Why Marriage Matters: America, Equality, and Gay People's Right to Marry*. (New York: Simon & Schuster, 2004).
- Zuckman H. and W. Fox. "The Ferment in Divorce Legislation" *Journal of Family Law* 12 1972-73.