

An Economic Assessment of Same-Sex Marriage

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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. Marriage is an institution. 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.¹ 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 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

¹ 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.

always available only to heterosexual couples.²

To some the idea of same-sex marriage came out of the blue, while for others it is a natural extension of changes begun long ago. 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.³ 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.⁴ 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 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. With this, pressure to change 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. Although debate over the nature of marriage is necessary, it is made difficult because of legal inertia, public and academic exhaustion, and the fact that the entire same-sex marriage debate takes

² 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.

³ See Coontz (2005).

⁴ 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.

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.⁵ Same-sex relations are the same as heterosexual relations, the argument goes, and therefore should be regulated the same.⁶ 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 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,

⁵ “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.

⁶ By the “same” is usually meant the relationships are based on love. As I argue below, marriage is not grounded in love, but rather incentive issues mainly related to procreation. Pro same-sex marriage arguments often attack the issue of procreation, noting that elderly marriages, infertile couples, etc. are allowed to marry. This misses the point for several reasons. First, 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 objection of the institution. Second, socially encouraging all heterosexual intercourse to take place through marriage ensures that procreative sex necessarily occurs there as well.

and pedoflial marriages?⁷ 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 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.⁸ 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.

⁷ 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]

⁸ This argument is briefly made in Buckley (1999).

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.⁹ I demonstrate my argument with a brief analysis of the no-fault divorce debate and history.

2. An Economic Explanation of Marriage

Institutions do not come into existence *ex nihilo*. Institutions are the result of 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).¹⁰ 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.¹¹ In general, economists see individuals coming together to cooperatively exchange and produce, and they do this because together we can generate much more wealth (broadly defined) than we can do on our own. Unfortunately, when people come together they can also opportunistically behave non-cooperatively. Workers shirk their duties, bad cheques get written, spouses commit adultery, and on and on. To mitigate these bad behaviors successful societies created institutions that constrain private incentives. Economists, over the past forty years have shown how widely varying these institutions can be, and how important they are for economic growth.¹²

⁹ See Allen and Richards (1999) for survey articles on these effects.

¹⁰ For an early articulation of the main ideas in this field, see Eggerston (1990) or North (1990).

¹¹ 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).

¹² The interested reader 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

If institutions are designed to maximize wealth net of the costs of maintaining the institution, and if these institutions, as demonstrated by their ability to survive, are able to achieve this outcome, then the implication is that they are economically efficient.¹³ 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 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 that the institutions of marriage we observe today are efficient. 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.

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? 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.¹⁴

(eds) (2005) on general articles of regulation, law, and governance; and DeSoto (2000) on economic development. 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.

¹³ See Alchian (1950) for the classic articulation that efficient institutions survive, while inefficient ones die out.

¹⁴ For example, Cohen (1995) states:

Because this conflict between the private and social incentives is essentially linked to the biology of procreation, the optimal marriage rules have been remarkably constant across time and cultures. Elsewhere I have laid out many of these conflicting incentives and have pointed out how marriage rules mitigate or solve the problems.¹⁵

The key assertion I'm starting with here is that marriage is an institution that maximizes the gains between a man and a woman, net of the tremendous costs that arise in managing such an exchange.¹⁶ Marriage is designed to deal with the myriad of issues that arise between a husband and a woman in order to create incentives to procreate and to invest in their offspring in order for them to be successful in the next generation. Marriage has lasted and survived so long because these issues remain relatively constant across heterosexual couples.¹⁷

The key problem with the introduction of same-sex marriage in this context is that it introduces two fundamentally different types of relationships under the umbrella of marriage. Customs, norms, and laws that are designed to efficiently manage issues that arise for heterosexual couples, are unlikely to satisfactorily deal with issues arising within the context of gay or lesbian couples.

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]

Cohn has long articulated the case that marriage is an institution designed to constrain men. Others have noted that opportunistic behavior takes place by both genders, and that marriage laws have always taken this into account.

¹⁵ See Allen (2005)

¹⁶ On the surface, this economic 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.

¹⁷ That is, societies that adopted different fundamental marriage institutions did not survive.

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, in terms of their actual behavior and contracting issues, they are three distinctly different relationships, and ignoring these differences makes it difficult to anticipate future problems. 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 per month. Heterosexuals, especially during the child bearing years have very similar sexual frequency rates that were closer to the gay male rate.¹⁸ 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.¹⁹

The most fundamental difference in these three types of unions results from the presence of 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

¹⁸ 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.

¹⁹ This finding points to one of the obvious sources of future legal contentions: the optimal level of exit conditions. If same-sex marriages are fundamentally less stable, then homosexuals will seek less restrictive exit conditions.

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. In fact, 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 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. Thus, we ironically see that the mere creation of same-sex marriage immediately has a bearing upon the legal rights and status of heterosexual couples.²⁰

Perhaps these differences matter very little in terms of same-sex *marriage* since marriages do not take place without some type of mutual agreement on how to deal with these differences in the context of the union. The real problem with same-sex marriage is 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. Many of these rules are based on historical roles of mothers and fathers and are rooted in biology and the doctrine of the natural parent. When a same-sex couple divorces 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? 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? Once 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?

²⁰ 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.

It is not too hard to imagine other differences in regulation that will arise between the different types of couples. First, procreation requires different levels of commitment from men and women. Many institutional rules within marriage are designed to restrict males from exploiting the specific investments women must make in child bearing.²¹ Since same-sex marriages are not based on procreation these restrictions are likely to be objected to and challenged in courts and legislation. To the extent they are changed they will hurt heterosexual marriages, women in particular. 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. Culturally speaking adultery will become more acceptable. 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.

The list is long, but since many of the 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. The presence of a child in a same-sex union necessarily means a third party was involved. This involvement may be as limited as an anonymous sperm donor, or as extensive as an actively involved third parent — an entire spectrum is possible. It seems impossible for the current two-parent model of laws to adequately meet the contractual issues that will arise in these cases.²² One thing that is clear is that courts will

²¹ See Cohen (1987) for the seminal paper on this topic.

²² Gallager (2004) notes that *Goodridge* was faced with this problem immediately in dealing with the presumption of paternity, and decided to switch it to a “presumption of parentage.” 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]

be forced to recognize the different types of families along the spectrum of cases. As other familial arrangements become recognized the legal complications and their predicted effect on heterosexual marriages become practically incalculable.²³

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. Marriage was designed for heterosexuals, that necessarily means it will not be satisfactory for homosexual marriages, and therefore homosexual couples will divorce at rates that are too high under the current regime. Alterations in divorce laws to deal with issues of same-sex divorce will necessarily apply to heterosexuals, and these new laws will not be optimal for heterosexuals, making marriage a more fragile institution for them.

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

²³ 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. Pretests 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?

homosexual couples will receive the benefits of marriage.²⁴ Any talk otherwise is simply social-science scare mongering.

Perhaps. But slightly over thirty years ago family law went through another 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 is an interesting exercise to go back over that debate and briefly note that the consequences of that law were unanticipated and subtle. Furthermore, the arguments supporting the change in law are now all too familiar. In the end, it turned out marriage was much more fragile than anyone publicly thought. Ultimately, the problem with thinking that institutional change will have no impact on marriage behavior is it ignores the fundamental purpose of marriage.

3. The Intentions of No-Fault Divorce

Jacob (1988) has referred to the introduction of no-fault divorce as the “silent revolution”. Indeed, one is hard pressed to find another example of social legislation that had as 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,

²⁴ For example, Koppleman (2004) states: “It’s hard to imagine how legal recognition of same-sex marriage would affect even one man’s deliberations about whether to marry a woman or to stay with his children.”

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. For example, an extremely influential book by a group appointed by the Archbishop of Canterbury stated:

When they call for reform of the law, they are not asking for ‘easy divorce’, but that the law should have regard to the empirical state of affairs, and that the court should be empowered to declare defunct de jure what in their view is already defunct de facto.

[Canterbury, p. 38, 1966]

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). Along the same lines Humphrey states: “To require an adversary proceeding and fabrication of a statutory excuse to legally justify the marriage dissolution makes a mockery of matrimonial law.” [p. 111 1972-73]

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 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. It is for this reason that the writers of the report ironically rejected the notion of mutual consent. They state:

The fatal defect of the consensual principle is ... that it subjects marriage absolutely to the joint will of the parties, so making it in essence a private contract. Since it gives the court, as representing the community, no effectual part in divorce, it virtually repudiates the community’s interest in the stability of marriage. ... Dissolution of marriage ought always to require a real exercise of judgment by the court, acting on the community’s behalf.

[p. 34, 1966]

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. The Canadian experience appears typical. From a reading of the Parliamentary debate on the 1968 Canadian law, there was little opposition. After the introduction of the bill, the leader of the opposition stated:

Mr. Chairman, in just a few words I should like to indicated that we on this side of the chamber approve of reforming the divorce law, and look forward to receiving the bill...

[Canada, p. 5017, 1968]

In the debate that follows, there is no opposition. Members from both sides simply repeat that adultery and separation are not the only factors that could terminate a marriage, and that the time has come for a new way. Jacob (1988), writing

mostly on the California experience also argues that no-fault divorce arrived with little resistance. And thus, beginning in Canada in 1968, most western countries quietly altered their divorce laws.

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 than in Canada, but the anecdotal evidence of increased divorce rates was also immediate. 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.

4.1. 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? The very early papers published on the subject are incredibly bad. Data in the early 1970s was rare, computers for analysis even rarer, and no theoretical framework existed to direct the method of testing. As I mention in Allen (1999) the first serious, but highly flawed study occurred in 1986. If one was interested in a scorecard on divorce rate studies, the crude score would be 11 to 6 in favor of the divorce rate increasing as a result of no-fault divorce laws. If one were to eliminate studies that contained mistakes in legal classification, mis-coded data, biased visual techniques, or trivial sample sizes, the score is 9 to 0 — an absolute rout. All of the divorce studies done since 1986 have concluded that the divorce rate increased with the introduction of no-fault divorce.²⁵ After almost thirty years of analysis, there is no question that divorce rates were effected by the law, and that they increased. There has only been one study on the effect of no-fault divorce in Canada (Allen 1998), and there I find that the change in the law was quite strong.

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. Crudely speaking, custody of children is the driving factor behind who files for divorce, second is access to the financial assets of the marriage. The problem with opportunistic or inefficient divorces is that they leave behind partners that are more worse off than the benefits

²⁵ The most recent, and unpublished studies, are starting to find reductions in divorce rates 15–20 years after the legal changes.

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 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. This explains why we hear both men and women opposing and supporting the current divorce regime: although the nature of the gains and losses to divorce are different for men and women, there is no gender bias in favor of men or women in terms of divorce.

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. In 1985 Lenore Weitzman made a splash in her book, *The Divorce Revolution*, with the claim that women were financially worse off by as much as 70% after divorce. No one since then has measured an effect nearly as large, 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. 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.

4.2. Age At Marriage

The impacts of no-fault divorce law mentioned above are not too surprising with hindsight. However, there may have been a number of very 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 will 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 *et al* (2005) 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.

4.3. Labor Force Participation of Women

Though there has been a relatively surprising amount of disagreement over the effect of no-fault divorce on the divorce rate, of the work done on the effect of divorce laws on the labor force participation of women (LFPR), there is remarkable agreement. 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. Although female participation in the workforce continued to increase, 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. Using the same Current Population Survey (CPS) data that she used for the divorce rate, Peters ran regressions of the LFPR against a series of demographic variables and a dummy variable for whether or not the individual lived in a no-fault state. 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 using the same CPS data as Peters. His main point was not with the fact that women would increase their LFPR as a result to a threat in divorce, but with how this mechanism worked. Parkman argued 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. Although Parkman disagreed over the mechanism described by Peters, he found a similar effect for the law.

Parkman (1998) expands on his earlier work and looks at the total amount of time that women are working. 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.

4.4. 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. Not too surprising (that is, with hindsight) 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.²⁶ 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.²⁷

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

²⁶ The most famous case in Canada is *Murdoch v Murdoch* (1975, 1 S.C.R. 423; 1974, 41 P.L.R. (3^d) 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.

²⁷ Under the law, joint parenting is mandatory unless one spouse is abusive.

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.

4.5. 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. We have "deadbeat dads" and "lock key" kids.

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?

5.1. Unintended and Unanticipated Consequences

It is clear from the above discussion that the move to no-fault divorce caused outcomes that were unanticipated and unintended. That is, many of the outcomes were surprises in that no one expected them to happen, 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. 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 of human behavior 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. It is important to understand this point because the same arguments made during the no-fault revolution are now being made in the context of expanding the definition of marriage.

All human actions involve theory. When an individual drives down the road he 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, etceteras. An inobservant Canadian 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. When a driver decides to take a sharp corner at 100 km/h and flies off the road, again, his theories of the motion of the car are proven false.

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. This holds for physical predictions like the driver and the car, and it holds for models of social science as well. In the 15th century, most of the sailor's on Columbus' ship believed that the world was flat. Although Columbus believed that the world was round, he did think that the world was much smaller than its actual size. It was a surprise to the sailors that they did not sail off the face of the earth, and it was an incorrect understanding of the local geography that lead Columbus to believe he had reached India. 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. I will argue below that negative unintended outcomes result from altering efficient institutions.

In the social sciences, where the quantity of theory often exceeds the quantity of testing, there are many examples of policies based on false theories that have often led to tragic outcomes. In economics failed policies litter the historic record like dead sea birds after an oil spill. Keynesian economic policies that encouraged government

spending under the assumption that there was a trade-off between unemployment and inflation, led to the stagflation of the 1970s where both unemployment and inflation were high. More recently, economists have flooded Eastern Europe after the fall of communism, preaching the merits of a capitalist market system. More than ten years after the reforms, many of these countries remain in poverty and economists are generally unable to explain the different patterns of growth rates. Anyone who has ever heard a Keynesian preach while Keynesianism was in fashion, or heard the private property gurus during the early 90s, knows that there was no humility in their policies, no acknowledgment that these models of the world might be false, and no anticipation of the failures to come.

5.2. 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, it is interesting to ask why the results were unexpected, why was there no anticipation of the problems that might arise from the no-fault law? A hint is found in the Canterbury report. That report failed to consider the incentives that would significantly change with a new divorce law — a failure which occurs over and over in the history of no-fault divorce debates, and now which appears in the debate over same-sex unions. Reformers, both legal and sociological have tended towards an unrealistic view of marriage, the law, and human motivation. Quite often the picture painted is that men and women are either compatible or not, and therefore, the marriage is either good or bad, and if bad then a divorce is inevitable. Individuals are characterized as dichotomous as well: mostly good and interested in the welfare of others, some bad and hopeless. Finally, the law is often viewed as completely binding; that is, whatever the law states in principle, will be the outcome, in fact. For example, when the law states there will be an equal split of the marital property — there will be.

This fails to account for the economic realities of marriage and the law. Economists view the world in terms of the rights people actually possess and their ability to

make decisions based on this possession, not just under the law. Furthermore, economists view marriage as a long term exchange shaped in an effort to police the self-interested motives of the husband and wife. One implication of the economic approach is that individuals change their behavior when they face different sets of incentives.

One of the key mistakes that no-fault divorce advocates made in arguing for the law, and which must have biased the interpretations of the early evaluations, was the assumption that there are either good marriages or bad marriages and their number is independent of the law. 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]” Sentiments like these are commonplace in the pro-no-fault literature.

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. 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. They ignored the fact that for any given law many marriages are marginal, just barely in the parties' interests in keeping together. For these marriages a relaxing of the law tips the scale in favor of divorce.

What is less clear among the reformers was their implicit theory of marriage. To the economist, a man and woman enter into a marriage because there are gains from joint production. Marital production, especially children, requires a long time and involves the investment of resources that are specific to the family. Often the wife is required to invest early in the marriage, and as a result puts herself at risk of breach of contract. To the economist, marital law is designed to prevent inefficient breaches, or to put another way, to prevent one spouse from taking advantage of the other's weaker bargaining position due to the specific investments in the marriage. Too often, the reformer does not have a theory of what marriage is, but rather simply articulates what they think marriage ought to be. However, policy recommendations made before understanding simply gets the cart before the horse and is about as effective.

This same form of argument is found today in the debate over same-sex marriage. Arguments 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. Yet differences in the sexes abound and couples exploit these differences to their joint advantage by specializing in those activities in which they have a comparative advantage. Furthermore, couples often find it in their joint interests to enhance their differences through human capital investments that increase their comparative advantages and increase the value of their marriage. To prevent this or to engage in public policy that discourages it, only makes couples worse off.

One of the most insidious aspects of the same-sex debate is the promotion of the idea that "spousehood is not automatically identified with parenthood." One

of the key ideas in economics, and one that is almost common sense, is that those who make decisions bear the costs of those decisions. Separating the role of spouse and parent creates all sorts of incentive problems. Furthermore, evidence mounts that the biological connections between parents and children is important in and of itself. As a normative tool to guide policy this, and the other characteristics, completely ignore the incentives that individuals within a family have.

6. Conclusion

The words “equality” and “fairness” are often used to simply get what we want. 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? 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 huge, and many other costs are simply too difficult to even anticipate. 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. I have used the example of the switch to no-fault divorce to make the case that marriage is efficient and that messing with it will result in unintended negative outcomes. 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 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. For the very reasons family law developed into something different than pure contract law, this would be a mistake. Under this solution, there is no mechanism to prevent marriage from meaning anything more than a private employment contract.

The only other option is to allow some type of civil union that i) can evolve legally on its own without binding heterosexual couples, but ii) does not have the same cultural status as marriage. Marriage between a man and women would remain the principle institutional vehicle by which fertility is intended to take place. In maintaining this position the institution can continue to successfully produce a successful next generation.

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