

AN ECONOMIC ASSESSMENT OF SAME-SEX MARRIAGE LAWS

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This Article argues that 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 to be covered by the same law will lead to a sub-optimal law for all three types of marriage.

I. INTRODUCTION

“Marriage” is a word familiar to toddlers, and yet so complicated that most adults cannot articulate its real meaning.¹ Marriage is an institution.² It is a complex set of personal values, social norms, religious customs, and legal constraints that regu-

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1. This is hardly a failure of those attempting to defend marriage:

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.

1 F.A. HAYEK, LAW, LEGISLATION AND LIBERTY, RULES AND ORDER 11 (1973).

2. Douglass North defines institutions as the “humanly devised constraints that shape human interaction.” DOUGLASS NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 3 (1990). Economists often mischaracterize marriage by calling it a contract. Although there are contractual aspects to marriage, its details go well beyond this description.

late a particular intimate human relation over a life span.³ Families are organized around marriage, and marriage provides benefits to families in terms of survival and success. The source of these benefits springs from the incentives created by the rich fabric of characteristics laced throughout the formal and informal marital rules. Social norms on personal 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 incentives are necessary because both husbands and wives often have private incentives at odds with the interests of the community and 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, interracial relations, and divorce have changed. Legal rules regulating everything from the treatment of children and division of property to the grounds for divorce have changed. Yet certain elements of the institution of marriage have remained relatively constant for centuries.⁴ For instance, marriage has always entailed more than a mere "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. Marriage has always been prohibited between siblings. Of course, until very recently, marriage was available only to heterosexual couples.⁵ This Article argues that the best explana-

3. The general public commonly thinks of marriage as a creation of the state. As an institution, however, marriage is larger than and existed prior to the state even though state regulation is now part of marriage.

4. Throughout this Article "marriage" means western marriage. Exceptions to the marriage definition can be found for any definition of marriage within some small tribe in a remote location or ancient time. As argued below, these types of marriages can be ignored because they do not survive or are unsuccessful in generating large populations. *See infra* notes 20–21 and accompanying text.

5. 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 have existed when they have imposed no social costs. The two obvious ones are ex post infertile marriages and marriage by those beyond childbearing years.

tion for the evolution of some marriage characteristics while others do not change is that marriage is an institution uniquely equipped to handle incentive problems between a man and a woman over their full life cycle.⁶

To some people, 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.⁷ Still others start with legal changes. Holland, followed by Belgium and Canada, became the first modern nation to legalize same-sex marriages at the turn of this century.⁸ Other jurisdictions (including, for example, Scandinavian countries, Vermont, and California) 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.⁹

6. Although solving incentive problems is the core of marriage, this has never prevented societies from using the institution of marriage as a platform to accomplish other goals. Historically, marriage has been used to connect kin groups for trade and political stability, improve legitimacy over claims of inheritance, and provide life and old-age social insurance. These latter functions, however, were never the reasons for marriage. Rather, marriage supported these services in a world where states and other third-party enforcement mechanisms were weak. When these services were separated from marriage over the past two hundred years, marriage continued to exist.

7. See STEPHANIE COONTZ, *MARRIAGE, A HISTORY* 7 (2005). Although same-sex marriage is a small part of her thesis, she views its modern version as a logical conclusion of the premise that marriage is grounded in love.

8. *Dutch Legislators Approve Full Marriage Rights for Gays*, N.Y. TIMES, Sept. 13, 2000, at A4; Marlise Simons, *World Briefing Europe: Belgium: Parliament Approves Gay Marriages*, N.Y. TIMES, Jan. 31, 2003, at A6. The first Canadian same-sex marriages took place on January 14, 2001 at the Metropolitan Community Church of Toronto. Debra Black, *Lesbians Hope Walk up Aisle Will Pave Way for Legal Marriage*, TORONTO STAR, Jan. 14, 2001, at A7. These became the basis of a legal challenge that ended at the Ontario Court of Appeal on June 10, 2003. *Halpern v. Toronto (City)*, [2003] O.A.C. 276 (Can.). Many Canadian same-sex supporters thus date the arrival of same-sex marriage at the date of the marriages, which makes Canada the first country to adopt same-sex marriage laws.

9. See Stanley Kurtz, *Slipping Toward Scandinavia*, NAT'L REV. ONLINE, Feb. 2, 2004, <http://www.nationalreview.com/kurtz/kurtz200402020917.asp>; Carey Goldberg, *In Vermont, Gay Couples Head for the Almost-Altar*, N.Y. TIMES, July 2, 2000, § 1, at 10;

The ultimate political fate of same-sex marriage, what form it takes, and how it relates to traditional marriage are still undetermined issues. An enormous debate continues over the issue of same-sex marriage, even in countries where the basic premise has been accepted, like Canada, where the government passed formal legislation changing the legal definition of marriage in the summer of 2005.¹⁰ Within this context, the pressure to change laws in the United States, where more than thirty states have passed some type of "Defense of Marriage Act," including in some cases constitutional amendments that prohibit same-sex marriage,¹¹ will only increase.

This pressure makes a debate over the nature of marriage necessary. Such a debate is made difficult, however, because of legal inertia, public and academic exhaustion, and its place within a larger debate over questions of divorce, marriage regulations, and the entire existence of family law. Many argue for a return to traditional covenant-based marriage, with difficult exit and entry provisions, while others argue that the concept of marriage should either be eliminated or expanded to include virtually all combinations of human quasi-familial relationships under the general legal regulation of contract law.

The arguments for same-sex marriage are now quite familiar. Couched in 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.¹² Same-sex relations are the same as heterosexual relations, the argument goes, and therefore should be regulated in the same way. In this context, "the same" usually means that both types

Jennifer Warren, *Bill Expanding Domestic Partners' Rights Signed*, L.A. TIMES, Oct. 15, 2001, pt. 2, at 6.

10. Civil Marriage Act, 2005 S.C., ch. 33 (Can.); Daniel Girard, *Gay Marriage Fight Over*, TORONTO STAR, July 13, 2005, at A12.

11. Heritage Found., *Marriage in the 50 States*, <http://www.heritage.org/Research/Family/Marriage50/Marriage50States.cfm> (last visited Mar. 17, 2006).

12. "All citizens," interestingly enough, does not include 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. See Joe Rollins, *Same-Sex Unions and the Spectacles of Recognition*, 39 LAW & SOC'Y REV. 457, 462 (2005) (critiquing the "aligning [of] homosexuality with abominations such as incest, bestiality, and polygamy"). This, however, ignores the advocates of more modern polyamorous relations that claim triadic matches are more equitable than dyadic ones.

of relationships are based on love.¹³ 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 advantageous arrangement 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 in the population 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) and slippery slope arguments (if same-sex marriage, then why not polygamy, incest, and pedophilic marriages?).¹⁴ Some arguments build upon the premise that marriage is defined as dual-gendered, 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 heated rhetoric of the debate tends to be quite remarkable, with stinging words regularly slung from both sides.

This Article 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 the contracting problems involved in procreation; however, unlike other arguments, this argument focuses on the economic role of marriage, the nature

13. Arguments in favor of same-sex marriage often attack the issue of procreation, noting that elderly couples and infertile couples are allowed to marry.

14. Proponents of same-sex marriage are quite dismissive of these arguments. See, e.g., EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY* 71 (2004) ("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 the table.").

of the institutional constraints, and the interaction between legal rules and behavior. This Article argues that the institutional details of marriage are designed with specific purposes in mind, and that these purposes generally have little to do with homosexual relations. The fundamental point of this Article is that when different human relationships fall under a "one size fits all" law, the result is a bad fit for everyone.¹⁵ Alterations to heterosexual institutions resulting from contracting problems arising in homosexual relations will 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 does not provide a good fit for the couple is the ultimate effect such laws will have on children. Marriage stability is often sensitive to changes in the law, with greater divorce rates a common outcome. The effects of divorce are often ambiguous on the husband and wife, but for children they are mostly negative.¹⁶ Arguing that marriage is efficiently designed to have children raised by both biological parents, and that tampering with this design can lead to dire consequences, might appear as nothing more than theoretical hot air. Proponents of same-sex marriage, however, use the same arguments and marriage models employed by no-fault divorce reformers. After discussing the theoretical issues of same sex marriage, this Article briefly examines the history and effects of no-fault divorce. The purpose of this exercise is to point out that first, the same love-based view of marriage was used in the earlier debate; second, no harmful or surprising outcomes were expected; and third, the eventual reality was exactly the opposite. The no-fault divorce experience serves to discredit 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.

15. This argument is briefly made in Frank Buckley, *Marriage and Homosexuals*, in *IT TAKES TWO: THE FAMILY IN LAW AND FINANCE* 102, 104 (Douglas W. Allen & John Richards eds., 1999).

16. Since the introduction of no-fault divorce laws, many argued a priori that divorce might be good for children. Empirically, this has not been the case on average. See Donald Moir, *A New Class of Disadvantaged Children*, in *IT TAKES TWO: THE FAMILY IN LAW AND FINANCE*, *supra* note 15, at 63, 67–68.

II. AN ECONOMIC EXPLANATION OF MARRIAGE

A. *Institutions and Efficiency*

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 effects they have on behavior are the subject matter of the field called new institutional economics (NIE).¹⁷ 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.¹⁸ Although economists generally see individuals coming together for cooperative exchange and production as generating much more wealth (broadly defined) than they could on their own, such cooperation also enables people to take advantage of one another or behave opportunistically. For example, employees shirk their duties, people write bad checks, spouses commit adultery, and so on. To mitigate these opportunistic 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 outperform other societies. Eventually, only those societies with optimal rules survive.¹⁹

17. For an early articulation of the main ideas in this field, see THRAINN EGGERTSSON, *ECONOMIC BEHAVIOR AND INSTITUTIONS* 5–6 (1990) and NORTH, *supra* note 2. Their work is fundamentally based on Ronald Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960). Hayek articulates a theory of institutions that significantly overlaps the arguments of the later writers. Hayek would take issue with the claim that institutions are designed; he would claim they result from human actions, accidental or otherwise. Still, he would fully support the idea that efficient institutions tend to survive. See generally HAYEK, *supra* note 1.

18. These costs are an example of “transaction costs.” See Coase, *supra* note 17, at 15 (describing how these costs influence the design of the law). For a brief introduction to the subject of transaction costs, see Douglas W. Allen, *No-Fault Divorce and the Divorce Rate*, in *IT TAKES TWO: THE FAMILY IN LAW AND FINANCE*, *supra* note 15, at 1, 18. In maximizing wealth net of transaction costs economists refer to institutions being efficient in the “second best” sense.

19. See Armen A. Alchian, *Uncertainty, Evolution, and Economic Theory*, 58 J. POL. ECON. 211, 213–14 (1950) (stating the classic articulation that efficient institutions survive, while inefficient ones die out). Economists, over the past forty years, have

How institutions actually come into being is irrelevant to the question of efficiency. Intentions do not matter; whether constructed in order to achieve a specific goal or developing by chance, only optimal institutions survive in the competitive world of social interactions. The implication is that surviving, or long-lasting, institutions are economically efficient.²⁰ In the context of marriage—perhaps the oldest institution—the survival criteria are quite obvious. Societies incapable of replicating themselves in numbers and quality relative to competing societies simply die out or are taken over.²¹ In dealing with the legal regulation of marriage, courts and legislatures form laws that either work well or do not in varying degree. Poorly designed laws lead to lobbying efforts and appeals that result either in successful regulation of marriage or in unsuccessful marriages, which in turn lead 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, as they are the result of centuries of evolution. It is not the purpose of this Article to defend or develop this general hypothesis of NIE, but rather to explain its implication for heterosexual marriage and the introduction of same-sex couples to that franchise.

theoretically and empirically shown how institutions are important for economic growth. See generally YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* (2d ed. 1997) (analyzing the distributions of property rights); HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL* (2000) (describing economic development); DAVID D. FRIEDMAN, *LAW'S ORDER* (2000) (explaining efficiency in law); CLAUDE MENARD & MARY M. SHIRLEY, *HANDBOOK OF NEW INSTITUTIONAL ECONOMICS* (2005) (describing regulation, law, and governance); NORTH, *supra* note 2 (describing economic development); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (6th ed. 2003) (explaining efficiency in law). 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.

20. Note that the social evolutionary argument for institutions only tells us that long-lived institutions are efficient in that they have a survival characteristic. It says nothing about current social changes, other than that we should be skeptical of them in light of millennia of past different practices.

21. In her fascinating history of marriage, Coontz describes dozens of exotic marriage types that have existed over time. COONTZ, *supra* note 7, at 24–34. What is striking, however, is how these arrangements only developed in isolation and never generated significant populations. When these societies made contact with others, they did not survive. No doubt there are many reasons for their failures, but the point here is that their marriage institutions did not survive.

B. *Marriage: An Efficient Institution*

Starting with the idea that long-lasting institutions efficiently regulate or constrain behavior, a question is presented: what is being regulated in the context of marriage, and for what purpose?²² 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 cycles are often incompatible with the social objectives of the marriage.²³

On the surface, this argument seems ridiculous. The alternative, that marriage is based fundamentally on love, seems more reasonable. However, the love hypothesis is over- and under-inclusive. Many people love one another in both sacrificial and sexual ways (for example, cohabitants, polygamists, homosexuals), but are not married. At the same time, there are loveless marriages in which love, though once present, no longer exists, and arranged marriages in which love is not present at the beginning. Historically, love played almost no role in marriage; matches were arranged between kinship groups.²⁴ Ultimately, however, theories of marriage must be tested empirically. As this Article argues, at least in the context of no-fault divorce laws, evidence does not support the love-based marriage hypothesis.²⁵

22. In 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 state the NIE hypothesis as "marriage maximizes the family objectives net of the costs of organizing." This hypothesis lies at the foundation of an enormous body of empirical literature testing various hypotheses about marriage and family life. See *infra* Part III.

23. See Lloyd R. Cohen, *Rhetoric, The Unnatural Family, and Women's Work*, 81 VA. L. REV. 2275, 2290 (1995) ("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.").

24. See COONTZ, *supra* note 7, for a readable history of the recent view that marriage is based on love.

25. 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. This theory predicts that the demand for same-sex marriage simply reflects the desire of homosexuals to capture these wealth transfers. This hypothesis, however, is belied by the experience in Canada. Although the Canadian Supreme Court's decision in *M v. H*, [1999] D.L.R. (4th) 577, afforded cohabiting and same-sex couples all the benefits of marriage since 1999, the demand for same-sex marriage has continued.

Another objection to the economic argument is that there are heterosexual marriages without children, and elderly and infertile couples are nonetheless allowed to marry. These cases, however, do not affect the *ex ante* presumption that marriage will be procreative, which, for reasons discussed below, requires legitimate sex to take place within the 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.²⁶

In 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 their lives. Such investments place them at risk of abandonment by men who initially indicate commitment in exchange for sex. But biology cuts both ways; because men seldom know the paternity of their children 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, allowing the original mate to raise the latter’s child unknowingly. These are just two examples of how biology could create a conflict between private and social incentives. Rules restricting abandonment, punishing adultery, and restricting male-female interactions are ways to mitigate these problems. In general, though, marriage is designed to deal with the myriad issues that arise between a husband and a wife, and to create incentives to procreate and to invest in their offspring so that they will be successful members of the next generation. An implication of this theory is that the optimal marriage rules have been remarkably constant across time and cultures, because these issues remain relatively constant across heterosexual couples.²⁷

26. This is the likely reason that societies have made alternative forms of sex (bestiality, sodomy, fornication, adultery, incest, necrophilia) illegal.

27. It also explains the 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. *See* Douglas W. Allen, *Marriage as an Institution: A New Institutional Economic Approach* (Aug. 2005) (unpublished manuscript, on file with author) (laying out many of these conflicting incentives and pointing out how marriage rules mitigate or solve the problems).

C. *Introducing Same-Sex Marriage*

Legal recognition of same-sex marriage means that three different types of relationships will be regulated under the same legal umbrella. Advocates of same-sex marriage portray gay and lesbian couples as similar to one another and portray both as similar to heterosexual couples. All couples love each other, all couples seek the benefit of marriage, and all aspire to equality and dignity. No one claims, however, that they are identical, and in many cases the differences between couples could matter for successful legal regulation. In terms of observable behavior, heterosexuals, gays, and lesbians appear to form three distinctly different types of relationships. In an early study on couples, researchers found major differences in behavior between the three types.²⁸ Gay men had very high rates of sexual activity, while lesbian couples had sex on average once per month. Heterosexuals, especially during the childbearing years, have sexual frequency rates similar to those of gay men.²⁹ Gay men were more likely to have multiple partners than lesbians or heterosexuals.³⁰ In a study on same-sex registered unions in Sweden and Norway, researchers found a number of differences between gay and lesbian unions.³¹ Surprisingly, gays were almost twice as likely as lesbians to be married. 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 fifty percent higher than heterosexual couples, and lesbian marriages had dissolution rates three hundred percent higher. The lesbian rate of separation was twice that of gay couples.

28. See PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 195–96 (1983).

29. See EDWARD O. LAUMAN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY* 89–90 (1994) (finding that over seventy percent of married heterosexuals during child-bearing years had sex at least one time per week); see also ROBIN BAKER, *SPERM WARS* 27–45 (1996) (arguing that, because of the problem of establishing paternity, this rate of sexual frequency is an evolutionary tactic to keep sperm ever-present within the female to ward off pregnancy by other males).

30. LAUMAN ET AL., *supra* note 29, at 314–16.

31. See Gunnar Andersson et al., *Divorce-Risk Patterns in Same-Sex “Marriages” in Norway and Sweden* 12–24 (Mar. 1, 2004) (unpublished manuscript, on file with author).

These differences may not be the result of a lack of legal regulation; rather, they may reflect a more basic difference. The fundamental difference between these three types of unions is the biological relationship between parents and children. In a heterosexual marriage, biology is perfectly aligned with the definition of parent. Indeed, the legal notion of "natural parent" is the biological parent. In a properly functioning heterosexual marriage, there are 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. In a same-sex marriage, if there are children, this biological link is necessarily severed. This difference, whether one believes it to be good or bad, produces a different set of incentive problems between heterosexual and same-sex marriages.

Historically, marriage was designed to create a bond between a biological mother, father, and their children. This was not always possible: some marriages fail, spouses die, and some couples are unable to procreate. The result has been allowance for remarriage, adoption, artificial insemination, and the like. These have been second-best solutions to unfortunate circumstances; there was never the threat that these *ex post* outcomes would influence the institution of marriage.

The impossibility of same-sex procreation, however, presents a different set of circumstances. All children in a same-sex marriage necessarily have a broken biological link to at least one of their parents, whether because of a previous marriage by one of the partners, artificial insemination, or adoption. What is the exception for heterosexual marriage is ubiquitous for same-sex marriages. It is not obvious that current structures—such as adoption and reproductive technology—that are adequate for heterosexual marriage will be sufficient for same-sex marriages.

There is another problem that arises in every same-sex marriage: children receive only one type of gender influence from their parents. In addition to the uncertain direct effects of same-sex parenting on children, this situation may give rise to difficult contractual issues. No doubt many of these families will seek out role models for their child from among the other sex, perhaps from the biological parent. These third parties are likely to play more important roles in the context of same-sex

marriage, and with this increased importance may come increased legal rights of the third party.³² Or, perhaps the solution will take another route, with the state playing a larger role in the inculcation of gender identity. One wonders if such an approach would lead to greater state involvement in the raising of children from heterosexual families as well.

The point is simply this: the ability to procreate is a fundamental difference between same-sex and opposite-sex couples. This difference is likely to manifest itself in hundreds of different issues that may require or warrant some type of legal intervention. Thus, any transfer of rights permitting same-sex marriage may harm heterosexual couples, for whom the present regime was created, and for whom it is efficient.

Biological problems with same-sex marriage also arise in same-sex divorce. Marriage is more than just a set of entry conditions; it includes a set of exit provisions that specify the 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. It is beyond the scope of this Article to undertake an exhaustive listing, but consider a few examples of the different types of problems that might arise.

For example, start with child support guidelines. Currently, many U.S. states and Canada use tables to determine how much child support a non-custodial parent will pay after divorce. These tables appear quite simple, and often depend only on the non-custodial parent's income and the number of children. These tables, however, are based on estimated cost functions of heterosexual homes. In such homes, there are often divisions of labor based on sex differences, and standards of living are estimated based on the incomes of married men and women. To the extent that same-sex marriages will have household costs and household distributions of income that are different from heterosexual households, these guidelines will under- or over-compensate for costs of living. Here, the differences between lesbian and gay households are no doubt quite dramatic; one set of guidelines cannot compensate for fundamentally different types of households. This is not a mere academic point; when child support guidelines over-compensate

32. Notice this issue does not arise with traditional adoption.

one spouse, they create an incentive to divorce.³³ Thus, the inability of one set of guidelines to deal adequately with the cost structure of three different types of households has real and significant impacts on the ability of these relationships to succeed.

Same-sex divorce will raise novel legal problems. For instance, if third parties do become more involved in parenting in same-sex marriages, will they face child support responsibilities upon divorce? Will sperm or egg donors to same-sex marriages acquire legal rights and responsibilities as parents? 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?³⁴

Not only will decisions be made on new issues, but old answers might have to change. For example, many institutional rules within marriage are designed to restrict males from exploiting the specific investments women must make in childbearing.³⁵ For gay men in a same-sex marriage, these institutional rules make no sense. Neither partner makes specific human capital investments in childbirth, even if children are present in their marriage. As a result, these restrictions will likely be challenged in courts and legislation. Second, many institutional features of marriage are designed to protect paternity and avoid births out of wedlock. Again, these issues are of little concern to same sex-couples where sex does not lead to children. If these rules restrict behavior in same-sex marriages in

33. Douglas W. Allen, *The Effect on Divorce of Legislated Net-Wealth Transfers*, 23 J.L. ECON. & ORG. (forthcoming 2007) (estimating that in Canada, an increase of \$100,000 in income to the husband leads to a ten percent increase in the probability of divorce).

34. A common objection at this point is that lacking a biological connection is nothing new: adoption has been common for centuries. While this is true, adoption has often been regulated, and most parental rights to children have been transferred to the new parents as if they were biological. Children within same-sex marriages are different. Many, if not most, children in such marriages, arrive from a previous heterosexual marriage. Thus, there is no screening as with traditional 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 those in lesbian households, is yet to be determined.

35. See generally Lloyd Cohen, *Marriage, Divorce and Quasi Rents: Or, I Gave Him the Best Years of My Life*, 16 J. LEGAL STUD. 267 (1987) (seminal paper on this topic).

ways gay couples do not like, they too will be challenged in the courts.³⁶ Third, given that same-sex relationships are often composed of two financially independent individuals,³⁷ there will be pressure for even easier divorce, as the problem of financial dependency will be reduced. Although forming an incomplete list, these problems demonstrate the inadequacy of the current two-parent model to deal with the contractual issues that will arise in same-sex divorce.

D. *The Feedback Mechanism*

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 practical matter, it seems unlikely that same-sex couples would be ignored by the courts, and courts will recognize the different types of families along the spectrum of cases.³⁸

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

36. Here, the different sexual habits of heterosexuals, gays, and lesbians will be relevant. The institution of marriage will no doubt bear down on the sexual habits of gay men; married gay men, therefore, will be 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 should demand still fewer regulations on infidelity.

37. See FRANCINE BLAU, MARIANNE FERBER & ANNE WINKLER, *THE ECONOMICS OF WOMEN, MEN, AND WORK* (5th ed. 2006).

38. Of course, other non-marriage relations are also affected. Historically, when couples lived together for certain periods of time or produced children together, their unions were deemed "common law marriages," subject to the same laws of divorce as legally married couples. Gay men *not* interested in marriage have begun to protest the application of these laws to them, and it is difficult to see why these laws, designed to protect the interests of children, should be applied to them.

evolve, but the sun will still rise the next day. But the bottom line is that these new common laws will apply to heterosexual couples covered under the same family law, and over time the loopholes and areas of poor fit 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 that presents the fundamental danger to heterosexual marriage.

It is often argued 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. Because legal regulations on marriage revolve around children, and because same-sex families are fundamentally different from heterosexual ones in this respect, this area poses the greatest risk of legal misfit. Ironically, evidence for these changes appeared 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 natural parent and replacing it with "legal" parent.³⁹ 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 harm heterosexual marriages. Maggie Gallagher notes a second example:⁴⁰ facing the problem of how to deal with the presumption of paternity, the court in *Goodridge v. Department of Public Health* modified the traditional presumption to a "presumption of

39. See Jane Adolphe, *Bill C-38: Redefining Parenthood and Ignoring Children* (Ave Maria Sch. of Law, Working Paper 2005).

40. Maggie Gallagher, (How) Will Gay Marriage Weaken Marriage as a Social Institution: A Reply to Andrew Koppelman, 2 U. ST. THOMAS L.J. 33, 57 (2004).

parentage.”⁴¹ 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. In this context, Gallagher asks,

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?⁴²

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

E. 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, Andrew Koppleman states that “[i]t’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.”⁴³ 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 . . .” also recurred frequently. 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 intact marriages would be unaffected by

41. 798 N.E.2d 941, 956 (Mass. 2003).

42. Gallagher, *supra* note 40, at 57.

43. Andrew Koppleman, *The Decline and Fall of the Case Against Same Sex Marriage*, 2 U. ST. THOMAS L.J. 5, 26 (2004).

the legal change and the social impact would be minimal. It was hard to imagine how releasing couples from the bondage of a dead marriage could have any negative impact on other loving marriages. It is an interesting exercise to return to 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. This Article argues 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 same mistakes made by no-fault divorce reformers are now being made by proponents of same-sex marriage.

III. THE INTENTIONS OF NO-FAULT DIVORCE

Herbert Jacob has referred to the introduction of no-fault divorce as the “silent revolution” because there was so little debate before its introduction.⁴⁴ 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, to prevent perjury, to treat marriage partners as equals, to eliminate the adversarial nature of assigning blame, and to 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.

All of the arguments for no-fault divorce were well meaning. No one suggested that no-fault divorce might actually lead to

44. See generally HERBERT JACOB, *SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES* (1988).

higher divorce rates, and certainly no one anticipated the more subtle impacts. In essence, the argument of the time was that the current law hurt a group of people (those in “dead” marriages) and that allowing this group freedom to divorce would benefit them without harming anyone else. Such an argument, when couched in the language of honesty, individual responsibility, and non-adversarial process, presents a picture to which it is certainly difficult to object.

IV. 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 1970,⁴⁵ a six-fold increase in just two years after a century of rather stable divorce rates. In the United States, where divorce is governed by state law, the transition to no-fault divorce was slower and less dramatic, but still moved in the same direction. The effects of no-fault divorce, however, were much greater than just the direct impacts on the divorce rate. The law influenced the rate at which women entered the workforce, the number 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.

A. *Divorce Rate*

The first question lawyers and academics asked after the switch to no-fault divorce was whether the law changed the number of divorces. Early studies were limited by data, so the

45. Douglas W. Allen, *No-Fault Divorce in Canada: Its Cause and Effect*, 37 J. ECON. BEHAV. & ORG. 129 (1998).

first serious study did not occur until 1986.⁴⁶ Since that study, there have been several major published papers,⁴⁷ and all have concluded that the divorce rate increased at the same time as the introduction of no-fault divorce.⁴⁸ After almost thirty years of analysis, it seems clear that divorce rates were affected 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. Yet what makes the rise in divorce so troublesome is that often the divorces are inefficient or opportunistic: the economic benefits of marriage exceed the joint benefits of living apart, yet the divorces still occur because the benefit to one party of being able to leave unilaterally and perhaps take away a disproportionate share of the marital assets exceeds the value of remaining married. Both men and women behave in this opportunistic fashion.⁴⁹ The problem with opportunistic or inefficient divorces is that the cost to the other party is greater than the benefit to the party initiating the divorce. Among the most common inefficient outcomes are a father being separated from his children or a former wife forced to live in poverty.

Economists and lawyers have only recently shifted their attention away from the divorce rate to empirical estimation of the effects of divorce on the parties involved. The results suggest a rather complicated story. It is clear that some divorces are opportunistic and inefficient. On the other hand, there are divorces that do make both husband and wife better off because they dissolve an inefficient marriage.

46. Elizabeth H. Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437 (1986) (examining the effects of legal and informational constraints on the marriage relationship).

47. The most significant of these is Leora Friedberg, *Did Unilateral Divorce Raise Divorce Rates? Evidence from Panel Data*, 88 AM. ECON. REV. 608 (1998). She found that no-fault divorce laws led to a six percent higher divorce rate and that they accounted for about seventeen percent of the divorces over the time period studied. She also found that the change was permanent and exogenous.

48. In a forthcoming paper Justin Wolfers finds that subsequent changes in marriage behavior leads to reductions in divorce rates fifteen to twenty years after the legal changes. Justin Wolfers, *Did Unilateral Divorce Raise Divorce Rates? A Reconciliation and New Results*, AM. ECON. REV. (forthcoming). Of course, the short-run effects of no-fault laws are also likely to be related to other subsequent changes in family law. More research is necessary to sort out these effects.

49. See generally Margaret F. Brinig & Douglas W. Allen, *These Boots Are Made for Walking: Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126 (2000).

Most spouses who file for divorce are women,⁵⁰ driven by concerns about child custody. Of those women who file for divorce, most claim after the divorce that they do not regret it.⁵¹ On the other hand, women are generally made poorer by divorce. The actual amount of poverty caused by no-fault divorce is disputed, although one study argues that seventy-five percent of low-income divorced women with children were not poor when they were married.⁵² Although divorce is a financial hardship for women, this is most often offset by control over the children and themselves. There is little empirical data on the costs of divorce for men. 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 fathers' rights groups suggests that the number of disenfranchised fathers is not trivial.

If the effect of divorce on men and women is complicated, the effect on children is straightforward. A tremendous amount of research has been conducted on the effect of divorce on children. According to Donald Moir's assessment of the literature, if we consider any social pathology (teen pregnancy, criminal activity, divorce, and so on) 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 two if that child comes from a divorced home.⁵³ Discussions of the effect of divorce on children during the no-fault debate suggested that at worst children would be no better, but no worse off; many 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 rate meant increasing numbers of disadvantaged children.

50. *Id.* at 128.

51. *Id.* at 129; *see also* references cited therein.

52. Margaret F. Brinig, *The Effect of Divorce on Wives*, in *IT TAKES TWO: THE FAMILY IN LAW AND FINANCE*, *supra* note 15, at 1, 18.

53. *See generally* Moir, *supra* note 16.

B. Age at Marriage

Increases in divorce rates are not surprising in hindsight and were somewhat predictable. 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 was the effect that no-fault divorce had on the age at which an individual might marry.

Everyone's valuation of marriage and aversion to a spousal mismatch is somewhat different. As a result, any movement toward easy divorce will have different individual effects. Assume there are two types of people: those that place little value on marriage (low-value) and those that place great value on marriage (high-value). In a fault divorce regime, high-value individuals will be less concerned about a mismatch—marrying a low-value individual—because the legal regime will ensure the duration of the marriage. Conversely, low-value individuals will be more concerned about a mismatch for fear of being constrained by both the law and a high-value spouse. In a no-fault regime, these preferences reverse: a high-value individual will be more concerned about a mismatch with a low-value individual, both for fear of later divorce, and because only a match with another high-value individual can achieve the marital permanence formerly ensured by the law. A low-value individual will be less concerned about a mismatch, because he can simply procure a divorce. Low-value individuals will thus find marriage more attractive in a no-fault regime, while high-value individuals will find marriage less attractive in such a regime.

These differences in marriage preferences manifest themselves 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 need to find another high-value type, 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 marry at a younger age after the change in the law. On the

other hand, high-value types will have to search harder and longer to ensure a higher probability of a more compatible spouse because marrying a more compatible spouse can substitute for the prior legal restrictions on divorce. As the search is costly, high-value types will marry at an older age after the switch to no-fault. Because under fault divorce, high-value types would marry younger than low-value types, the variance in the distribution of marriage ages shrinks with the introduction of no-fault divorce. The average age at marriage before 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 potentially minor average change, however, masks large offsetting changes at the individual level.

Allen, Pendakur, and Suen collected individual marriage records for all marriages in approximately forty states between 1970 and 1996.⁵⁴ Using this data, they find the variance in ages at first marriage does indeed shrink in no-fault states,⁵⁵ showing that the divorce law has the subtle, unintended consequence of altering the marriage ages of everyone, especially those who have especially high or low values for marriage. In this respect, the divorce law affects everyone, not just those who divorced.

They also find that no-fault divorce increases the average age at which people marry,⁵⁶ suggesting 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 now must engage in a costly search that postpones family life. Because more of this type of person exists in the population, postponing marriage in this subset suggests 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 feeds back

54. Douglas W. Allen, Krishna Pendakur & Wing Suen, *No-Fault Divorce and the Compression of Marriage Ages*, 44 *ECON. INQUIRY* (forthcoming 2006).

55. *Id.* (manuscript at 18–19, on file with author).

56. *Id.* (manuscript at 17–18).

into the divorce rate and influences the way we view marriage culturally.

C. *Labor Force Participation of Women*

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

Robert Michael was the first to suggest that the rise in LFPR was caused by increases in divorce.⁵⁷ Because divorced women are more likely to work, and because the divorce rate was increasing after 1970, he suggested this could explain the anomaly. He observed a lagged relationship between increases in the divorce rate and increases in the LFPR of married women with young children.⁵⁸

Elizabeth Peters found that women's LFPR increased by two percent in no-fault states.⁵⁹ She argued that married women make specific family investments when they stay home and take care of children.⁶⁰ 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, tries to protect herself by working during marriage.⁶¹

Allen Parkman examined the total amount of time that women work,⁶² including not only the increased workforce participation of women, but also increases in household work overall. Parkman uses a time series data set that spans 1975 to

57. Robert Michael, *Consequences of the Rise in Female Labor Force Participation Rates: Questions and Probes*, 3 J. LAB. ECON. S117 (1985).

58. *Id.* at S139–40.

59. H. Elizabeth Peters, *Marriage and Divorce: Informational Constraints and Private Contracting*, 76 AM. ECON. REV. 437 (1986).

60. *Id.* at 443.

61. *Id.* at 451; see also ALLEN M. PARKMAN, NO-FAULT DIVORCE: WHAT WENT WRONG? 96–99 (1992) (arguing that women in no-fault states took steps to protect their human capital by entering the work force and pursuing education).

62. Allen M. Parkman, *Why Are Married Women Working So Hard?*, 18 INT'L REV. L. & ECON. 41 (1998).

1981 and contains data on household work.⁶³ He finds that women living in no-fault states work on average 4.5 hours more per week than their counterparts in fault-based states. In contrast, the no-fault divorce rule does not affect the number of hours worked by husbands in those states.⁶⁴ Parkman argues that this refutes the notion that women work simply to increase the family budget, and argues that women work more as a way of insuring against the threat of divorce.⁶⁵

One final important study is by William Johnson and Jonathan Skinner, who use a panel study from Michigan to analyze the effect of divorce on the LFPR.⁶⁶ They find that women increase their participation in the workforce before a divorce occurs, which raises 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.⁶⁷ Their results account for 2.6 of the 15% growth in labor force participation that is not explained by real wages and other factors.⁶⁸

These changes in female LFPR are similar to those in age at first marriage: the change in divorce law influenced vast segments of the population that did not experience divorce. It is good when women enter the workforce because they want to improve their and their family's quality of life. It lowers the welfare of the family, however, when women work out of fear of abandonment. Had there been a law protecting these women, they would likely have chosen not to work. The phrase "super-mom burnout" has now entered our vocabulary and is just another one of the many significant costs that has resulted from allowing no-fault divorce.

63. *Id.* at 45–48.

64. *Id.* at 48.

65. *Id.* at 49.

66. William R. Johnson & Jonathan Skinner, *Labor Supply and Marital Separation*, 76 AM. ECON. REV. 455 (1986).

67. *Id.* at 468.

68. *Id.* at 468–69.

D. 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 for divorce led to a series of other changes as individuals exploited what amounted to loopholes. The old fault system implicitly forced divorcing couples to collude on a fault ground in order to obtain a divorce. Most reformers saw this as a weakness, but at least the act of collusion led to mutual divorces. No one could be abandoned as 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, 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 U.S. states, property had been determined by the name—usually the husband's—on the title. With the onset of no-fault divorce, these jurisdictions quickly changed to some notion of community property with presumptions of equal contributions, but not before many women were divorced and left with little but the shirts on their backs.⁶⁹ Laws regulating marital property continue to evolve in a haphazard fashion as various issues come before the courts.

Support laws and custody laws are also currently in flux. Fathers' groups have protested the default rule that custody is given to the mother and have lobbied for more joint custody and parenting rules. In the state of Oregon, however, joint parenting laws increased the time it took to get a divorce because couples use the "abuse clause" to obtain full custody.⁷⁰

Sometimes changes in these secondary laws cause even more divorce problems. Throughout Canada and the United States,

69. The most famous case in Canada is *Murdoch v. Murdoch*, [1975] S.C.R. 423. 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 her husband held the property, she walked away with almost nothing. After this case, the lobby for property distribution reform gained momentum, and the courts took more liberty in awarding property to wives.

70. Douglas W. Allen & Margaret F. Brinig, *Bargaining in the Shadow of Joint Parenting* (2005) (unpublished manuscript, on file with author). Under such a law, joint parenting is mandatory unless one spouse is abusive.

there has been a movement toward 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, and length of marriage. They give the impression of being “scientific” and are couched in 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. Canada’s child support guidelines demonstrate this problem in that they do not adjust for the costs of children when income changes. As a result, divorce rates increase by as much as 10% when the potential non-custodial parent’s income hits \$100,000 per year.⁷¹

E. *The Divorce Culture*

The broader societal implications of divorce have been described by Barbara Dafoe Whitehead:

[D]ivorce 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.⁷²

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.

71. Allen, *supra* note 33.

72. BARBARA D. WHITEHEAD, *THE DIVORCE CULTURE* 182 (1997).

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 thirty years has influenced everything from greeting cards to day care centers. The divorce culture has led to a society with more coercion, individualism, and less commitment.⁷³ Schools now teach "life skills," "job counseling," and "secular ethics"; these lessons were, at one time, universally taught by families.

Parkman makes the following conclusion regarding the effects of no-fault divorce:

[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.⁷⁴

One must wonder: if these outcomes had been anticipated in 1968, would the divorce revolution have come about with so little debate?

V. WHY WERE THE EFFECTS OF NO-FAULT DIVORCE UNEXPECTED?

A. *Unintended and Unanticipated Consequences*

Clearly, the move to no-fault divorce caused negative outcomes that were unanticipated and unintended. Unintended or unanticipated outcomes are the result of false theories of human behavior. For example, an individual driving down the road has a number of theories in mind. He believes that other drivers will obey the rules of the road, that he knows the rules of the road, and that the car will obey the laws of physics. An inobservant American driver in New Zealand quickly discovers that his standard theories of driving are wrong when, driv-

73. *Id.* at 184–88.

74. PARKMAN, *supra* note 61, at 104.

ing on the right-hand side of the road in Auckland, he unavoidably enters into a head-on collision. The driver did not anticipate having 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. Someone 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.

B. *False Theories of Marriage*

It is easy to understand that the effect of no-fault divorce was unintended: the results have been so bad that no one would have wished them on future generations. These results, however, were also unanticipated, because no one had a proper theory of marriage. Contemporary documents, like the Archbishop of Canterbury's Report, demonstrate that proponents of no-fault divorce had an inadequate theory of marriage on a number of dimensions.⁷⁵ 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.⁷⁶ Thus, most divorce law reformers ad-

75. ARCHBISHOP OF CANTERBURY'S GROUP, *PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY* (1966).

76. Sentiments like these are commonplace in the pro-no-fault literature. Whitehead quotes an early twentieth-century advice writer as saying, "[N]o 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. WHITEHEAD, *supra* note 72, at 19. See also Annamay T. Sheppard, *Women, Families and Equality: Was Divorce Reform a Mistake?*, 12 WOMEN'S RTS. L. REP. 143, 148-49 (1990) ("The idea, embraced by the no-fault separation ground, that unhappy marriages are not worth retaining . . . is as defensible as the equality idea. 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."); Harvey L. Zuckman & William F. Fox, *The Ferment in Divorce*

vocated a change in divorce law because they thought that they were freeing a fixed number of bad marriages that were bad independent of the law. It is more useful, however, 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 to this idea is the notion of a "marginal" marriage. This is a marriage where the couple is, jointly, indifferent to staying together or apart. Marginal marriages depend on the costs and benefits of staying together, and changes in these costs and benefits can turn good marriages into marginal ones and marginal ones into bad ones. There is no exogenously given number of good marriages.

There was also 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 failed to account for the economic realities of marriage, and as a result, was unable to predict how no-fault divorce would affect behavior.

The same misunderstandings of marriage and its institutions are found today in the debate over same-sex marriage. Proponents claim that adding a small number of same-sex marriages into the net number of marriages 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 affects men and women, is downplayed. Issues of social responsibility, loving partnerships, and spousehood are promoted over the institutional 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 toward same-sex marriage will have different consequences than proponents claim.

Legislation, 12 J. FAM. L. 515, 536 (1972-1973) ("[T]here are relationships which cannot easily be altered to make the marriage smoother. Divorce provides a quick and unequivocal termination of such marriages.").

VI. CONCLUSION

Laws, if they are to have value, must necessarily come down on one side or another. As Coase pointed out over forty years ago, the question is not how to eliminate harm, but rather who should be allowed to hurt whom such that the greater harm is avoided?⁷⁷ And so, over time the franchise and regulation of marriage has evolved whenever the benefits of change have exceeded the costs. Consider an objection raised by 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 children's choices, the legalization of interracial marriage, the legalization of contraception, the criminalization of marital rape (an offense that wasn't 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.⁷⁸

Many of these changes were not legal changes, and marital laws have not changed for "anyone and everyone," but Rauch's point appears well taken until costs and benefits are considered. For example, interracial marriages are exactly the same as marriages within a race in terms of contracting issues between parents. Thus, there are no costs to allowing interracial marriages into the franchise; there are only private benefits. Geddes and Lueck show how changes in the market value of women led to increasing costs of coverture and other restrictions on female liberties. These changes ultimately led to the decline of those marital laws.⁷⁹ There is an economic logic behind the evolution of marriage.

So the cold-hearted economic question is this: what are the costs and benefits of same-sex marriage? This Article has argued that the potential anticipated costs of same-sex marriage

77. Coase, *supra* note 17, at 2.

78. Jonathan Rauch, *Objections to These Unions: What Friedrich Hayek Can Teach Us About Gay Marriage*, REASON ONLINE, June 2004, <http://www.reason.com/0406/fe.jr.objections.shtml>.

79. See Rick Geddes & Dean Lueck, *The Gains from Self-Ownership and the Expansion of Women's Rights*, 92 AM. ECON. REV. 1079 (2002).

would be large. Heterosexual marriage rules would be modified because they would be inappropriate for same-sex marriages. This feedback mechanism will make large numbers of heterosexual marriages less stable and will tend to increased divorce, which would be bad for the next generation. The key to this argument is that millennia-old marriage laws exist for a reason: to efficiently regulate incompatible incentives between husbands and wives that mostly arise over differences in biology. Large discrete changes to bedrock aspects of marriage are likely to be inefficient. The example of no-fault divorce supports 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 in favor of no-fault divorce are, at a fundamental level, now being used to alter the definition of marriage. At both times, advocates have ignored 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 an identical structure to heterosexual marriage, but would 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 all marriage as special 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 for heterosexuals. Still, this solution would break the feedback loop of "one size fits all," and marriage between a man and woman would remain the principal institutional vehicle by which reproduction is intended to occur. 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.