



## Dispensable Marriages:

### *Unilateral Divorce and the Need for Reform in North Carolina*

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**I**'M DONE." WITH JUST TWO WORDS, STACY MORRISON'S HUSBAND ANNOUNCED THE BEGINNING OF THE END TO THEIR NEARLY 10-YEAR MARRIAGE WHILE SHE WAS MAKING DINNER ONE NIGHT IN THEIR NEWLY PURCHASED HOME, AS THEIR NINE MONTH-OLD SON PLAYED NEARBY. IN HER BOOK, *FALLING APART IN ONE PIECE*, MORRISON—EDITOR-IN-CHIEF OF *REDBOOK* MAGAZINE—TELLS THE DEEPLY MOVING STORY OF HER JOURNEY TO THE OTHER SIDE OF A DIVORCE SHE DID NOT SEE COMING AND DID NOT WANT. "I'M DONE WITH THIS," HE SAID, GESTURING WITH HIS HAND TO ENCOMPASS OUR LIVING ROOM, OUR KITCHEN, OUR HOME, OUR SON, OUR FUTURE, OUR DREAMS, EVERY SINGLE MEMORY WE'D EVER SHARED TOGETHER IN OUR 13 YEARS AS A COUPLE, AND ME, SUDDENLY MEANINGLESS, ME," MORRISON WRITES. "DONE, JUST LIKE THAT."<sup>1</sup>

Although she eventually came to accept the divorce and even worked with her ex-husband toward a more amicable parting, Morrison's story puts a human face on an all too-common experience shared by every man or woman who has

watched a spouse walk away from a marriage he or she thought was happy. "I didn't realize marriage had its own get-out clause, which could leave one partner, standing there dumfounded..." Morrison admits in the book. "Forever can be undone in a second: once Chris chose to enact the get-out clause, the magic of that leap of faith we'd taken together instantly evanesced."<sup>2</sup>

What Morrison describes as a "get-out" clause for marriage is unfortunately the reality of divorce law in the United States today. Although marriage is a public union that requires the consent of two people—who together make a joint pledge before their families and peers to love for life and enter into a relationship the law distinguishes from every other—it only takes one partner to legally end a marriage.

In every state—most recently New York—so-called "no-fault" divorce laws make it possible for a spouse who wants out of a marriage to end it without the consent of the other spouse and with no justification to the courts required. Additionally, with one year or less separation periods for divorce

in most states (in North Carolina it is one-year), the leaving spouse is not even required to pause long enough to consider the ramifications of what divorce will mean for those left behind, especially the children, and whether it is worth the price.

## What is No-Fault Divorce?

According to the Institute for Marriage and Public Policy (IMAPP), no-fault divorce “refers to a cluster of family law changes that took place in the United States, Canada and many other ‘Western’ nations in the late 1960s to mid-1980s.” The most significant legal change that occurred was in the grounds required for obtaining a divorce. IMAPP explains that no-fault essentially “licensed unilateral divorce: for the first time, one spouse could successfully petition for divorce over the objections of his or her spouse, without alleging any grounds, such as adultery, mental cruelty or abandonment.” Under the old “fault-based” system, a couple could obtain a divorce without alleging fault *only if* both partners consented to the divorce.<sup>3</sup> According to Harvard law professor, Mary Ann Glendon, the fault-based system of divorce “had degenerated into a formal recitation of perjured testimony, leaving acrimony in its wake, and supposedly engendering disrespect for the legal system.”<sup>4</sup>

**History.** California was the first state to eliminate fault as the grounds for a divorce, following a six-year process of study and debate driven by the state’s high divorce rate, and concerns that the fault-based system made the divorce process too hostile. The no-fault law was signed into law in 1969 by then-Governor Ronald Reagan. It was an act he later came to regret, according to Michael Reagan, his son from his first marriage to actress Jane Wyman, who, 20 years earlier, had divorced Reagan citing “mental cruelty.”<sup>5</sup>

In his book, *Good Intentions Gone Awry*, University of New Mexico Professor Allan Parkman explains that California’s no-fault divorce law was “path-breaking” in a number of ways, including that it changed the law so that “one spouse could decide unilaterally to get a divorce without the consent or agreement of the other spouse.” According to Parkman, divorce reformers in California also helped “promulgate the Uniform Marriage and Divorce Act,” which was drafted by the National Conference of Commissioners on Uniform State Laws, and “served as framework for state no-fault divorce statutes.”<sup>6</sup>

Over the next 16 years, nearly every state followed California’s lead by adopting some form of no-fault divorce, although many states, including North Carolina, added no-fault grounds to their existing fault-based statutes.<sup>7</sup> For years, New York was the lone holdout. But in August 2010—despite opposition from both the Catholic Church and the president of the state chapter of the National Organization of Women (NOW)—Gov-

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ernor David Patterson signed into law legislation that made New York the last state in the nation to adopt no-fault divorce.<sup>8</sup> Today, no state requires a spouse who desires a divorce to prove “fault” on the part of the other spouse in order to end a marriage, although fault still has some impact in determining spousal support and alimony in 28 states, including North Carolina, according to the American Bar Association.<sup>9</sup>

**North Carolina.** The Tar Heel state’s no-fault legislation was enacted overwhelmingly by the General Assembly during the 1977-1978 session.<sup>10</sup> It amended North Carolina’s fault-based divorce statute so that the State will grant a divorce “on the application of either party” when: 1) the couple has “lived separate and apart for one year” (and one of the parties intended for the separation to be permanent); 2) *and* one of parties “has resided in the State for a period of six months.”<sup>11</sup>

## Divorce, American Style

While the U.S. is not alone in allowing no-fault divorce, Professor Mary Ann Glendon points out that the divorce laws in countries such as the U.S. and Sweden differ from Western European countries “in the amount of leverage they afford to one or the other spouse in making an advantageous settlement, and in the messages they communicate about marriage itself.”<sup>12</sup> In her book, *Abortion and Divorce in Western Law*, Glendon explains that unlike the U.S., there is no “individual right to divorce” in Western German, English and French statutes—a fact that is reinforced by requirements of longer separation periods (ranging between three and six years) “before one spouse can unilaterally terminate a marriage to a legally ‘innocent’ partner.”<sup>13</sup>

She notes that the U.S., Sweden and Canada, are “set apart” by a system of divorce that has “altered the legal definition of marriage itself by making it a relationship terminable at will.”<sup>14</sup> According to Glendon, “A legal system which requires a spouse to wait for several years to divorce a non-consenting husband or wife is obviously telling a different story about marriage than told in a country where a divorce is available on one party’s demand in a year or less.”<sup>15</sup>

## Divorce Reform Efforts in Other States

Divorce reform legislation has been proposed in several states, including Missouri, Oklahoma, New Mexico, Utah and Virginia, although none of these bills have become law to date. Below is an example of a divorce reform bill that was introduced in 2010 in Missouri by Representative Cynthia Davis (R-MO).

HB 1234, the “Marriage Matters” bill, sought to implement divorce reform in Missouri by:<sup>1</sup>

- Waiving part of the marriage license fee for engaged couples who complete a minimum of 15 hours of pre-marital counseling performed by a member of the clergy, religious institution, or professional counselor;
- Allowing those who file for a divorce to get a refund if they change their minds within one year of the filing;
- Changing the state’s no-fault law to only allow couples with children (under age 21) to divorce if one of the following factors exist: both partners consent to the divorce in writing; or a waiting period of two years has elapsed since the petition for divorce; or fault has been proven such as: adultery, insanity, incarceration, physical abuse or abandonment.

<sup>1</sup><http://www.house.mo.gov/content.aspx?info=/bills101/bills/HB1234.htm>

### The Faults of “No-Fault”

The no-fault system may have made divorce less messy for the legal system, but, as Maggie Gallagher notes in *The Abolition of Marriage*, it also “radically transformed the legal and moral basis of marriage.”<sup>16</sup> By making divorce-on-demand a reality for one spouse, no-fault shifted the power from the “innocent” spouse to the “guilty” spouse (or, from the spouse who wants to save the marriage to the spouse who wants to end it), and negatively impacted the way society views marriage. The result has been an increase in divorce rates, and lifelong harm to the millions of broken families left behind, especially the children of divorce.

**Favors the Spouse Who Wants Out.** No-fault divorce may have made the divorce process easier for the small minority of extremely unhealthy marriages. But what about the overwhelming majority of divorces in which one partner opposes the split? A national study by Andrew Cherlin and Frank Furstenberg found that four out of every five marriages are ended by one partner, with 80 percent of divorces opposed by one spouse.<sup>17</sup> The current no-fault system guarantees that no matter how much one partner opposes a divorce, the courts will always grant one to the spouse who wants it. Rather than make the divorce process equal, as proponents promised, the no-fault system favors the spouse who wants out of the marriage, even when he or she is guilty of fault, such as adultery.

By shifting the power to the “guilty spouse,” no-fault removed the ability of a spouse who does not

want a divorce to negotiate with his or her partner to save the marriage, or to at least reach a more equitable divorce agreement. For example, under the fault-based system, a husband who sought to divorce his wife would have to negotiate with her to obtain her consent—perhaps by offering more alimony or the family house.<sup>18</sup> Under no-fault, negotiation is not necessary because the law allows one spouse to divorce the other at will.

Furthermore, as Mike McManus of Marriage Savers points out in his book, *How to Cut America’s Divorce Rate in Half*, in 22 states, including North Carolina, it is no longer possible for a wronged spouse to sue for a divorce on traditional grounds, such as adultery.<sup>19</sup> (Note: *The only other ground for divorce in North Carolina—which is seldom used—is “incurable insanity” on the part of one spouse, for which the law requires a three-year separation with no cohabitation*).<sup>20</sup> When it comes to granting a no-fault divorce, it does not matter to the courts whether one spouse has legitimate grounds for a divorce, such as domestic violence, because under no-fault, no one is to blame for the end of a marriage.<sup>21</sup> As Maggie Gallagher puts it, with no-fault divorce, “The only rule is: He who wants out wins.”<sup>22</sup>

**Harmful Messages.** No-fault divorce also contributes to the transmission of two harmful messages about marriage to society—that marriage is essentially about adult desires, not children’s needs, and that it is dispensable when it no longer meets the needs of both partners.

“The American story about marriage, as told in the law and in much popular literature, goes something like this: marriage is a relationship that exists primarily for the fulfillment of the individual spouses. If it ceases to function, no one is to blame, and either spouse may terminate it at will,” explains Glendon. “Children hardly appear in the story; at most they are rather shadowy characters in the background.”<sup>23</sup>

It could be argued that fault-based divorce laws of the past helped to transmit a very different and more traditional message about marriage—that it is a public institution that binds a man and a woman in a complementary union that is recognized and privileged through law and custom for the purpose of creating the best family environment for children. Consequently, breaking the marital vow was something the law took seriously and made it more difficult for one spouse to do alone.

**Increased Divorce.** “Although there is considerable scholarly controversy over this matter, the nearly universal introduction of no-fault divorce laws seems to have played a role in opening the floodgates of divorce, especially because these laws facilitated unilateral divorce and lent moral legitimacy to divorce,” writes Professor W. Bradley Wilcox, director of the National Marriage Project, in his 2009 article, “The Evolution of Divorce.”<sup>24</sup> He notes that between 1960 and 1980, the same time

period that the majority of states were enacting their no-fault divorce statutes, the national divorce rate more than doubled, from 10.6 divorces per 1,000 married women to 22.6 divorces per 1,000 married women.<sup>25</sup>

It is safe to assume that no-fault divorce was a contributing factor in the increase in divorce rates during this time period. A review of 24 empirical studies conducted by IMAPP shows that 17 of these studies found that the introduction of no-fault increased the divorce rate in the range of between five and 30 percent.<sup>26</sup>

Today, the U.S. has the highest divorce rate in the Western world—double the divorce rate in Western European nations, such as France and Germany.<sup>27</sup> North Carolina is currently one of 28 states with divorce rates slightly above the national average.<sup>28</sup>

## Counting the Cost

Divorce is associated with a wide range of negative lifetime outcomes for individuals and society. A vast body of research has found that the end of a marriage (or the lack of marriage) negatively affects everything from men's and women's health and happiness to children's educational attainment, psychological well-being, substance use and abuse, predisposition to crime and the likelihood of incarceration, as well as their future relationship quality, including the chances of divorce.<sup>29</sup> (*For more on divorce and children, see "Broken Families, Splintered Lives" FNC, Fall 2010*).

Divorce also results in a decline in living standards for families, and causes financial hardship for women and children, who are more likely to live in poverty outside of marriage than within it. One study found that families that are not poor prior to a divorce experience about a 50 percent drop in income after a divorce.<sup>30</sup>

In addition, divorce carries a huge price tag for taxpayers. A groundbreaking study released in 2008 by four public policy organizations, including the Institute for American Values, calculated the costs of divorce and unwed childbearing for all 50 states. The IAV study estimated that divorce and unwed childbearing cost U.S. taxpayers at least \$112 billion a year, or over \$1 trillion a decade. In North Carolina, the study estimated that divorce and unwed childbearing cost taxpayers at least \$1.3 billion a year, with family fragmentation accounting for 11 percent of the state and local tax burden.<sup>31</sup>

## Time for Divorce Reform

No-fault divorce has become so engrained in American society that some family and legal scholars argue that it is not feasible for states to completely return to the fault-based system of the past. However, there are a number of more limited reforms that North Carolina could adopt to strengthen the marriage ethic and help reduce divorce.

Mike McManus proposes two "limited reforms" that he argues could cut a state's divorce rate in half: replacing no-fault divorce with mutual consent divorce when the couple has minor children, and requiring joint custody for married parents who divorce.<sup>32</sup>

**Mutual Consent.** "If a couple has children, their obligation to them should take precedence over a personal desire by one parent to abandon the marriage," McManus argues. "Therefore, only if both parents agree to a divorce, should a marriage be terminated."<sup>33</sup>

A no-fault divorce would be allowed for marriages that do not involve minor children. Additionally, in cases where one spouse alleges a major fault that can be proven in court, such as adultery, mutual consent would *not* be required for the divorce, and the wronged spouse could sue for divorce.

McManus and John Crouch of Americans for Divorce Reform estimate that replacing no-fault



# Suggested Divorce Reforms for North Carolina

Compiled by the North Carolina Family Policy Council

**Replace no-fault with mutual consent** divorce for couples with minor children in cases where no major fault has been committed (such as adultery, domestic violence, child abuse, abandonment, or incarceration). Allow a no-fault divorce for childless couples or for couples with grown children.<sup>1</sup>

**Combine mutual consent divorce with shared parenting custody**, in cases where both parents are fit, so that mom and dad get more equal time with their children.<sup>2</sup>

**Extend the required separation period** for a divorce in North Carolina from one year to two years.

**Require at least six sessions of divorce education** during the separation period for married couples with children seeking a divorce. The classes would focus on the harms of divorce on children and the benefits of marriage for children.

<sup>1</sup>Mike McManus, *How to Cut America's Divorce Rate in Half*, Marriage Savers, 2008.

<sup>2</sup>Ibid.

with mutual consent could decrease a state's divorce rate by 30 percent. "Mutual consent would shift the bias toward the spouse who wants to preserve the marriage, toward the children, and toward preserving the family," McManus explains. "It would give the spouse leverage to fight for the marriage."<sup>34</sup>

**Shared Custody.** For married parents seeking a divorce, McManus suggests combining mutual consent with a presumption of shared custody, rather than sole custody, in cases where both parents are fit. "The exact nature of shared parenting would be worked out by the husband and wife," he writes. According to McManus, shared custody would not necessarily mean a 50-50 division of time with a child, but perhaps to two-thirds of the child's time with one parent, and one-third of time with the other.<sup>35</sup>

McManus notes that shared custody agreements for divorcing couples with children would remove a major incentive to divorce for some individuals because a divorce would require shared parenting rights and responsibilities with a former spouse. Both Crouch and David Levy of the Children's Rights Council estimate that shared custody could further reduce divorce rates in a state by as much as 20 percent.<sup>36</sup>

**Longer Separation Period.** Another reform proposed by McManus and others is to lengthen the time period that married couples are required to live apart before they can divorce. In contrast to most U.S. states, some Western European nations require three to six year separation periods for divorces where one partner contests the divorce, and the divorce rates in these countries are much lower

than in America.<sup>37</sup> McManus argues that longer separation periods could lead to reconciliation for some couples by giving troubled marriages time to get better. He points to an analysis of the National Survey of Families and Households by Linda J. Waite, which found that 86 percent of "unhappily married" couples, who chose to stay together, were in happier marriages five years later.<sup>38</sup>

**Divorce Education.** In a related reform, Wilcox of the National Marriage Project suggests combining longer separation periods with a requirement that divorcing couples with children attend divorce education classes. These classes would focus on the emotional and social consequences of divorce for children, as well as the benefits of marriage for men, women and children.<sup>39</sup>

## For the Children

With an average of nearly 100 divorces a day,<sup>40</sup> and a divorce rate that is above the national average, the time for divorce reform in North Carolina is long overdue. National studies have found that the majority of divorces are contested by at least one spouse, do not occur as a result of major marital conflict, and, most importantly, include children,<sup>41</sup> who will suffer the most lifelong damage from their parents' divorce. Making unilateral divorce more difficult for married couples with children represents a common sense, limited reform approach to North Carolina's divorce statutes.

Divorce reform will help strengthen the marital contract in North Carolina, with the potential to reduce the divorce rate and save the State and taxpayers money as well. Most importantly, it will transmit an important message about marriage—that it is a public union protected by the State because it binds men and women together in a unique family relationship that creates the best environment for children. Through divorce reform, the State will be helping to preserve the family unit by making the marriage vow harder for one partner to break when there are children's lives on the line. ❖

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21. Op. Cit. Glendon
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23. Glendon, Pg. 108
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