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DIVORCE, CHILDREN'S WELFARE,  
AND THE CULTURE WARS

**Elizabeth S. Scott\***

Are children harmed when their parents divorce? If so, should parents' freedom to end marriage be restricted? These questions have generated uncertainty and controversy in the decades since legal restraints on divorce have been lifted. During the 1970s and 80s, the traditional conviction that parents should stay together "for the sake of the children" was supplanted by a view that children are usually better off if their unhappy parents divorce. By this account, divorcing parents should simply try to accomplish the change in status with as little disruption to their children's lives as possible.<sup>1</sup> This stance has been challenged sharply by conservative family-values advocates who see divorce and marital instability as the key to societal decline. In their view, children whose parents divorce are damaged in their moral, social, and emotional development, and society ultimately pays a high price through increased teen pregnancy, school drop-outs, poverty, and delinquency.<sup>2</sup> These advocates argue that marriage can only be saved if the government restricts divorce by reinstating fault grounds and discouraging unhappy spouses from selfishly defecting from their responsibilities. In contrast, liberals and some feminists oppose any restrictions on the freedom of unhappy spouses to divorce, in part because they suspect (correctly for the

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<sup>1</sup> Pat Nordlinger, *The Anti-Divorce Revolution*, *The Wkly. Standard*, Mar. 2, 1998, at 25 (discussing recent articles about making divorce easier for children); Steve Varnis, *Broken Vows, Therapeutic Sentiments, Legal Sanctions, Divorce, Soc'y*, Nov. 1997, at 33 (noting a trend among therapists to make divorce a "neutral" event).

<sup>2</sup> Judith Wallerstein et al., *The Unexpected Legacy of Divorce* xxiii (2000); Barbara Dafoe Whitehead, *Dan Quayle Was Right*, *The Atlantic*, April 1993, at 47.

most part) that the ultimate agenda for many conservatives is a return to the era of traditional marriage and gender roles.<sup>3</sup> Liberals tend to discount concerns about the harm to children of divorce and assume that parents only end marriages that are intolerable.<sup>4</sup>

The upshot, as the recent controversy surrounding the introduction of covenant marriage legislation confirms, is that divorce, particularly when children are involved, has become the focus of a raging battle in the “Culture Wars.”<sup>5</sup> Opinion on this issue is deeply polarized, and moderate voices are seldom heard. Nonetheless, polls suggest that public opinion is more uncertain and nuanced than are the views of advocates—for example, many people oppose general government restrictions on divorce, and yet make an exception for couples with young children.<sup>6</sup>

A growing body of social science research on the impact of divorce on children indicates that the issue is more complex than either conservatives or liberals would have us believe. Among the most important studies of the past decade is a longitudinal study of families conducted by Paul Amato and Alan Booth. Contrary to the conservative line that divorce is always bad for children, Amato and

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<sup>3</sup> Herma Hill Kay, “Family Values” Embraces Fault in Divorce, *Nat’l L.J.*, May 1, 1995, at A21; Arlene Skolnick, *Family Values: The Sequel*, *Am. Prospect*, May-June 1997, at 86-87.

<sup>4</sup> Barbara Ehrenreich, *In Defense of Splitting Up: The Growing Anti-Divorce Movement Is Blind to the Costs of Bad Marriages*, *Time*, Apr. 8, 1996, at 80. See also Katha Pollitt, *Social Pseudoscience (Children of Divorce)*, *The Nation*, Oct. 23, 2000, at 10; Katha Pollitt, *Can This Marriage Be Saved?*, *The Nation*, Feb. 17, 1997, at 9.

<sup>5</sup> See James Davison Hunter, *Culture Wars: The Struggle to Define America* 50-51, 176-96 (1991) (describing the battle over divorce in American society). The salience of the impact of divorce on children as a social issue is suggested by the recent cover story in *Time* magazine, which described the political controversy. Walter Kirm, *Should You Stay Together for the Kids?*, *Time*, Sept. 25, 2000, at 74.

<sup>6</sup> Walter Kirm, *The Ties that Bind: Should Breaking Up Be Harder to Do?*, *Time*, Aug. 18, 1997, at 48. (A *Time/CNN* poll found that 59% of those polled oppose government restrictions on divorce, 61% thought divorce should be harder for couples with young children).

Booth found that children who are exposed to serious conflict in their parents' marriage are better off when conflict is reduced by divorce.<sup>7</sup> On the other hand, we should not reassure ourselves that children generally are better off if their unhappy parents divorce. A surprisingly high percentage of marriages that end in divorce involve low or moderate levels of conflict—what Amato calls “good enough” marriages.<sup>8</sup> Those divorces appear to have quite a negative impact on the long term well-being of the children involved. In short, those children whose parents' marriages are not highly conflictual would be better off if their parents stayed together.<sup>9</sup>

In this essay, I examine this issue through the lens of legal policy. After a brief description of the research findings about the impact of divorce on children, I turn to the two interesting legal policy questions raised by the research. First, has the law contributed to divorce in low-conflict marriages; and, second, are there legal reforms that could encourage these parents to stay together, without making the situation worse for those children for whom divorce is beneficial? I argue that the no-fault divorce reforms of the past generation may have played a role in promoting divorce in low-discord marriages. I also argue that legal reforms might be crafted in a way that could ameliorate the problem, without returning to traditional fault-based divorce law. I propose a variation of the

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<sup>7</sup> Paul Amato & Alan Booth, *A Generation at Risk* 237 (1997) [hereinafter Amato & Booth, *Generation*]; Paul Amato, *Good Enough Marriages: Parental Discord, Divorce and Children's Long-term Well-being*, 9 *Va. J. Soc. Pol'y. & L.* 71 (2001) (this issue) [hereinafter Amato, *Good Enough Marriages*].

<sup>8</sup> Amato, *Good Enough Marriages*, *supra* note 7, at 85-88.

<sup>9</sup> A large body of social science research supports this statement. See generally research summarized in Robert Emery, *Marriage, Divorce, and Children's Adjustment* (1999); Thomas L. Hanson, *Does Parental Conflict Explain Why Divorce Is Negatively Associated with Child Welfare?*, 77 *Soc. Forces* 1283 (1999) (research confirms that children in low conflict families are worse off when parents divorce); Susan Jekeliek, *Parental Conflict, Marital Disruption, and Children's Emotional Well-Being*, 46 *Soc. Forces* 905 (1998) (children of high-conflict marriages show improved well-being post-divorce).

covenant marriage model that could assist couples in adhering to their intentions for lasting marriage for the benefit of their children—with safety valves to allow escape from intolerable relationships. However, as I will explain in the last part of the essay, I am not confident that such reforms will be effective in a society in which attitudes about divorce are as polarized as they are in the United States today.

#### I. SOCIAL SCIENCE RESEARCH—THE IMPACT OF DIVORCE ON CHILDREN

A large body of social science research demonstrates clearly that children whose parents divorce generally fare poorly compared to children who grow up in intact families.<sup>10</sup> Children of divorce suffer economic hardship because their family income declines.<sup>11</sup> Their academic performance tends to be inferior, and they have more adjustment and behavior problems than children whose parents stay together. Many children of divorce are resilient, of course, and recover from the dislocation of divorce.<sup>12</sup> It is clear, however, that divorce represents a significant risk factor that threatens the well-being of children.

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<sup>10</sup> Robert Emery provides an excellent review of the research on the effects of divorce on children. Emery, *supra* note 9. See also Sara McLanahan & Gary Sandefur, *Growing Up with a Single Parent: What Hurts, What Helps* 1-2 (1994); Frank F. Furstenberg, Jr. & Andrew J. Cherlin, *Divided Families: What Happens to Children When Parents Part* 45-61 (1991); E. Mavis Hetherington et. al., *Long-Term Effects of Divorce and Remarriage on Adjustment of Children*, 24 *J. Am. Acad. Child Psychiatry* 518 (1985).

<sup>11</sup> Daphne Spain & Suzanne M. Bianchi, *Balancing Act: Motherhood, Marriage, and Employment Among American Women* 141-60 (1996); Greg J. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Divorce*, 22 *Demography* 485, 485-86 (1985); Saul D. Hoffman & Greg J. Duncan, *What Are the Economic Consequences of Divorce?*, 25 *Demography* 641, 641 (1988); Karen C. Holden & Pamela J. Smock, *The Economic Costs of Marital Dissolution: Why Do Women Bear a Disproportionate Cost?*, 17 *Ann. Rev. Soc.* 51, 51 (1991).

<sup>12</sup> Emery, *supra* note 9, at 3.

Or does it? An important question about the differences found between children of divorce and children in intact families is whether the problems of the former should be attributed mostly to the divorce or to their exposure to conflict between their parents *before* the divorce.<sup>13</sup> It is well established that sustained exposure to parental conflict is harmful to children.<sup>14</sup> If the harmful effects that children of divorce experience result from exposure to their parents' marital conflict, then divorce improves the situation and may reduce the harm. Thus, it becomes important for policymaking—and for marriage counseling—to better understand the source of the harm, so that we may know whether (or when) to encourage or discourage divorce.

In the past generation, researchers have shed light on this question and have made significant progress in sorting out the harmful impact of interparental conflict on children from the impact of divorce itself.<sup>15</sup> In the 1990s, Paul Amato and Alan Booth evaluated the well-being of the adult children of couples who had participated in their longitudinal study, including a group whose parents had

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<sup>13</sup> Paul Amato describes five perspectives that account for children's adjustment to divorce. They include: 1) the parental loss perspective; 2) the parental adjustment perspective; 3) the interparental conflict perspective; 4) the economic hardship perspective; and 5) the life stress perspective. Paul Amato, *Children's Adjustment to Divorce*, 55 *J. Marriage & Fam.* 23, 23 (1993).

<sup>14</sup> Hetherington et al., *supra* note 10, at 518. Robert E. Emery, *Interparental Conflict and the Children of Discord and Divorce*, 92 *Psychol. Bull.* 310, 310 (1982).

<sup>15</sup> See Emery, *supra* note 14, at 313-15; Hetherington et al., *supra* note 10, at 518, 522, 527; Daniel S. Shaw et al., *Parental Functioning and Children's Adjustment in Families of Divorce: A Prospective Study*, 21 *J. Abnormal Child Psychol.* 119, 119-22 (1993); J.H. Block et al., *Parental Functioning and the Home Environment in Families of Divorce: Prospective and Concurrent Analyses*, 27 *J. Am. Academy of Child & Adol. Psychiatry* 207, 207 (1988); J. H. Block et al., *The Personality of Children Prior to Divorce: A Prospective Study*, 57 *Child Dev.* 827, 827, 835-37 (1986).

divorced since the study began in 1980.<sup>16</sup> The study provides valuable insights because the researchers acquired information from these couples about their relationships both before and after divorce. The researchers found that the impact of divorce on the well-being of children as young adults was strongly correlated with the level of conflict between the parents during marriage.<sup>17</sup> Those children whose parents' marriages were characterized by high levels of conflict were better off when their parents divorced than when they remained together. No surprise here. What is somewhat surprising is that the researchers found that children whose parents ended marriages that involved low or moderate levels of conflict (perhaps a majority of divorces) did the worst of all the groups on all measures of well-being—worse than children whose parents remained in low-conflict marriages and worse than children from high-conflict marriages that ended in divorce.<sup>18</sup> Other researchers have confirmed this finding.<sup>19</sup> It points to the conclusion that a large percentage of divorces have a harmful impact on the children, and the effect is greatest where the parents' decision to end the marriage seems least justified.

Parents who end low-conflict marriages are an interesting and puzzling group because they seem to choose divorce even though their marriages are not that bad—even

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<sup>16</sup> The basic study included periodic interviews of 2000 individuals over many years. In evaluating the well-being of the children of participants, Amato and Booth used measures of life satisfaction, psychological distress, self esteem, and global happiness. Amato & Booth, *Generation*, supra note 7, at 25-44.

<sup>17</sup> *Id.* at 198-208.

<sup>18</sup> Amato & Booth, *Generation*, supra note 7, at 220; Amato, *Good Enough Marriages*, supra note 7, at 80-82.

<sup>19</sup> Hanson, supra note 9, at 1283, 1308. Hanson used data from the National Survey of Families and Households to measure parental-conflict in a sample of married couple families and then, five years later, to determine which families divorced and how children fared in divorced and still-married couples. Hanson's findings were similar to Amato & Booth's, in that children whose parents had less conflict before divorce fared worse afterwards than children in high-conflict families.

by their own reports. In the Amato and Booth study, these spouses reported general happiness, little hostility and indeed expressed affection and respect for their spouses shortly before divorce.<sup>20</sup> They engaged in activities together and generally gave little sign that divorce was likely. So, why did they divorce? The reasons Amato lists are not primarily related to the quality of the marriage. Rather, these individuals left their marriages because (compared to those who remained married) they were less subject to constraints that create barriers to divorce.<sup>21</sup> These constraints include financial costs of divorce,<sup>22</sup> religious beliefs, and close community ties. When asked to explain their decisions, those who left low-conflict marriages reported mid-life crises, dissatisfaction with their spouse's personality, or, in some cases, no reason that they could articulate.<sup>23</sup>

The readiness of parents to leave "good enough" marriages may reflect changing attitudes toward marriage and marital commitment that grew out of cultural changes in 1960s and 70s. In a 1985 article, Carl Schneider described this trend, arguing that religion and morality have declined as influences on behavior, having been supplanted by individual motivation to achieve personal happiness and self-realization.<sup>24</sup> These changing values have shaped the marriage relationship, which is increasingly viewed by modern individuals as a means to personal fulfillment rather than as a lifetime commitment. If this account is accurate, then the attitude that an unsatisfying marriage should be set aside even if it is not miserable, makes some

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<sup>20</sup> Amato, *Good Enough Marriages*, supra note 7, at 88.

<sup>21</sup> Amato, *Good Enough Marriages*, supra note 7, at 90.

<sup>22</sup> The financial costs could include simply the anticipated costs of going through divorce and maintaining two households. It could also include the costs and disruption of disengaging from a relationship of joint financial investments.

<sup>23</sup> Amato, *Good Enough Marriages*, supra note 7, at 91.

<sup>24</sup> Carl Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 *Mich. L. Rev.* 1803, 1845-47 (1985).



sense. Divorce, on this view, allows each spouse to pursue fulfillment elsewhere.

The social science research challenges two comforting assumptions that have contributed to widespread tolerance of divorces involving children. First, it seems less certain, in light of the Amato and Booth findings, that most parents reluctantly make this difficult decision only when their marriage is truly unbearable, and that in doing so they carefully weigh their children's interests. Those parents who end "good enough" marriages may be optimistic about their children's adjustment to divorce, perhaps believing that their children's well-being is contingent on their own happiness. However, the second assumption—that children are generally better off if their unhappy parents divorce—no longer seems viable in light of the mounting research evidence. The sobering conclusion to which the research points is that significant numbers of children whose parents divorce suffer adverse effects and would benefit if their parents remained married.

## II. LEGAL REGULATION AND THE PROTECTION OF CHILDREN

In theory, at least, it should be a matter of interest to policymakers that divorce is often associated with harmful outcomes for children because children's welfare is an important focus of policy concern. That is not to say, however, that effective legal mechanisms exist to reduce the harm. The challenge is a tricky one. Ideally, as Amato suggests, policy reform would discourage parents in low-to-moderate conflict marriages from divorcing, while encouraging divorce among those couples whose marriages are conflictual.<sup>25</sup> Realistically, however, it seems unlikely that changes in legal policy could facilitate divorce among couples who remain together in highly conflictual marriages without destabilizing marriage more broadly. Under no-fault divorce law, no legal barriers discourage divorce, and so we must conclude that unhappy couples

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<sup>25</sup> Amato, *Good Enough Marriages*, *supra* note 7, at 91.

who stay together do so for powerful religious, moral or other reasons that are not readily subject to influence. The policy goal must be a more limited one of discouraging divorce among low-conflict couples with children while avoiding additional barriers that unduly deter divorce in high-conflict marriages.

#### *A. No-Fault Divorce Law*

Before turning to the question of whether such legal reforms are feasible, it may be useful to examine the effect of the no-fault divorce reforms of the last generation on parents' decisions to divorce. It would be a mistake to exaggerate the impact of legal change on the divorce rate or on attitudes toward divorce. Although it is clear that social norms supporting marital commitment have weakened substantially, the extent to which no-fault divorce law has played a role in this change is uncertain. The interaction between law and social norms is complex, and the direction of influence is not clear.<sup>26</sup> Nonetheless, it is possible that no-fault divorce reforms may have contributed to the inclination of parents in "good enough" marriages to divorce by inadvertently destroying restrictions on divorce that served as useful precommitment mechanisms.<sup>27</sup> Whatever its deficiencies, traditional divorce law created barriers that reinforced the initial commitment that most couples have when they get married. By imposing substantial costs on the decision to divorce (the requirement of proving fault), divorce law discouraged unhappy spouses from leaving marriage because of transitory dissatisfaction or routine stresses—boredom, mid-life crises, and the like. Thus, it seems likely that divorces of the kind that seem to be most harmful to children were less common under the fault regime. Divorce was available, but it was not easy

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<sup>26</sup> Elizabeth Scott, *Social Norms and the Legal Regulation of Marriage*, 86 Va. L. Rev. 1901, 1969-70 (2000) (arguing that law and social norms interact in a dynamic process in the regulation of marriage, and that legal reforms both reflect and influence evolving social norms).

<sup>27</sup> I develop this argument in Elizabeth Scott, *Rational Decisionmaking about Marriage and Divorce*, 76 Va. L. Rev. 9, 17-25 (1990).

because of the legal restrictions. In general, unhappy spouses likely pursued this option only when continuing in marriage was intolerable and most couples in “good enough” marriages stayed together.

The no-fault reforms removed these legal barriers and made divorce easier. Under modern divorce law, either spouse is legally free to leave marriage for any reason or no reason at all. The upshot is that spouses who are not deterred by other barriers (religion, social disapproval, financial constraints), or who have attractive alternatives (other relationships perhaps), are more likely to leave marriage than might have been true a generation ago. Where barriers to divorce are low and exit is always an option, marriage is more vulnerable to life’s stresses. Marital stability may depend on sustained satisfaction with the relationship, and spouses may be more inclined to compare fulfillment in marriage with alternative sources of happiness outside of marriage.<sup>28</sup> Under these circumstances it becomes harder for couples to adhere to the cooperative intentions with which they entered marriage—and many fail to do so. Thus, it is not surprising in this legal environment that many “good enough” marriages end in divorce. The surprise is that so many endure.

### *B. Can “Good Enough” Marriages Be Saved?*

The next question is whether there are legal reforms that could ameliorate the costs created by no-fault divorce law. Social conservatives offer a simple solution—turn back the clock to the traditional regime of fault-based divorce law.<sup>29</sup> In my view, this is not likely to be a satisfactory solution. There were many good reasons to abandon the requirement of proving fault as the basis for divorce. For starters, the premise that one spouse is

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<sup>28</sup> *Id.* at 39-40.

<sup>29</sup> F. Caroline Graglia, *Domestic Tranquility* 293-97 (1998); Maggie Gallagher, *The Abolition of Marriage* 247-50 (1996); Nordlinger, *supra* note 1, at 26.

responsible for the failure of the marriage (and that the other is “innocent”) is a questionable one. Also, proving marital misbehavior to a third party decision-maker is an uncertain business and seems likely to intensify conflict. Moreover, most people today would resist returning to a regime of coercive government regulation of marriage that imposes the values of one group in society on the rest.<sup>30</sup>

Instead, a useful government role could be to assist couples to achieve their goal of lasting marriage by providing an option not currently available in most states—a voluntary legally enforceable commitment term. My proposal is that couples entering marriage be allowed to choose either marriage regulated by conventional no-fault rules or marriage that could only be legally terminated after an extended waiting period (of two years, for example.) Perhaps the second option would only apply to divorces involving children, although some couples might want the security of this legal commitment, whether or not they have children. The recently enacted covenant marriage statutes adopt a similar approach to the one that I am proposing.<sup>31</sup> However, these statutes include fault grounds for divorce as well as a waiting period. This undermines their appeal by hearkening back to an era to which most people have no desire to return and it encourages collusion and strategic behavior by spouses eager for a quick exit.

How would a period of mandatory delay discourage divorce in “good enough” marriages? First and most directly, it would create a barrier to divorce, making the

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<sup>30</sup> See Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 Va. L. Rev. 1225, 1239-50 (1998) for further elaboration of the argument against basing divorce on fault.

<sup>31</sup> Covenant marriage is offered as an option in two states. Couples entering marriage can choose marriage regulated by conventional no-fault divorce rules or covenant marriage. If they choose covenant marriage, they must undergo pre-marital counseling and can divorce only on fault grounds or after a two year separation period. See Ariz. Rev. Stat. Ann. §§ 25-901—25-906 (West 2000); La. Rev. Stat. Ann. §§ 9:224(c), 9:225(a)(3), 9:234, 9:245(a)(1), 9:272-275, 9:307-309 (West 2000).

decision to leave marriage more costly. It might also promote more thoughtful decision-making about divorce. During the waiting period, the spouse who is considering divorce would have the opportunity to assess more accurately whether the decision reflects her long-term interest and that of her children or, alternatively, is based on passing dissatisfaction with the marriage. If her determination to leave the marriage is unchanged after the waiting period, then contemporary norms support divorce as the right choice. A waiting period may also postpone the establishment of a new family by either spouse. This is almost surely better for the children of the abandoned marriage, who are more likely to remain a priority in their parents' lives (particularly non-custodial parents) if they are not competing for attention with children of a new relationship. Although some spouses might start a new family during the waiting period before divorce, most would not. Finally—and this is more intangible—the waiting period defines the relationship as one that is not easily set aside, and this may subtly influence the attitudes and behavior in marriage of couples who have undertaken this commitment. In general, parties who anticipate that their relationship will continue into the future have an incentive to cooperate that disappears when exit is always an option.<sup>32</sup>

An obvious concern about such a proposal is whether the waiting period could be structured so as to protect children in those high-conflict marriages for whom divorce is beneficial. No couple, of course, would be required to live together during the mandatory waiting period. The option of formal separation should be available,<sup>33</sup> and courts could enter custody and support

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<sup>32</sup> See Robert Axelrod, *The Evolution of Cooperation* 10-12, 30-33 (1984); Scott, *supra* note 27, at 50-54 (demonstrating that a cooperative equilibrium can emerge in an iterated game between two parties, but that it may deteriorate at the end game stage, because the expectation of future interactions is important to maintaining cooperation).

<sup>33</sup> Formal separation or divorce from bed and board (a *menso et thoro*) was commonly available under the fault regime. This status was like divorce from the bonds of marriage in almost every way, except that

orders on petition by one spouse. Protective and restraining orders would be available in any situation in which they are needed to protect a spouse or children against the threat of domestic violence and abuse. For high-conflict marriages that are subject to the waiting period, the only tangible restriction on the couple that is not currently available would be one on remarriage. It does not seem as though this restriction in itself would expose children to ongoing conflict between their parents.

### III. POLARIZED PUBLIC OPINION AND LAW REFORM

In theory, it would seem as though modest law reforms such as the kind of voluntary commitment option that I have proposed might reduce divorce without sacrificing the well-being of children in high-conflict marriages. At a minimum, a waiting period would encourage parents to think long and hard about whether the choice to end their marriage will harm or benefit their children.<sup>34</sup> Whether couples would be inclined to undertake this commitment (and thus whether the reform will have a significant impact on divorce) depends on the social meaning that this commitment option assumes. This is very hard to predict; it is possible to construct both a pessimistic and a more optimistic account.

First, the pessimistic view. As the recent debate over covenant marriage reveals, even innocuous voluntary commitment options are viewed with suspicion in some quarters. Many people today are uneasy about any legally enforceable commitment in marriage and suspect that

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neither spouse was free to remarry. The idea of divorce from bed and board can be found in modern statutes and is usually treated as a legal separation. See, e.g., Ala. Code § 30-2-40 (2000); D.C. Code Ann. § 16-904 (2000); Haw. Rev. Stat. Ann. § 580-41 (2000). I do not envision that many spouses would choose this option but its availability serves as a safety valve.

<sup>34</sup> Promoting consideration of children's interest by parents could be further encouraged by mandatory counseling that focuses on the effect of divorce on children. Virginia recently established such a requirement. See Va. Code Ann. § 20-103 (Michie 2001).

proposals to allow or encourage such commitment are part of a reactionary social agenda being promoted by those who would like to return to traditional marriage and gender roles.<sup>35</sup> I have argued elsewhere that this reaction may be due to a strong historic association between the legally enforceable spousal commitment that existed in traditional marriage and powerful norms that reinforced gender hierarchy and subordination of women in marriage.<sup>36</sup> Thus, it is not surprising that many feminists oppose covenant marriage, despite the fact that it may provide greater security in marriage for some women.<sup>37</sup> On its face, a voluntary commitment option that could assist couples in maintaining a “good enough” marriage for their children’s benefit is a far cry from the coercive state restrictions of the fault regime. Nor would it seem to threaten women’s autonomy in marriage. However, *any* legal restriction on divorce creates anxiety about a return to “the good old days,” which were not that good for wives.

Wariness may be greater in the current political climate. Attitudes about divorce are deeply polarized today. Some conservative “family-values” advocates *want* to return to a world of traditional marital roles and government restrictions on divorce. They advocate a revival of fault grounds divorce law as part of a larger vision of a social order in which mothers are homemakers and fathers are the heads of households.<sup>38</sup> In response,

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<sup>35</sup> See Pollitt, *supra* note 4, at 9 (“[t]he real aim of conservative divorce reform is to enforce a narrow and moralistic vision of marriage”); Skolnick, *supra* note 3, at 88 (“[Conservatives/reformers] favor a range of public and private initiatives to ‘restore’ marriage and make alternatives to the two-parent biological family socially unacceptable and practically difficult.”).

<sup>36</sup> Scott, *supra* note 26, at 1960-66.

<sup>37</sup> Some feminists who oppose covenant marriage think divorce is generally good for women, and that restrictions on divorce will harm women. See, e.g., Katha Pollitt, *Is Divorce Getting a Bum Rap?* *Time*, Sept. 25, 2000, at 82.

<sup>38</sup> F. Carolyn Graglia, *The Housewife as Pariah*, 18 *Harv. J.L. & Pub. Pol’y* 509, 511-12 (1995) (no-fault divorce forces women, including those who would be happy as housewives, to work); Patrick Buchanan,

liberals and feminists tend to be wary of any constraints on individual freedom in marriage. Moreover, some feminists believe that easy access to divorce is essential to women's well-being and that any restrictions run the risk of trapping women in marriages that are abusive, or at least psychologically oppressive.<sup>39</sup> Beyond this, divorce can mean escape from dependency on and subordination to husbands. As such, it may be the path to autonomy and self-realization for many women.<sup>40</sup>

The controversy over the impact of divorce on children is somewhat more complex. It seems puzzling that liberals tend to dismiss or at least discount the relatively hard evidence that divorce is harmful to children—evidence that conservatives trumpet at every opportunity. Liberal critics emphasize that not all children suffer grievous harm, and the harm often dissipates over time.<sup>41</sup> This, of course, is true, but it seems to beg the question; surely, practices that inflict substantial harm on children

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Right from the Beginning 149, 341 (1988); Jerry Falwell, Listen, America! 124-25 (1980); Gary Becker, Finding Fault With No-Fault Divorce, *BusinessWeek*, Dec. 7, 1992, at 22 (no-fault divorce laws are problematic because they force women to remain in the workplace and prevent them from being homemakers). Becker emphasizes the efficiency (rather than the morality) of specialized roles.

<sup>39</sup> See Linda J. Lacey, Mandatory Marriage "For the Sake of the Children": A Feminist Reply to Elizabeth Scott, 66 *Tul. L. Rev.* 1435, 1443-46 (1992).

<sup>40</sup> See Ashton Applewhite, Cutting Loose: Why Women Who End Their Marriages Do So Well 1-4 (1997) (divorce can be liberating for women and bring opportunities for personal growth); Pollitt, *supra* note 4, at 9. Judith Stacey challenges the possibility of truly egalitarian marriage under current social and economic conditions and suggests that stable marriage depends on systemic inequality. Judith Stacey, Good Riddance to The Family: A Response to David Popenoe, 55 *J. Marriage & Fam.* 545, 547 (1993).

<sup>41</sup> Arlene Skolnick, Response to Barbara Whitehead: Family Trouble, *The American Prospect*, Sept.-Oct. 1997, at 19-20. (noting Whitehead's "about-face" regarding whether children of divorce suffer long-term harms and discounting her logic that divorcing parents put their needs above their children's). See also Norval Glenn, A Plea for Objective Assessment of the Notion of Family Decline, 55 *J. Marriage & Fam.* 542, 543 (1993).



should concern us, even if the injury is not universal or permanent. These critics also emphasize the harm of children's exposure to conflict between their parents in marriage—injury that conservatives conveniently forget.<sup>42</sup> However, as I have indicated, the research evidence does not support the implicit suggestion that most marriages ending in divorce experience high levels of conflict. And yet, there is no reason to think that liberals are less concerned about the welfare of children than are conservatives. Why the reluctance to confront this threat to children's well-being?

In my view, the liberal response reflects two political concerns that are usually unarticulated. First, focusing on the harmful impact of divorce on children threatens to undermine acceptance of the single-parent family as a legitimate family form. A claim that children are better off if their parents stay together implies that the traditional nuclear family of two married parents and their children is the optimal family form and that single-parent families are inferior. This normative implication threatens the social tolerance of diversity in family structures—tolerance that is far from solidly established. The fear is that divorced and single mothers and their children may be stigmatized by policies that discourage divorce.<sup>43</sup>

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<sup>42</sup> Philip A. Cowan, *The Sky is Falling, But Popenoe's Analysis Won't Help Us Do Anything About It*, 55 *J. Marriage & Fam.* 548, 551 (1993).

<sup>43</sup> Many liberals have criticized conservatives as hostile to single parent families. See, e.g., Skolnick, *supra* note 3, at 94 (criticizing the validity of the statistics relied on by many conservative pundits including Whitehead and Popenoe, *infra*); Sara McLanahan, *The Consequences of Single Motherhood*, *The Am. Prospect*, Summer 1994, at 48 (criticizing efforts of conservatives to demonize single mothers); Arlene Skolnick and Stacey Rosencrantz, *The New Crusade for the Old Family*, *The Am. Prospect*, Summer 1994, at 60-61 (noting that the debate about single-parent families is not just about statistics, which are often misrepresented, but about values). Reluctantly, though, some liberals have admitted that children actually are better off in married families. See, e.g., McLanahan, *supra*, at 49-54 (noting problems in single-parent families); *Consensus on Divorce Reform?*, *J. of Am. Citizenship Pol'y Rev.*, July-August 1996, at 62 (noting the presence of

Liberal critics are also skeptical about whether the conservative agenda is directed primarily toward promoting the welfare of children. Many conservatives seem quite uninterested in providing for the welfare of children of single parents, as evidenced by political debate over children's health care, spousal and child support, and support subsidies for poor families.<sup>44</sup> Thus, understandably, liberals may conclude that the conservative agenda has more to do with reinstating traditional marriage than with protecting children. If so, rejection of the substantive claim that divorce is often harmful for children becomes easier.

Even social science researchers who study divorce and family structure are caught up in the political controversy—a development that reveals the deeply ideological character of the debate. Scientists who report harmful effects of divorce on children are branded by other researchers as conservatives whose agenda is to promote traditional marriage. Moreover, researchers who compare outcomes for children in different family forms find themselves the targets of harsh criticism by colleagues who challenge the legitimacy of such inquiry.<sup>45</sup> In general,

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NOW founder and feminist Betty Friedan and former Clinton advisor, Willam Galston at conference hosted by the conservative Heritage Foundation, and their agreement with some of the harms faced by children of divorce). Many conservative critiques of single parent families are based on statistics showing harm to children. See, e.g., Barabara Whitehead, *The Divorce Culture* 153-81 (1997) (placing blame for many of society's ills on the lack of "traditional" two-parent families); David Popenoe, *Life Without Father* (1996).

<sup>44</sup> See, e.g., Pollitt, *supra* note 4 (noting lack of provisions for increased child support and other measures to help children of divorce in conservative divorce reform proposals).

<sup>45</sup> The critiques of Paul Amato (hardly a conservative by any neutral measure) by David Demo and Katherine Allen are representative. See generally Amato, *supra* note 13; Katherine R. Allen, *The Dispassionate Discourse of Children's Adjustment to Divorce*, 55 *J. Marriage & Fam.* 46, 46 (1993); David H. Demo, *The Relentless Search for Effects of Divorce: Forging New Trails or Turnbling Down the Beaten Path?*, 55 *J. Marriage & Fam.* 42, 42 (1993). These critics' normative position is

social scientists are a liberal group and are loathe to be linked to a conservative social agenda.<sup>46</sup> This was brought home by the recent *Time* cover story on the impact of divorce on children.<sup>47</sup> The story focused on Judith Wallerstein, who has recently published a book describing the lasting harm of divorce on children, based on her longitudinal study of children of divorce begun in the 1970s.<sup>48</sup> Wallerstein has become an outspoken critic of easy divorce policies (reversing her earlier position), and not surprisingly, she has become the darling of the family-values conservatives.<sup>49</sup> Other researchers cited in the

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that all family forms are equal, and they assume that any comparison of two-parent families and single-parent models presumes that the latter is deficient. As Amato points out, they object categorically to focusing research on family structure and reject findings that any differences exist that might suggest problems in single-parent families. Amato, *supra* note 13, at 23.

<sup>46</sup> See Glenn, *supra* note 41, at 543. Glenn, a sociologist who studies marriage, speculates about the hostile response among social scientists to David Popenoe's argument that children's welfare is threatened by the decline of the family due to the weakening of marriage. He describes a survey of social scientists in which 87% identified themselves as liberal/radical, while 6% described themselves as conservative/reactionary. *Id.*

<sup>47</sup> See Kim, *Should You Stay Together for the Kids?*, *supra* note 5, at 77-79.

<sup>48</sup> Wallerstein et al., *supra* note 2, at xxvi-xxvii. Wallerstein studied 131 children whose parents divorced in Marin County, California in the mid to late 1970s. She has followed the group ever since, publishing periodic reports. See Judith Wallerstein & Joan Berlin Kelly, *Surviving the Break up: How Children and Parents Cope with Divorce* (1980); Judith Wallerstein & Sandra Blakeslee, *Second Chances: Men, Women, and Children a Decade after Divorce* (1990).

<sup>49</sup> For example, in a 1995 interview in *Mother Jones* magazine, Wallerstein says she doesn't "think government policy has caused divorce, and ... government policy can[']t make a good marriage." Mary Ann Hogan, *The Good Marriage?*, *Mother Jones*, July-Aug. 1995, at 20. Wallerstein goes on to say that current conservative ideas such as reintroducing fault "worr[ies]" her because "[i]n America we tend to rush into things without thinking what their unintended consequences may be." *Id.* at 21. In the *Time* article, she notes her change of opinion about divorce. Absent abuse or other extenuating circumstances, "a lousy marriage, at least where the children's welfare is concerned, beats a great divorce." Kim, *Should You Stay Together for the Kids?*, *supra* note 5, at 79.

article downplayed the harmful impact of divorce on children, in distancing themselves both from Wallerstein (whose research has been subject to serious criticism on methodological grounds<sup>50</sup>) and from the political movement with which she is associated.<sup>51</sup>

In the current political climate, thoughtful discussion about the role of legal policy in ameliorating the costs of divorce for children is very difficult. Social conservatives have captured this issue, and liberals have staked out a position in opposition to what they view as a reactionary agenda. Policies that promote marital stability, such as commitment options that benefit children, may be redefined as one more effort to return to traditional marriage.

What will be the response of those people (probably most Americans) who do not identify strongly with either ideological camp? Many people likely have attitudes about divorce, individual freedom and children's welfare that are more complex and difficult to categorize than are those of the advocates whose voices are usually heard in the debate. It is hard to predict the public response to policy initiatives such as covenant marriage, in part because individuals with more nuanced views may be silenced in an environment in which conservatives and liberals seek to dominate public discourse and to impose costs on the expression of attitudes

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<sup>50</sup> Wallerstein's research has been criticized on several grounds. She used a relatively small group of white, middle-class subjects who were recruited from a mental health clinic (and thus may not be representative of children of divorce). She also had no control group in the original study, making it difficult to evaluate whether the effects she observed could be attributed to divorce. See Kirn, *Should You Stay Together for the Kids?*, *supra* note 5, at 78.

<sup>51</sup> For example, Paul Amato is quoted in the Time article. As noted, "Amato agrees with [Wallerstein] about divorce's 'sleeping effect' on children ...." However, Amato went on to say that "It's a dismal kind of picture that she paints.... [A]lthough growing up in a divorced family elevates the risk for certain kinds of problems, it by no means dooms children to having a terrible life." Kirn, *Should You Stay Together for the Kids?*, *supra* note 5, at 78.

with which they disagree.<sup>52</sup> Moreover, individual responses may be influenced by the perceived costs and benefits of association with supporters or opponents. Thus, if covenant marriage is identified with the conservative “family-values” agenda of some of its proponents, it may assume a social meaning that repels moderates who do not want to be associated with that agenda or with those who promote it. This may even be the reaction of those who might otherwise endorse the reforms and who think that parents should be ready to sacrifice some personal happiness for their children’s well-being.

It is not clear, however, that legal reforms targeted to promote stability in marriages with children will be fatally tainted by this association. Thus, a more optimistic prediction about the public reaction is also plausible. In this country, strong social norms encourage parents to fulfill their responsibilities to their children and look out for their welfare; parents who fail to do so are subject to social disapproval.<sup>53</sup> Since the 1970s, divorce decisions by parents have been generally tolerated because of a widely held view that children really are better off when their unhappy parents divorce. Today, there is a growing uneasiness with this view.<sup>54</sup> The public debate may not fully reflect this uneasiness because it has been inconsistent with prevailing attitudes, and expressions challenging parental freedom align the speaker with the conservative

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<sup>52</sup> Timur Kuran describes how expression of preferences can be silenced when public opinion is polarized on a sensitive topic. See Timur Kuran, *Private Truths, Public Lies: The Social Consequences of Preference Falsification* 56-59 (1995). This silencing makes assessment of real preferences difficult and prediction of social change a very uncertain business.

<sup>53</sup> Consider the norms against child abuse and neglect. Parents are held responsible for their children’s welfare and healthy development and are subject to social disapproval when children show “[e]vidence of poor parenting” such as when they “are unsupervised, badly behaved, dirty or undernourished.” See Scott, *supra* note 26, at 1912-14.

<sup>54</sup> See Kim survey, *supra* note 6, The evolution of Judith Wallerstein’s views suggests how the growing perception that divorce is harmful to children can change attitudes.

view. Nonetheless, it seems likely that our sanguine response to divorces involving children will become increasingly untenable, because it is based, at least in part, on inaccurate information. The research of Professor Amato and other social scientists demonstrates that many, perhaps a majority, of divorces have a lasting harmful impact on children, and the harm seems to be greatest when the parents' decision to divorce is least justified. This evidence may weaken the prevailing norm, and perhaps embolden those who silently disapprove of easy divorce in marriages with children. Behavioral expectations for parents who are unhappy in their marriages may change, and a new social norm may emerge: "If you have children, you should not give up on your marriage unless it is really bad and until you have worked long and hard to make it work." Changing social attitudes could lead to greater receptivity to legal initiatives that reinforce the emerging norm.

In this environment, the type of marital commitment option that I have proposed may be seen as a useful mechanism to assist couples in achieving their goal of lasting marriage and fulfilling their responsibilities as parents. Most people would agree that parents, rather than children, should bear the costs of a less-than-optimal marriage. Children are not responsible for their parents' happiness, but parents are responsible for their children's well-being. If there is a societal consensus on this, voluntary commitment options that help parents fulfill their obligations should be well-received.