THE POLITICS OF FAMILY DISSOLUTION[1]

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ABSTRACT

Questions of divorce and child custody, along with connected issues like domestic violence, child abuse, and child support, have been characterized by clichés and misconceptions and by misleading and inaccurate information. This is attributable to failure to understand the politics behind these phenomena. All have been subject to political pressure and ideological manipulation, though this has been accompanied by almost no analysis, investigation, or explication by students of politics. Yet these matters have far-reaching consequences for the social order, including the political order, constitutional rights, and civil liberties. Almost no discussion has been held on the adverse consequences or the possible policy options appropriate to address them, though the measures available to rectify adverse impact on civil society are relatively straightforward.

Keywords: divorce, child custody, fatherhood, domestic violence, child abuse, child support

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Horror stories about the family now saturate the media. Clichés about 'nasty divorce' and 'ugly custody battle' have become daily fare. Yet while voyeuristic 'he said / she said' accounts may transform our media into purveyors of real life soap opera, they seldom inform us accurately.

Family breakdown, divorce, and separation involving children entail consequences much more far-reaching than the public has been led to believe. Beyond disrupting and even destroying millions of lives, they also undermine our social order, our economic prosperity, law enforcement and criminal justice, even our civil liberties and constitutional government.

Loosening bonds between parents and their children and increasing government control over children has reached critical proportions. It is little exaggeration to say that children have become commodities and weapons that are fought over, traded, bought, sold, stolen, and even killed. Custody battles, fatherless children, child abuse, parental kidnappings, swelling foster care rolls, adoption markets, truancy, violent crime, substance abuse, psychotropic drug use, escalating medical costs, sex trafficking, child soldiers—all these are connected, directly or indirectly, to family dissolution.

Yet the family crisis is usually treated apolitically, largely as the domain of the therapeutic professions of psychology, psychiatry, social work, and sociology (Smith, 2010). Legal scholars do examine the role of the state and legal system, but usually within a legal framework whose assumptions are not questioned, with little consideration of how it became established, what political interests were involved in creating it, the impact it has on family dynamics, and its larger implications for our constitutional order.

Yet politics are central to the family crisis. In his great work, *Family and Civilization* (2008), Harvard sociologist Carle Zimmerman depicted the modern family and state as locked in a titanic struggle, in which one's strength is the other's weakness. In Zimmerman's account, the declining family and expanding state over centuries constituted a phenomenon of civilizational dimensions.

Throughout the Western world and beyond, growing government intervention into family life and the separation of children from parents by government authority is a trend that many view with alarm (Hewlett & West, 1998; Mack, 1997). How the state involves itself

in private family life, how it assumes control over children and distributes them among parents and other parties—these are matters with far-reaching implications not only for family policy but for freedom (Morse, 2006).

Yet current practice is the product of policies implemented gradually over decades with virtually no public debate or input.

Until recently, free societies handled these matters with a principle that, while it might be violated, was never renounced: Parents are responsible for, control, and speak for their minor children. This guarantee for parental authority ensured the integrity of the family separate from the state and prevented children from being manipulated for political purposes. "No known society treats the question of who may properly call a child his or her own as simply…a matter to be decided entirely politically as one might distribute land or wealth," writes Susan Shell (2004).

> *No known government, however brutal or tyrannical, has ever denied, in fact or principle, the fundamental claim of parents to their children.... A government that distributed children randomly…could not be other than tyrannical. Even if it had the best interest of society in mind…a government that paid no regard to the claims of biological parenthood would be unacceptable to all but the most fanatical of egalitarian or communitarian zealots.*

Regarding the facts, Shell could not be more mistaken. What she regards as a dystopian nightmare into which 'no known government' has ever ventured has today become the routine practice of governments throughout the Western democracies. They are demonstrating that she could not be more correct about the consequences.

The tyranny Shell predicts is now the reality for many people, and it proceeds precisely from this breakdown of not just the authority but the rights of parents, a process directly attributable to the growing power of the state (Baskerville, 2007).

Parenthood has never been adequately examined by students of politics. Yet it is politically unique. It is the one relationship where some may legally exercise coercive authority over others. It is the one accepted exception to government's monopoly of force, which is why governments often try to undermine it and why state officials—social workers, family court judges, divorce lawyers, forensic psychotherapists, public school

administrators—seek to prohibit or curtail activities by which parents instruct, protect, and provide for their own children without dependence on the state. Without parental authority, government's reach is total (Donnelly, 2011).

This role of parental authority in preserving freedom can only be secured by the bonds of marriage (Morse, 2006; Sugrue, 2006). Politically, marriage is by its nature paradoxical in a way that is critical to our current dilemma. Marriage must be recognized by the state, but precisely because it creates a sphere of privacy and parental authority from which the state must then withdraw or be excluded. Because no government can be counted upon to exercise this restraint voluntarily, all citizens must constantly demand that it do so. Marriage—protected by a legally enforceable contract—gives citizens the legal authority and the moral high ground from which to do so.

When a child is born within wedlock, it does not occur to most parents to petition the government for permission to keep the child. Only when marital bonds have not been formed or are broken does the state claim sovereign authority over the child. Moreover, this is not a gender-neutral matter: Biology dictates that marriage is critical for defining fatherhood much more than motherhood (Amneus, 1999).

WHAT PRECISELY IS 'CUSTODY'?

Today we speak matter-of-factly about 'winning custody' and 'losing custody' as if it were a game. Yet 'custody' is a euphemism disguising serious government measures. Were we instead to speak of 'the government taking away your children,' it would more accurately convey what is taking place.

An award of 'custody' is a government intervention into private family life and the parent-child relationship. 'Winning' or 'losing' custody actually means the government assuming control over one's children. Some suggest that, because parents naturally control their children from birth, the government does not grant custody but only takes it away. In any case, a custody order is a government decree granting, not the right to parent one's children, but the power to prohibit someone else from parenting his or her children. It removes from parents the care, control, and companionship of their children and, and it marshals the penal apparatus to prevent them from acting as parents. Custody is only

marginally about children, therefore; it also confers formidable power on grown-ups.

'Custody' means the power to criminalize the association between parent and child. One would expect that such an awesome power could be exerted only against parents who had been demonstrated to be unfit or committed some legal offense. Yet this is not the case.

Today, parents who have committed no legal infraction can be and are arrested simply for associating with their own children. Few people to whom it has not happened realize how easily and frequently children are taken from their parents with no grounds or even allegations of wrongdoing. The forcible separation of children from their parents for reasons that have nothing to do with the children's wishes, safety, health, or welfare is now routine. While it has a number of mechanisms, the most common, and often the starting point for the others, is the system of involuntary divorce. As family law now operates, one parent can have the other summoned to court and, without presenting any evidence of legal wrongdoing, request that he be summarily stripped of all rights over his children, evicted from his home, and prohibited from contact with his children, and in almost every case the judge will grant the request automatically, with no questions asked. It is not necessary that the parent be found unfit, that he or she commits a crime or violates the marital agreement, or that the parent even agree to a divorce or separation (Hubin, 1999, 136).

In principle, we as a society have long believed and public policy has for centuries been devised on the assumption that authority over children resides and should reside with their parents, unless the parents have done something to forfeit it. (Haffen, 1976). Yet with 'no-fault' divorce, that power was transferred to state officials. This government takeover of the family has long been considered justified when both parents agree to divorce or when one violates the marriage contract and incurs the legal consequences for doing so. The innovation introduced by no-fault divorce is that the government can now intervene into the family, assume control over the children, and sever the relationship between the children and one or both legally unimpeachable parents, not by the mutual agreement of both parents but at the mere request of one.

The euphemisms of modern divorce have disguised the erosion of fundamental rights and responsibilities over private life. We are told a marriage has 'broken down' or that the

parents 'can't agree.' Therefore, government officials *must* step in and assume control over the children and family.

But these assumptions are open to a number of challenges. We do not normally call in government officials to settle private disagreements with criminal penalties. Government agents are not necessarily disinterested parties. They have a tangible interest in intervening, for it rationalizes a major extension of state power. Through children, the modern state once again achieves its most coveted ambition: to assume control over the private lives of its citizens.

Through 'no-fault' divorce, one parent can now declare unilaterally that the parents 'disagree' and thereby petition government officials to move in and summarily remove the other parent without that parent having done anything legally wrong. But if disagreement is sufficient grounds for the government to eliminate one parent, then the most effective method for the parent who seeks to have the other eliminated is to be as disagreeable as possible. The government can then reward the aggressive parent by establishing him or her as a puppet government, a kind of government satrap within the family.

In the ensuing custody 'trial,' the parent targeted for removal is usually labeled the *defendant*, and it does have the quality of a prosecution. Yet because that parent is seldom charged with any recognized legal infraction, he will find it impossible to defend himself. If allegations of abuse are made, he will not be formally charged but simply be kept from his children. The case against him will be built not on evidence of any legal transgression but entirely on how he conducts his private life. "The authorities will act quickly to *protect* your children from you," writes Jed Abraham (1999, 6). "They'll curtail your visitation during their investigation; you'll be restricted to being with your children only in the presence of a supervisor, and you'll be ordered to pay the supervisor's fees."

For the rest of the children's childhood they and the "non-custodial parent" (a term some consider an oxymoron) will live under constant government surveillance and supervision. The parent will be told when he may see his children, what he may do with them, and where he may take them. His access to their school or medical records will be controlled, and decisions regarding their health and education will be made by others. He

will be told what religious services he may (or must) attend with them and what subjects he may discuss with them in private. Officials and even private persons will confiscate what they please from his earnings claiming (with no proof required) that it will be used for the good of his children, and the burden of proof (and financial burden) will be on the parent who wants his property returned. He can be ordered to work certain hours and at certain jobs, the earnings from which will be confiscated. The times and places he is authorized to associate with his children may conflict with his employment or other obligations, but each time he wants the arrangements changed he must petition the government and pay more lawyers. If he loses his job or falls ill he will be declared a felon without trial and subject to incarceration. He can be jailed for failure to earn sufficient income. His visits with his children can be monitored and supervised by officials, for which he will pay a fee. His financial records will be seized and examined and his bank account subject to confiscation. Anything he says to his family members or anyone, even in private, can be used in court. He can be ordered to sell his house and turn the proceeds over to attorneys and others he has not hired. His own children can be used as informers against him (Baskerville, 2007).

The children themselves effectively become wards of the court. They can be placed in daycare or other institutions without his consent, and he can be ordered to pay for it—above what is already demanded for their maintenance. If they react adversely or object to the separation from their parent, they can be administered psychotropic drugs, committed to a psychiatric facility, placed in foster care, turned over to the custody of social workers, or incarcerated in a juvenile detention facility—all without his knowledge or consent. "You'll watch them from afar as they grow up with the kinds of psycho-social problems that children who live with their fathers rarely have," writes Abraham (1999, 138). "You'll watch from afar, and you won't be able to do anything about it."

In the jargon of family law, faithfully echoed by the media and academia, this parent has "lost custody," a seemingly harmless and mundane formulation of events. But this jargon disguises far-reaching implications. In plain English, this parent's unauthorized association with his own children is now a crime. Proceeding from this, his failure to follow other government orders controlling his movements, finances, and personal habits—directives that apply to no one but him—is also grounds for arrest. In effect, the court has legislated a

personalized criminal code around this parent, subjecting him to criminal punishment for doing what anyone else may do, such as associating with his own children, attending one of their soccer games, or worshiping at the same church.

The astonishing but incontrovertible fact is that with the exception of convicted criminals, no group in our society today has fewer rights than parents. Even accused criminals have the right to due process of law, to know the charges against them, to face their accusers, to a lawyer, to a trial, and to expect knowingly false accusations to be punished. A parent can be deprived of his children, home, savings, future earnings, and privacy, and he can be incarcerated, without any of these constitutional protections. "Criminals, killers, and rapists are presumed not guilty in the absence of evidence to the contrary," observes a grandmother, "but fathers fighting for custody are assumed guilty" (Shared Child Custody Legislation, 2005). Once citizens have children, they forfeit their most essential constitutional rights[2] (Baskerville 2007, ch. 2).

Though outside the immediate scope of this essay, it is also worth noting that these practices and principles entail additional consequences, both personal and social and even political, beyond the civil liberties of individuals. Involuntarily separating children from their parents obviously induces severe emotional and psychological pain for both parents and children that requires little imagination to understand. Moreover, the impact on children especially is of direct interest to the wider society. Even aside from the principle that "an injustice anywhere is a threat to justice everywhere," the adverse effects on children is well established to be a (and even *the*) primary contributor to social instability carrying substantial costs to public finances. Virtually every major social pathology is directly attributable to single-parent homes, including violent crime, substance abuse, truancy, and a continuing intergenerational cycle of unwed motherhood. Fatherlessness far eclipses poverty and race as the leading predictor of criminality and other anti-social behavior (*Father Facts*

[2] Justice Mary Southin of the British Columbia Court of Appeal: "The legislature…has decreed that fathers have no rights" (Dad "feels like dirt," 2001). Canada's Justice Minister Martin Cauchon stated that, "Parents have responsibilities, they don't have rights" (Rights and Responsibilities, 2003).

6).[3] Further, these are precisely the social ills that make the largest claims on domestic government finance, including budgets for law enforcement and incarceration, education, and health care, as well as additional welfare or "social" services. Finally, increasing government expenditure and jurisdiction naturally enlarges the scope and power of government generally, as has been demonstrated in this policy area in particular (Baskerville, 2008).

IS THE PROBLEM GENDER BIAS?

Because the evicted parent is usually the father, some complain that justice in custody procedures suffers from 'discrimination,' 'gender bias,' and 'sexism.' A very strong bias against fathers is well-established (McNeely, 1998; Tillitski, 1992; Leving, 1997, ch. 2; Seidenberg, 1997, ch. 1). Yet this constitutes a superficial understanding of what is taking place.

Gender discrimination in family law awards is now prohibited in virtually all jurisdictions, and courts have held statutes discriminating in favor of mothers in custody cases to be illegal (*State ex rel. Watts v. Watts*; *Commonwealth ex rel. Spriggs v. Carlson*). No official figures are available on the gender division in custody awards in any jurisdiction in any country, even though it would be a simple statistic to compile, because judicial interests lobby to prevent such figures from being recorded (McNeely, 1998, 952-953).[4] Yet despite formal legal equality between parents, it is generally agreed that some 85-90% of custody awards go to mothers (Kelly, 1994). One survey of the academic literature concludes, "it appears that, over all, mothers obtain sole physical custody ten times more often than fathers" (Miller, 2000, 11 note 17). One study in Arlington, Virginia claimed that over eighteen-months maternal custody was awarded in 100% of decisions (Seidenberg, 1997, ch.

[3] Attempts to attribute these behaviors to poverty or racial discrimination have been refuted by studies that control for these variables (Bronfenbrenner, 1990, 34; Angel and Angel, 1993, 188).

[4] "Judges and County Clerk Loretta Bowman in the past agreed to not record the gender of litigants, thereby making it impossible to probe and lay to rest charges of judicial gender bias." Yet the court acknowledged that its computer system "(which tracks hundreds of thousands of domestic, criminal, and civil cases) is capable of recording such detail" (Levy, Gang, and Thompson, 1997).

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This imbalance is often attributed to prejudice. "I ain't never seen a calf following a bull," declares a Georgia superior court judge. "They always follow the cow. So I always give custody to the mamas" (Amneus, 1999, 4). Many uninitiated many people see nothing wrong with this imbalance, on the principle that mothers are natural caregivers for young children. "Children should be with their mother," declares another judge, a view with which many may be inclined to agree, until they learn that the mother allowed the child to contract a sexually transmitted disease (Sillars, 1998).[6] "We see bizarre cases where abusive and violent mothers are given child custody,'" writes attorney Peter Jensen (2002). "One sees fathers kept from the bedsides of dying children because their presence might upset the mother."

As these cases indicate, bias against fathers goes well beyond the rationale of, 'all else being equal,' young children belong with their mothers. Automatic mother custody applies largely regardless of the mother's behavior. "Washing their hands of judgements about conduct…the courts assume that all children should normally live with their mothers, regardless of how the women have behaved," observes Melanie Phillips (1999, 275). "Yet if a mother has gone off to live with another man, does that not indicate a measure of irresponsibility or instability, not least because by breaking up the family and maybe moving hundreds of miles away from her children's father she is acting against their best interests?"

Fathers almost universally report being insulted and harangued with the *obiter dicta* of judges as if they were naughty boys. "Your job is not to become concerned about the constitutional rights of the man that you're violating," New Jersey judge Richard Russell told

[5] The assertion that fathers are awarded custody when they contest it and that courts are biased against mothers has been refuted in Parke and Brott (1999, 178f).

[6] Little hard evidence indicates that children thrive better with mothers than with fathers following divorce, and some to the contrary. "Across a variety of assessments of psychological well-being (self-esteem, anxiety, depression, problem behaviors), children (especially boys) did significantly better in the custody of their fathers" (Clarke-Stewart, 1996, 239). This is not the important issue, however, and this finding does not necessarily justify removing children from mothers (even in their "best interest") who have committed no legal infraction.

his colleagues at a judges' training seminar. "Throw him out on the street. … We don't have to worry about the rights" (Judicial Training, 1995, 14).

Gender bias alone cannot account for judges' consistent refusal to protect father's parental rights. Many people can probably understand some discrimination against fathers when divorces are agreed mutually. What is happening today is very different. It is one thing to recognize that young children need their mother; it is another altogether to say she needs the power to arbitrarily keep away their father. Yet current judicial practice allows precisely that. "No matter how faithless," writes Bryce Christensen (2001, 65), "a wife who files for divorce can count on the state as an ally." Mothers who abduct children and keep them from their legally blameless fathers, even without abuse charges, are routinely given immediate "temporary" custody. In fact this is seldom temporary, since it cannot be changed without a lengthy (and lucrative) court battle. The sooner and the longer she can establish herself as the sole caretaker the more difficult and costly it is to dislodge her. The more she cuts the children off from the father, alienates them from him, levels accusations, delays the proceedings, and obstructs his efforts to see them, the more likely she is to win sole custody (Turkat, 1995).

This apparently peculiar behavior by courts is simply a new and perhaps predictable variation on an old theme. Charles Dickens famously observed in *Bleak House* that "the one great principle of the…law is to make business for itself," and it is a well-attested principle of legal politics that courts reward belligerence because it creates business for themselves and their cronies. "*Boni judicis est ampliare jurisdictionem*," wrote Walter Bagehot (2001, 144), "or, in English, 'It is the mark of a good judge to augment the fees of his court', his own income, and the income of his subordinates." Family court judges openly attest that their aim is to increase their volume of cases (Baskerville, 2007, ch. 1; Page, 1993). Thus the more belligerence a spouse displays and the more litigation she creates, the more likely the courts will be to reward her in order to encourage others.

Any restraint the other spouse shows is likely to cost him dearly, as most discover too late. On the other hand, reciprocal belligerence and aggressive litigation on his part may carry enough hope of reward to keep him involved. Some counsel fathers that the process is so rigged that their best hope is to imitate the techniques of mothers: If you think she is

planning to divorce, divorce first. Then conceal, obstruct, delay, and so forth. "If you do not take action, author Robert Seidenberg advises (1997, 92), *your wife will"*. Thus we have the nightmare scenario of a race to the trigger, to adopt the terms of nuclear deterrence replete with the pre-emptive strike. Whoever divorces first survives.

Far from merely exploiting family breakdown after the fact then, divorce law has turned the family into a game of 'prisoners' dilemma,' in which only the most trusting marriage can survive and the slightest marital discord renders *not* absconding with the children perilous and even irrational. Willingly or not, all parents are now prisoners in this game.

For many, the key factor in their acceptance of automatic mother custody is the perception that fathers are initiating or at least acquiescing in the dissolution of marriages. Yet among researchers and family counsellors the truth has long been known to be the opposite. In the largest federally-funded study ever on these issues, Braver has shown that at least two-thirds of divorces are initiated by women, whether measured by official filings or surveys. Moreover, few of these divorces involve grounds, such as desertion, adultery, or violence. Most often the reasons given are 'growing apart' or 'not feeling loved or appreciated' (Braver, 1998, ch. 7; also Farrell, 2001, 169, 278 note 1).

And the bottom line is the children: After analyzing 21 variables, Brinig and Allen conclude that the parent who anticipates gaining custody is the one most likely to file for divorce (2000, 126-127, 129, 158): "We have found that who gets the children is by far the most important component in deciding who files for divorce."[7]

The implications are profound. If the same parent who initiates the divorce can expect sole custody of the children—without having to demonstrate any legal fault by the other—what we call 'divorce' has in effect become a kind of legalized parental kidnapping (Quinn, 2002, A25; Baskerville, 2007, ch. 1).

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[7] Wallerstein and Blakeslee (1996, 39) found roughly two-thirds of divorces were sought by women "in the face of opposition" from the husband. These proportions are certainly higher when children are involved.

Gender bias alone cannot adequately explain the explosion of divorces that are depriving children of fathers. More important are basic conflicts of interest in the family law system. Though apologists promiscuously invoke both traditional stereotypes about motherhood and modern ideas of women's rights, what drives the custody machinery is money and power. "Speaking as a lawyer, I am unalterably opposed to any change in our divorce act," says one insider (McManus, 2008).

> *Our divorce act has greatly increased divorces, crime, bankruptcy and juvenile caseloads. Any change in our no-fault system would be a financial disaster for the bar and for me personally, as these type of cases comprise a majority of my practice.*

And most of this business comes from children. "Fights over control of the children," reports another insider, "are where most of the billable hours in family court are consumed" (Parejko, 2002, 98-99). Courts today effectively offer parents—usually but not necessarily mothers—a tempting package of financial and emotional incentives to file for divorce.

PARENTAL RIGHTS OR BEST INTEREST OF THE CHILD'?

An unresolved dilemma pervades family law. It is not which parent or parents should have custody. It is the more fundamental question of who ultimately controls children, their parents or the state. In other words, how secure is the private sphere of life, and how far into private homes does the state's authority go?

The fundamental right of parents to the care, custody, and companionship of their children, and to raise them without interference by the state, has long been recognized as being virtually 'sacred' by courts throughout the English-speaking world (Hafen, 1976, 615-616). Numerous judicial decisions have held that parenthood is an 'essential' right, that "undeniably warrants deference, and, absent a powerful countervailing interest, protection." Courts have ruled that parenthood "cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." Parental rights have been characterized by the courts as "inherent, natural right[s], for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and the pursuit of happiness, our government is formed" (Baskerville, 2007, 77).

The age-old principle stipulating a "realm of family life which the state cannot enter" (*Prince v. Massachusetts*, 1944) is a direct threat to the *raison d'etre* of family law as practiced

today, whose very existence is predicated on precisely the opposite principle that no realm of life is too private for government intervention.

Fundamental to this principle is that parents decide what is best for their children, unless they forfeit that right through some legally recognized misconduct. “For centuries it has been a canon of law that parents speak for their minor children,” wrote Justice Potter Stewart. “So deeply embedded in our traditions is this principle of the law the Constitution itself may compel a state to respect it” (*Parham v. J.R.*, 1979).

Yet today this principle is increasingly ignored in favor of “the best interest of the child” and other criteria which transfer control of children from their parents to governments and abolish parents’ traditional rights to their children. With no public discussion, family law has been quietly shifted to operate on the diametrically opposite principle: that “the child’s best interest is perceived as being independent of the parents, and a court review is held to be necessary to protect the child’s interests” (Williams, 1994, 2).

The implications extend well beyond family law. A very fundamental shift has taken place here in the power of government over private life, without the slightest discussion or even notice. If parents do not have ultimate control over their children (absent some legally recognized wrongdoing by which they forfeit it), they effectively have no private lives, and government becomes total. Parents who resist the government’s assumption of control over their children become criminals, and exercising ordinary parental authority becomes a crime.

While the phrase sounds innocuous, ‘the best interest of the child’ carries far-reaching implications. Most obviously, it is vague and subjective and therefore subject to manipulation and bias. Fathers complain it is a ruse for bias toward automatic mother custody, regardless of her behavior or legal guilt. “When someone mentions the best interests of the child," writes Al Knight (2001), “it is code for the best interests of the mother.” Courts themselves have held that “what is good for the custodial parent is good for the child” (Braver, Ellman, and Fabricius, 2003, 206).

Yet the most serious implication of the ‘best interest” standard is that it transfers from parents to the state the power to define it, over the objections of parents who have done nothing to forfeit the right to make the determination themselves. It gives state officials

virtually absolute control over everyone's children to dispose of as they please. "Such a criterion is dangerous because it renders the claims of all parents to their natural children tenuous," writes Robyn Blumner (1999; cp. Kruk, 2005, 122). "Children could be given over to any set of new parents who offer a more advantaged upbringing."[8] The Illinois supreme court has likewise held with respect to adoptions:

> *If the best interests of the child are to be the determining factor, persons seeking babies to adopt might profitably frequent grocery stores and snatch babies when the parent is looking the other way. Then, if custody proceedings can be delayed long enough, they can assert that they have a nicer home, a superior education, a better job, or whatever, and the best interests of the child are with the baby snatchers (Leving, 1997, 196).*

"The law, thankfully, is otherwise," the court concludes. Not for divorced parents. The court has succinctly described precisely the principles of divorce court. "One of the factors used to determine 'best interests' is the length of time the child has been separated from the parent who is seeking custody" (Custody Decision-Making, n.d., 14). Or a parent who is simply seeking to recover the custody that has been taken away.

Many accept this practice on the assumption that judges must decide what is best for children when the parents 'cannot agree.' But allowing one parent to surrender *both* parents' rights over their children to government officials because of 'disagreement'—without any infraction by the other (who may disagree only with the removal of his children)—invites collusion between the divorcing parent and state officials.

When officials are empowered to decide the best interest of other people's children, it may become the best interest of the officials. "I represent your kids, but I don't want to," Judge Robert Page declares (Barr, 1998). "Because I don't love your children… It is a legal fiction that the law's best interest is your children."

The *best interest* standard also invites litigation and therefore creates financial

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[8] The American Bar Association ("Protecting the Best Interests of Children," n.d.) favors the term, despite admitting that it is "subjective" and allows courts to separate parents and children at will.

incentives to remove children from parents. “It provides…hair-trigger litigability,” writes Walter Olson (1991). “Everything comes to be relevant and nothing, as the lawyers say, dispositive. Does your ex swear? Smoke? Gamble? Watch too many soap operas? Perhaps none of these peccadilloes significantly endangers a child, but all can have some effect and you never know what will tip the balance. So it can't hurt to bring them all up.” Having dispensed with objective standards of guilt or innocence, fault becomes entirely subjective, defined in terms of what officials claim to be the impact of adult actions on children they do not know and about whom, as Judge Page confesses, they are unlikely to care.

The ‘best interest’ also transforms courts from dispensers of justice into dispensers of patronage, through the appointment of numerous forensic ‘experts.’ Again, this is a well-established principle of legal politics. “The judge occupies a vital position not only because of his role in the judicial process but also because of his control over lucrative patronage positions.” Jacob demonstrates (1984, 112) that these “are generally passed out to the judge’s political cronies or to persons who can help his private practice.”

In pursuit of the undefined ‘best interest’, the judge may dispense entirely with questions of justice (which in other instances is what courts are for) in favor of questionable child development theories. In practice this means that principles of justice and the constitutional rights of parents are excised from the proceeding in favor of social science theory, perhaps colored by political ideology. “Family lawyers…maintain that justice has no place in their courts” writes Melanie Phillips (1999). “Family court judges thus preside with equanimity over injustice, having turned themselves into a division of the therapy and social work industries.”

Braver calls such expert advice “little more than guesswork.” “There is absolutely no credible evidence that these [methods] are valid predictors of which spouse will make the best primary parent,” he writes. “In fact, there is no evidence that there *is* a scientifically valid way for a custody evaluator to choose the best primary parent.” Braver diplomatically attributes the resulting one-sidedness of evaluators’ recommendations to “gender bias,” but pecuniary interest may be a more plausible explanation. He quotes a professional custody evaluator that “almost all” his business would be lost under a simple presumption of shared parenting (1997, 221-222).

To reconcile egalitarian principles with a preponderance of sole mother custody, yet another standard, the 'primary caregiver,' has become popular in family court.

Like other legal innovations implemented in the absence of public debate, this raises serious questions. Important, but not necessarily the most serious, is again gender bias. "The 'primary caretaker' theory is first, foremost, and always a change-of-name device designed to maximize the number of cases in which the court will be compelled to preserve the bias of maternal preference and award sole custody to mothers," writes Ronald Henry (1994, 53). "Every definition that has been put forward for this term has systematically counted and recounted the types of tasks mothers most often perform while systematically excluding the ways that fathers most often nurture. No effort is made to hide this bias." Henry continues:

> *The typical definition of the primary caretaker gives credit for shopping but not for earning the money that permits the shopping; for laundering the little league uniform but not for developing the interest in baseball; for vacuuming the floors but not for cutting the grass.*

Yet even could fairer criteria be determined, a more serious implication to the "primary caretaker" doctrine is the assumption that it is legitimate for government officials to look into private homes and approve or disapprove not recognized illegalities but how citizens conduct their personal lives. If officials disapprove of how parents arrange their domestic routine, this doctrine rationalizes removing their children. So parents must provide evidence and witnesses documenting their domestic practices to the satisfaction of government officials, who will apportion the children accordingly. Even assuming it were possible to create a fair standard between mothers and fathers, it is obviously not possible for officials to determine who is the 'primary caregiver' of children without a highly intrusive inquisition into what people do in the privacy of their homes. The fact that family courts already conduct such inquiries does not, in itself, justify a legal theory rationalizing such practice.

This is a prescription for government that is highly invasive of private life, presuming unfitness on the part of parents, requiring them to justify how they raise their children in order to keep them, and employing the criminal justice system to implement political ideology within private homes.

CONSIDERATIONS FOR REFORM

Immediately upon a divorce filing, standard practice throughout the Western world is to immediately and summarily separate the children from one parent, usually the father. The segregated parent may then see the children only when authorized, and unauthorized association subjects that parent to arrest. The government and the divorcing parent assume no burden to prove that the eliminated parent has committed any legal transgression and are not required to present any evidence. On the contrary, the burden and cost of recovering his children then rests on the sequestered parent.

For reasons given by Shell above, this power needs examination. The power to summarily separate a child from a parent who has committed no legal offense and under no suspicion of unfitness, however 'temporary,' is directly contrary to centuries of practice by free societies. Placing summary criminal penalties on legally unimpeachable citizens solely for unauthorized association with their own children is unprecedented and has never been debated or justified in the Western democracies. As Shell indicates, no free society can require parents to prove why they should be permitted to keep their children. A divorce petition is merely a piece of paper and does not change these facts. If the criminalization of parents' association with their children is the price that must be paid for unrestricted divorce, then a debate is long overdue on what precisely we mean by divorce. Who must bear the burden of proof for deciding when a child can be forcibly separated from a parent for any period of time at all is a subject that has never been debated by scholars, policymakers, or the public, but it clearly requires attention.

Similar questions may be applied to permanent custody arrangements. The circumstances under which officials may sever relationships between parents and their children without a reason involving the proven guilt or unfitness of the parents is a subject that has received no attention from scholars, policymakers, or the media. Yet it is essential to the current crisis of the family.

Spousal separation need not automatically be treated as an unconditional and unquestioned given, to which the abandoned parent, the children, and the rest of society must adjust. Separation from the marital home is a deliberate act that abrogates a legal agreement. People who marry and beget children assume obligations and acquire both rights

and responsibilities. The action of one spouse in reneging on his or her contractual obligations eliminates neither the need of children for their other parent nor the rights of that parent. A separating parent with evidence that the other parent has committed some actionable offense can present that evidence in court. In the absence of such evidence, a spouse always has the option of departing from the marriage and home alone.

Recognizing these alternatives is consistent with both long-established precedents for parental rights and the larger principle that legal innocence is sufficient grounds for being left alone by the state—and, in this case, left alone *with one's children*. As a rule governing when children may be taken from their parents, the vague, subjective, and innovative 'best interest of the child' criterion has never been debated or justified against the older and more precise standard, based on decades of constitutional case law, that a child may not be forcibly separated from a parent or have their relationship with their parent interfered with without legally recognized grounds of civil or criminal wrongdoing or, at a minimum, without agreement by that parent to a divorce or separation.

Granting that divorce is a right, it does not follow that that right entails immunity from all its consequences or the power to shift the liabilities and costs onto innocent parties. Neither must the right to divorce necessarily extend to abrogating the right of legally innocent citizens to be left in peace in their own homes with their own children. Still less does it confer the automatic right to marshal the courts, police, and prisons as instruments to punish otherwise innocent parents simply for failure to cooperate with all the proceedings. By contrast, no infringement of liberty is entailed in requiring parents who choose, without recognized grounds, to desert marriages they freely entered or who commit recognized marital faults such as adultery to accept the costs of that decision, including the presumption that they have put their own wishes before the needs of their children and are therefore less immune from the consequences of their actions than a parent who remains faithful to the family. On the contrary, the current practice of allowing that burden to be imposed on legally innocent parties has produced innovative intrusions into private life.

Recognizing this reality means that 'custody' need not necessarily be actively given to anyone but simply passively left to remain with the innocent parent of either gender. "If…the interests of the children are paramount," asks Melanie Phillips (1995, 15), "why shouldn't the

behaviour of the parents be one of the factors…when custody is awarded?" This is consistent with most people's understanding of basic justice, though it could be formulated in even more minimal terms. "There's really not much we can do about people—male or female—who will selfishly turn their spouse and children's lives upside down by ripping apart a family without even offering a coherent reason," observes Tim O'Brien (2001), who argues that we could reduce the consequences, "by simply amending our no-fault divorce law to give the (rebuttable) presumption of custody of any minor children to the defendant [who is legally innocent], regardless of gender." O'Brien elaborates on what must seem unexceptionable to the uninitiated.

> *It is, after all, reasonable to presume that 'the best interests of the child' will be better served by remaining with the parent who does not abandon commitments for frivolous reasons and wants to maintain the family. The spouse/parent who still wishes to leave may, of course, do so—with his or her clothes and any other personal belongings. The more dedicated, responsible party should keep the children, home, property, and claim on future child support.*

"The immediate effect of such a change would undoubtedly be a plummeting divorce rate," O'Brien adds. "The difficulties of collecting [child support] in the few remaining cases would be significantly reduced since the only parents who would incur such obligations are those who have voluntarily taken them on in exchange for being released from the marriage contract."

As O'Brien indicates, such reform would obviate the need for most coerced child support. The precise purpose of child support has likewise never been made clear or publicly debated. Most people assume coerced child support is assessed on parents who have abandoned their children or at least agreed voluntarily to live apart from them. No evidence indicates that it was ever intended to subsidize the forced removal of children from innocent parents or to force an innocent parent to "finance the filching of his own children" (Abraham 1999, 151). The precise purpose of 'child support' likewise stands in need of public debate and determination, with enforcement programs that are designed and structured to serve the intended purpose rather than others.

Divorce operatives resist reforms with the refrain that they *may* trap women in *abusive* marriages. If the abuse means physical violence, this is clearly not true, since physical

violence has long been recognized as legitimate grounds for divorce.

It is true that one likely consequence of any effective reform will be to increase the already exploding number of fabricated spousal and child abuse accusations made during divorce proceedings. One possible remedy, consistent with what has long been regarded as sound legal ethics, is to demand from the criminal justice system a clear distinction between acts that are criminal and matters that are private. A leading authority on child abuse recommends that it be categorically adjudicated as criminal assault—not only to protect children more effectively, but also to ensure that accused parents receive due process protections and those not formally charged can be left in peace with their children until evidence of criminality is presented against them (Orr, 1999). Similarly, adjudicating domestic violence as violent assault like any other, including criminal standards of evidence, would at once protect the victimized, the accused, and the integrity of the justice system. "The criminal prosecution of those family members who are alleged to direct violence toward any other member of the family would be more effective in holding accountable both the perpetrators of violence and those who falsely allege abuse than at present, particularly in those cases where allegations of abuse are dealt with exclusively within the family court arena," writes Edward Kruk. "The use of family courts as 'quasi-criminal courts' that do not have the resources to apply due process when abuse allegations are made," endangers both civil liberties and families (2005, 136).

Theoretically, new legislation should not be necessary to protect the rights of parents and children. Western democracies invariably provide protections for civil rights and civil liberties—including case law recognizing parental rights—the enforcement of which should be sufficient to protect the rights of citizens to their children, property, and freedom.

The trends described here, however, demonstrate that the bond between parents and their children are not effectively guaranteed. One direct and immediate means of achieving this is by a rebuttable presumption of shared parenting. This would mean statutory provision that parents divide time with, and authority over, their children in roughly equal proportions in the absence of a marriage, as they would do in its presence (Baskerville, 2007, conclusion). Even this, however, may be only partially effective.

Some jurisdictions have been debating statutes or constitutional measures to guarantee parental rights. This could be expanded into an international debate.

If today's democratic constitutions need changes to protect family integrity from pressures that could not have been foreseen only a few generations ago, the most direct and comprehensive approach would be provisions guaranteeing the privacy and inviolability of the family and household and codifying traditional rights of parents to the care, custody, and companionship of their children and to direct their upbringing free from arbitrary state interference. From homeschoolers, to victims of false child abuse accusations, to divorced fathers and mothers, it is parents who are being besieged by an increasingly repressive state apparatus and denied basic due process protections. Such a provision would also reinforce the marital bond in the most critical cases—those involving children—without the allegedly intolerant or exclusionary implications of other proposed measures to strengthen marriage.

Several years ago, the United States Congress began debating a constitutional amendment known as the Parental Rights Amendment. It that declares, "The liberty of parents to direct the upbringing and education of their children is a fundamental right" (House Joint Resolution 3, 2011). The introduction of this Amendment illustrates that questions about the power of the government to come between parents and their children is now of the highest concern. It should serve as the starting point for a long overdue international discussion.

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