

# WHAT GOD HAS JOINED TOGETHER...

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***"The advent of "no-fault" divorce in the US has given rise to a system that strips fathers of their rights, accelerates the breakdown of families, and makes a mockery of the marital contract".***

The worldwide crisis of the family is now inspiring urgent attempts to strengthen marriage and promote responsible fatherhood. With a divorce rate upwards of 50 percent, and with some 40 percent of children now living in homes without their fathers—and with a growing realization of the destructive social and personal pathologies this trend engenders—groups like Marriage Savers and the National Fatherhood Initiative have arisen in the United States to restore these institutions through public awareness and education.

While such efforts are laudable, their effectiveness is likely to be limited until we come to grips with the realities underlying the family crisis. If we face some bitter truths about why families are breaking up, the study will take us beyond the safe confines of vague moral exhortation into realms of law and politics that many of us would rather avoid.

To begin, we must realize the image many people have —of marriages simply and mutually “breaking down”—is not accurate. As permitted under “no-fault” divorce laws, some 80 percent of American divorces are unilateral, according to Frank Furstenberg and Andrew Cherlin, authors of *Divided Families*. In other words, most divorces take place over the objection of one spouse, who is generally committed to keeping the family together.

Contrary to another persistent myth, when minor children are involved, the divorcing parent is overwhelmingly likely to be the mother. In *Divorced Dads: Shattering the Myths*, Arizona State University psychologist Sanford Braver has shown that at least two-thirds of American divorces are initiated by women. Moreover, few of these divorces involve grounds such as desertion, adultery, or violence. The reasons most often given are “growing apart” or “not feeling loved or appreciated.”

Other studies have reached similar conclusions. The proportion of divorces initiated by women climbed to more than 70 percent when no-fault divorce was introduced, according to Margaret Brinig of the University of Iowa and Douglas Allen of Simon Fraser University. Mothers “are more likely to instigate separation, despite a deep attachment to their children and the evidence that many divorces harm children.” And the “bottom line” is indeed the children. After analyzing 21 different variables, Brinig and Allen concluded that “who gets the children is by far the most important component in deciding who files for divorce.” Author Robert Seidenberg goes further, reporting that “all the domestic relations lawyers I spoke with concurred that in disputes involving child custody, women initiate divorce almost all the time.” [original emphasis]

## **Nightmare scenario**

It is difficult to overestimate the importance of this finding. A very different picture of the situation is clearly assumed by political leaders who call for repeated crackdowns on supposedly dissolute fathers. "I believe children should not have to suffer twice for the decisions of their parents to divorce," Senator Mike DeWine said on the Senate floor in June 1998; "once when they decide to divorce, and again when one of the parents evades the financial responsibility to care for them." But most fathers (and some mothers) have made no such decisions. They are expelled by a divorce to which they have not consented.

Family law today allows mothers to walk away from marriages whenever they feel like it and take the children with them. Not only is this behavior permitted; it is encouraged and rewarded with financial incentives. Even more disturbing, in some cases it appears that mothers are actually being pressured into filing for a divorce they do not necessarily want by social-service agencies.

The problem runs much deeper than the bias against fathers in court custody decisions. Such bias certainly exists, but it goes well beyond the supposition that "all else being equal," children should stay with their mothers. "Washing their hands of judgments about conduct... the courts assume that all children should normally live with their mothers, regardless of how the women have behaved," observes Sunday Times columnist Melanie Phillips. "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... she is acting against their best interests?"

Mothers who take and keep children from their fathers are routinely given immediate "temporary" custody. In fact this custody is seldom temporary. Once a mother has custody, the situation cannot be changed without a lengthy (and costly— or, for the lawyers, lucrative) court battle. The sooner and the longer the mother can establish herself as the children's sole caretaker, the more difficult and costly it is to dislodge her. Further, the more she cuts the children off from the father, poisons them against him, levels false charges, delays the proceedings, and obstructs his efforts to see his children, the more likely she is to retain sole custody.

As for the father, any restraint he shows is likely to cost him dearly, as most fathers discover too late. On the other hand, reciprocal belligerence and aggressive litigation on his part may carry enough hope of reward to keep him interested. It is significant and revealing that the latest tactical wisdom suggests to nervous fathers that the game is so rigged that their best chance may be not to wait for their day in court but to snatch the children right away, before the litigation begins. Then the fathers—who are now the ones with custody—are advised to conceal, obstruct, delay, and so forth. "If you do not take action," writes Robert Seidenberg in *The Father's Emergency Guide to Divorce-Custody Battle*, "your wife will." Thus we seem to have a nightmare scenario, reminiscent of the strategies for nuclear warfare, complete with the threat of a pre-emptive strike. There is a race to pull the trigger; whoever strikes first, survives.

## **The Dickens principle**

Far from merely exploiting family breakdown after the fact, then, American domestic-relations law has turned family problems into games of “prisoners’ dilemma,” in which only the most trusting marriage can survive, and the emergence of marital discord renders the decision not to abscond with the children as perilous and even irrational. Willingly or not, all parents are now prisoners in this game.

How did all this come about? The advent of “no-fault” divorce, often blamed for leaving wives vulnerable to abandonment, has left fathers with no protection against the confiscation of their children. “No-fault” is a misnomer, for the new laws did not stop at removing grounds for divorce, so as to allow divorce by mutual consent (as their sponsors promised that they would); they also created what Maggie Gallagher, in *The Abolition of Marriage*, calls “unilateral” divorce, allowing either spouse to end the marriage at any time without any agreement or fault by the other.

What is striking about these new divorce laws is that they were passed “while no one was looking,” largely at the prompting of lawyers and judges. There had been no popular clamor to dispense with restrictions on divorce prior to their passage; no public debate was ever held in the national media. “The divorce laws . . . were reformed by unrepresentative groups with very particular agendas of their own and which were not in step with public opinion,” writes Phillips in *The Sex-Change Society*. “All the evidence suggests that public attitudes were gradually dragged along behind laws that were generally understood at the time to mean something very different from what they subsequently came to represent.” Attorney Ed Truncellito agrees. In August 2000 he filed suit with the Texas Supreme Court against the state bar. Truncellito contends the legislative history of no-fault divorce law in Texas makes it clear that the law was meant to be applied only in uncontested cases. He insists that “the state bar knew all along that the no-fault law was being misapplied, but they covered it up for financial gain.” Truncellito claims that for practical purposes, under Texas law today, “no one is married,” because the laws created “unilateral divorce on demand.” Although feminist groups were involved in the drive for no-fault divorce, they were not usually the most important proponents; the changes were passed largely by and for the legal industry.

Dickens’ observation “the one great principle of the... law is to make business for itself” could hardly be more starkly validated. Nothing in the law requires a judge to grant the divorcing parent’s initial request to strip the other parent of his children. A judge could simply rule that, *prima facie*, neither the father nor the children had committed any infraction that would justify their being forcibly separated, and that neither the mother nor the court had any grounds on which to separate them. Yet such rulings are virtually unheard of. One need not be overly cynical to notice that judges who made such judgments would be rendering themselves largely redundant—and denying earnings to a massive entourage of lawyers, custody evaluators, psychologists and psychiatrists, guardians *ad litem*, mediators, counselors, child-support enforcement agents, social workers, and other hangers-on of the court, all of whom profit from the custody battle and have a strong say in the appointment and promotion of judges.

## **The power of family courts**

For all the concern that has been voiced in recent years about both family destruction and judicial power, it is surprising that so little attention has been focused on family courts. Without doubt they are the arm of the state that routinely reaches furthest into the private lives of individuals and families. Though lowest in the ranking of the judicial hierarchy, the family courts have the greatest discretionary power. "The family court is the most powerful branch of the judiciary," according to Robert W. Page, Presiding Judge of the Family Part of the Superior Court of New Jersey. By their own assessment, according to Judge Page, "the power of family court judges is almost unlimited." Others have commented on their vast power rather less respectfully. Former US Supreme Court Justice Abe Fortas once used the term "kangaroo court" in reference to the family courts. Contrary to basic principles of open government, these courts generally operate behind closed doors, excluding even family members, and most leave no record of their proceedings.

These courts emerged in the 1960s and 1970s alongside the revolution in divorce laws. Their existence, and virtually every problem they address—divorce, custody, child abuse, child-support enforcement, even juvenile crime—revolve around one overriding principle: removing the father from the family. If fathers remained with their families, family courts would have little reason to exist, since the problems that they handle seldom appear in intact families. While mothers also fall afoul of family court judges, it is fathers against whom their enmity is largely directed, because fathers are their principal rivals.

The judges' contempt for both fathers and constitutional rights was openly expressed by New Jersey municipal court judge Richard Russell. Speaking to his colleagues during a training seminar in 1994, he said:

Your job is not to become concerned about the constitutional rights of the man that you're violating. Throw him out on the street, give him the clothes on his back and tell him, "See ya around." . . . We don't have to worry about their rights.

Family court judges are generally appointed and promoted by commissions that are dominated by bar associations and other professional groups which have an interest in maximizing the volume of litigation. The politics of court appointments operate according to principles of patronage that Richard A. Watson and Rondal G. Downing, authors of *The Politics of the Bench and the Bar*, have described as "cronyistic." Political scientist Herbert Jacob describes how "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 cites probate courts, where positions as estate appraisers "are generally passed out to the judge's political cronies or to persons who can help his private practice." The principles are similar in family courts (with which probate courts are sometimes united), only there what is passed out is control over children.

Like all courts, family courts complain of being overburdened. Yet it is clearly in their interest to be overburdened, since judicial powers and salaries are determined by the level of demand for their services. "Judges and staff... should be given every consideration for salary and the other 'perks' or other emoluments of their high office," suggests Judge Page,

adding that divorce court judges aim, and should aim, to increase their volume of business. "As the court does a better job, more persons will be attracted to it," he observes. "The better the family court system functions the higher... the volume of the persons served." A court "does a better job" by attracting more divorcing mothers with more windfall settlements.

### **Fathers with no rights**

Once the father "loses custody," in the jargon of the court, he becomes in many ways a virtual outlaw and subject to plunder by a variety of officials. His contact with his own children becomes criminalized, in that he can be arrested if he tries to see them outside of court-approved times and places. Unlike anyone else, he can be (and fathers have been) arrested for running into his children in a public place such as the zoo, a sporting event, or a parish church. He can also be arrested for telephoning his children when he has not been authorized to do so, or for sending them birthday cards.

Fathers are routinely summoned to court and subjected to questioning about their private lives and how they raise their children. Whether or not they have been accused of any wrongdoing, they are subject to questioning that attorney Jed Abraham has characterized as "interrogation." Their personal papers, bank accounts, and homes must be opened and surrendered on request to government officials, who are not required to produce warrants. Their children are taught to suspect them, with the backing of government officials, and given directions to inform on them.

Anything a father has said to his spouse or children can be used against him in court. His personal habits, movements, conversations, purchases, and even his relationship with his own children are all subject to inquiry and control by the court. A Virginia father had his visitation time reduced when a judge decided that soccer was a more important Sunday-morning activity than attending church services. Another father in Tennessee may face a jail term for giving his son an unauthorized haircut. Jed Abraham describes how fathers against whom no evidence of wrongdoing is presented are ordered to submit to "plethysmographs," in which an electronic sheath is placed over the penis while the father is forced to watch pornographic films involving children.

Despite the constitutional prohibition on incarceration for debt, a father can be jailed without trial for failure to pay not only child support but also the fees of lawyers and psychotherapists he has not hired. A father forcibly separated from his son for three years now faces jail in Virginia if he cannot pay the equivalent of two years' salary to a lawyer he never hired, for a divorce he never requested. The judge has summoned a legally unimpeachable citizen and ordered him to write a check or go to jail. And the weapon he is using is a child.

Litigants have long claimed that family courts tamper with transcripts and other evidence, but were unable to document their claims until Zed McLarnon, a forensic audio-visual expert, showed photographic evidence that hearing records in his case were being doctored. For his complaint, later aired in the Massachusetts News, McLarnon was assessed \$20,000 in fees for attorneys he had not hired, and jailed without trial by the

same judges who were responsible for the doctored tapes. The court is currently moving to seize his house and car. His attorney claims the court also “removed documents from his case file, falsified the case docket, refused to enter motions and hearings in the public record, and withheld the public case file for nine months.”

### **The child-support conundrum**

The criminalization of fathers is further consolidated through child-support burdens, which constitute the principal financial fuel of the divorce machinery, underwriting divorce and giving both mothers and the state further incentive to remove children from their fathers.

We often hear the imprecations of politicians and enforcement officials against fathers who fail to pay child support. What we do not hear is that child-support obligations are determined not by the needs of children but by the politics of interest groups involved in collection. Guidelines are generally set by the same agencies and courts that enforce and adjudicate them. Such de facto legislation by courts and enforcement agents raises serious questions about the separation of powers and the constitutionality of the process. Where government officials develop an interest in hunting “delinquents,” it is predictable that they will find delinquents to hunt. The more onerous the child-support levels, and the more defaults and arrearages that accumulate, the more demand there will be for coercive enforcement and for the personnel and powers required.

A presumption of guilt pervades courts and prosecutions, where “the burden of proof may be shifted to the defendant,” according to a legal analysis by the National Council of State Legislatures. In clear violation of the US Constitution, courts have held that “not all child-support contempt proceedings classified as criminal are entitled to a jury trial,” and “even indigent obligors are not necessarily entitled to a lawyer.” Thus impoverished parents who lose their children through literally “no fault” of their own are the only citizens who—when they are fortunate enough to be formally charged and tried at all before being incarcerated—must prove their innocence without the help of an attorney and without the opportunity to present their case before a jury of their peers.

Federal policies (which provide incentive payments attached to each dollar of child support collected by state governments) give another reason for the states to channel all child-support questions through the machinery of the criminal justice system, so that they will show up on the relevant federal ledgers. This policy aggravates the criminalization of fathers, and encourages agencies to squeeze every possible dollar out of every available parent. The result is systematic bullying by courts and enforcement agents: a pattern of activity that is now too common to ignore.

In Milwaukee a father is hauled into court and threatened with jail when a 40-cent arrearage is compounded by penalties and late fees until it reaches to hundreds of dollars. Another father is arrested for not paying child support while he was a hostage for five months in Iraq. In Texas a father is exonerated of a serious crime after ten years on death row, to be presented with a bill for child support not paid during his imprisonment. A decorated hero of the Oklahoma City bombing is driven to suicide by hounding from child

support agencies. In Nebraska and elsewhere men must pay support for the children who are produced by their former wives' adulterous affairs. In Los Angeles, 350 child-support orders are established each month based on mistaken paternity claims, but the district attorney insists that men must pay—even if the children are not their own. (Also in Los Angeles, two assistant district attorneys resign because of ethical scruples connected with child-support enforcement policies.) In Virginia child support is sought for 45-year-old "children," while in Kansas and California teenage boys are ordered to pay child support to grown women convicted of criminally raping them. In Indiana a father must pay to be shackled with an electric ankle bracelet and turn over three-fourths of his salary, ostensibly for a 21-year-old "child," while his 12-year-old goes without medical treatment. The list of such abuses is virtually endless. Are these merely anecdotes or occasional excesses of the system? That is possible, but if the abandonment of children by their fathers is really such a widespread problem, why are government agencies concentrating scarce resources on these absurd cases, rather than devoting themselves assiduously to the most flagrant abuses?

### **Driven to despair**

In March 2000 a Canadian man named Darrin White was denied all contact with his three children, evicted from his home, and ordered to pay more than twice his annual income as child and spousal support, plus court costs for a divorce to which he had never agreed. Shortly after that judgment, White hanged himself from a tree. No evidence of any wrongdoing had ever been presented against him.

The fate of Darrin White is increasingly common. "There is nothing unusual about this judgment," former British Columbia Supreme Court Judge Lloyd McKenzie told the Vancouver Sun when he was questioned about White's case. McKenzie pointed out that the judge in White's case applied standard guidelines for spousal and child support—the same sort of guidelines that are regularly used in the US and other western countries.

In fact there are those who would argue that the phenomenon of fathers who are driven to suicide by family courts now threatens to become an epidemic. In Britain the National Association for Child Support Action has published a "Book of the Dead," chronicling 55 cases in which they report that the official Court Coroner concluded fathers were driven to suicide because of judgments from divorce courts and/or harassment by child-support agencies. The suicide rate among divorced fathers has increased dramatically, according to Augustine Kposowa of the University of California, who reported his findings in the *Journal of Epidemiology and Community Health*. Kposowa attributes his finding directly to family court judgments. Yet reports on his study by several major media outlets studiously avoided that conclusion of his study, instead accentuating therapeutic explanations that emphasized the fathers' lack of "support networks." One reporter bluntly told Kposowa that his findings were not "politically correct."

Family law is now denying rights as basic as freedom of speech, freedom of the press, and even the right to hold private conversations. An Arizona father has been ordered not to criticize judges in his conversations with members of his own family. British and Australian family courts have closed Internet sites and prosecuted fathers for criticizing

judges. In many American jurisdictions it is a crime to criticize family court judges. On Fathers' Day 1998, a California father who had been planning to protest the fact that he had not seen his son in more than two years was taken into custody for a "psychiatric evaluation." The former husband of singer Wynonna Judd was recently arrested for talking to reporters about his divorce. Following his Congressional testimony critical of the family courts, Jim Wagner of the Georgia Council for Children's Rights was stripped of custody of his two children and jailed. "We believe . . . the court is attempting to punish Wagner for exposing the court's misconduct to a congressional committee," said Sonny Burmeister, president of the Georgia Council.

As the logic of involuntary divorce plays itself out, we now find instances in which divorce is forced on not only one parent but both. Mothers are not only being enticed into filing for divorce by financial and emotional incentives; they are being pressured toward divorce by threats against their children. These pressures arise when government agencies, for reasons of their own, determine that a married couple is not providing a suitable environment for their children; the agencies then tell the mother that she will lose her children unless she ends the marriage. On February 20, 2001, the Massachusetts News reported that Heidi Howard was ordered by the state's Department of Social Services to divorce her husband Neil or lose her children, although the Department acknowledged he had not been violent. When she refused to accept their advice, the social workers seized her children, including a newborn, and attempted to terminate the Howards' parental rights. Massachusetts News reporter Nev Moore says she has seen hundreds of similar cases. In short, the state can now tear apart families by imposing divorce on married parents.

### **What can be done?**

The divorce industry has rendered marriage, in effect, a fraudulent contract. Until marriage is made an enforceable contract, there is little point in exhorting young people to put their trust in the legal institution. Young men in particular who are lured into marriage and family today can lose their children, their homes, their freedom, and even their lives. It is not surprising that ever fewer men are ready to make the marital commitment.

More than anyone else, the ones who must stand up and demand that marriage be made an enforceable contract are fathers. This does not necessarily require "turning back the clock" to fault-based divorce—a move that many observers now believe is not politically feasible. What it does require is the recognition that marriage confers legal rights on parents and their children, including the right not to be separated without compelling legal grounds. Except in extreme circumstances, that right should prevail over what government officials deem to be in the children's "best interest."

The others who must speak out in defense of marriage are the clergy. The destruction of marriage and families by the state directly concerns the churches, not simply because all matters of morality and justice concern the churches, but also because this particular controversy touches upon the integrity of their pastoral ministry. As long as marital and parental bonds can simply be legally dissolved by the state at the request of one spouse—with no grounds, wrongdoing, legal action, or agreement by the other—our pastors must consider how far they may be, however inadvertently, deceiving their flock and



dishonoring their calling by encouraging young people to enter into a legal contract that has been stripped of its practical meaning.

The words “divorce” and “custody” now sound deceptively innocuous. We should remind ourselves that they involve bringing the law-enforcement and penal system into the home, for use against family members who have not necessarily done anything legally wrong. Fathers are not without sin, of course, and marital difficulties are seldom the fault of one party alone. But our justice system is supposed to be based on a distinction between legal wrongdoing (criminal or civil) and human imperfection or sin. Ironically, that distinction has been obliterated—not by churches or ecclesiastical courts, but by secular ones.

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*He has appeared on national radio and television programs, including The O'Reilly Factor, Hardball with Chris Matthews, Court TV with Fred Graham and Katherine Crier, Think Tank with Ben Wattenberg, Endangered Liberties with Paul Weyrich, Legal Notebook with Tom Jipping, the Armstrong Williams Show, Take Action America, and others. He is a regular radio commentator for the Free Congress Foundation.*

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