A key argument being advanced to support the rewriting of U.S. marriage laws is that granting legal status, on par with marriage, to same-sex couples will have no effect on marriage as an institution, nor upon Americans who choose, or have already chosen, the natural pattern of uniting as husband and wife. Yet, a look at the record of what has transpired in the wake of a key change in the law during the 1970s—the advent of no-fault divorce—suggests that supporters of so-called same-sex marriage seem unaware of the sea change that was achieved, with little opposition, that radically altered the nature and practice of marriage in the United States.

Since Governor Ronald Reagan of California signed the nation’s first no-fault divorce law in 1970, no-fault divorce has forced a departure from American law and economics that had, based on English law precedent and nineteenth-century contract theory, encouraged spouses to take advantage of free-market efficiencies of a lifelong marital household division of labor. Nowadays, brides and grooms are denied the opportunity of making their marital vow a full and complete pledge, as neither bride nor groom can abjure the alternative of arbitrarily fleeing the marriage. That built-in menace is omnipresent and legally unavoidable. Reasonably enough, “divorce insurance” has emerged: Wives pursue careers for fear of spousal abandonment. Denied reinforcement by full-time homemaking wives, breadwinning husbands are rendered the weaker employment-market competitors against career women. Consequently, couples who
desire the type of life-partnership marriage that was common before
1970 have been disempowered, as the law actually discourages husband
and wife from teaming to build one.

A precept underlying both the defense of no-fault divorce—and the
more recent push for same-sex marriage laws—is the feminist notion that
our knowledge of our world, and our world itself, are socially constructed.
Social constructionism is the major contender for an all encompassing
concept to sustain the feminist weltanschauung. It bears an uncanny
resemblance to anarchist political theory, which holds, according to
Sigmund Freud, that “there is no such thing as truth, no assured knowl-
edge of the external world. What we give out as being scientific truth is
only the product of our own needs as they are bound to find utterance
under changing external conditions: once again, they are illusion.” Social
constructionism also shares with anarchist theory what Freud cites as its
Achilles’ heel: “Anarchist theory sounds wonderfully superior so long as
it relates to the opinions about abstract things: it breaks down with its
first step into practical life.” Consequently, “if there were no such thing as
knowledge distinguished among our opinions by corresponding to real-
ity, we might build bridges just as well out of cardboard as out of stone.”

Putting no-fault divorce in historical and legal perspective will illus-
trate how that 1970s innovation reflects the abstractions of social con-
structionism more than the concrete realities of law and economics. The
law, and particularly U.S. marriage law prior to 1970, is a phenomenon
far beyond the apparent arbitrariness of a matter “constructed” by some
free legislator. Law emerges from the clash of claims relative to certain
behaviors. At the same time, the market emerges from the joinder of
choices regarding certain goods. Inasmuch as any claim presupposes a
choice, market action assumes a logical precedence over the juridical
order. Claim and choice—that is, law and economics—are compatible
and complementary. Strong is the connection between positive law—

1. Daphne Patai and Noretta Koertge, Professing Feminism: Cautionary Tales From the Strange
3. See Bruno Leoni, Law, Liberty and the Competitive Market, ed. Carlo Leoni, trans. Anne Diarmid
law actually and specifically enacted by proper authority—and the state.\(^4\) In contrast, the natural law is, in principle, one of noncoercive order, and one that corresponds to reality.\(^5\)

**Precedents to U.S. Marriage Law**

The natural law as the foundation of the English law was defined explicitly by Sir William Blackstone (1723–1780), the University of Oxford’s great jurist. The four volumes of his *Commentaries on the Laws of England* were published between 1765 and 1769. More than any other single book, Blackstone’s *Commentaries* marked the codification of Anglo-American law. His *Commentaries* acknowledge marriage as a civil contract. Common lawyers, however, had borrowed nearly every one of their notions respecting marital legitimacy from civil (and even canon) law. Consequently, consent, not cohabitation, makes the marriage. The general rule was that every person was capable of contracting a marriage.\(^6\)

According to U.S. Court of Appeals Judge Richard A. Posner, England was the only Protestant nation to determine that marriage needed no divorce escape-hatch.\(^7\) True enough, marriage was dissoluble by either death or divorce. However, two types of divorce existed: total and partial. Total divorce signified a marriage as null, having been absolutely unlawful *ab initio*. Total divorce proceeded only from canonical impediments to marriage. Canonical restrictions were those, like consanguinity, sufficient under ecclesiastical laws to forbid a marriage. Canonical disabilities were grounded upon the express language of divine law or obviously deducible therefrom. Partial divorce, on the other hand, arose from circumstances making living together unbearable, e.g., adultery, and the sole cause of separation from “bed and board.” The most meritorious rationale for this rule was that divorces could otherwise become extremely frequent were

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\(^5\) Ibid.


they derivative from matters within the command of either spouse.\textsuperscript{8}

English marriage law is best understood through the eyes of the Irish statesman Edmund Burke (1729–1797). Burke studied the law in London from 1750 until 1755. The major project of the final two or three years of his life was his \textit{Letters on a Regicide Peace}, published in 1796, in which he discerned a kind of regicide at work in any country refusing to accept any undemocratic principle of governance. Burke was particularly incensed by French revolutionary assemblies licensing divorce at the pleasure merely of either spouse, at a month’s notice:

When manners were corrupted, the laws were relaxed; as the latter always follow the former, when they are not able to regulate them, or to vanquish them. Of this circumstance the legislators of vice and crime were pleased to take notice, as an inducement to adopt their regulation; holding out a hope, that the permission would as rarely be made use of. They knew the contrary to be true; and they had taken good care, that the laws should be well seconded by the manners. Their law of divorce, like all their laws, had not for its object the relief of domestic uneasiness, but the total corruption of all morals, the total disconnexion of social life.\textsuperscript{9}

Burke supposed that the object of the new French divorce law was “the total disconnexion of social life.” What did Burke find to be its real-world fruits?

It is a matter of curiosity to observe the operation of this encouragement to disorder. I have before me the Paris paper, correspondent to the usual register of births, marriages, and deaths. Divorce, happily, is no regular head of registry amongst civilized nations. With the Jacobins it is remarkable, that divorce is not only a regular head, but it has the post of honour. It occupies the first place in the list. In the three first months of the year 1793, the number of divorces in that city amounted to 562. The marriages were 1785; so that the proportion of divorces to marriages was not much less than one to three; a thing unexampled, I

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believe, among mankind. I caused an inquiry to be made at Doctors’ Commons, concerning the number of divorces; and found, that all the divorces (which, except by special act of parliament, are separations, and not proper divorces) did not amount in all those courts, and in a hundred years, to much more than one-fifth of those that passed, in the single city of Paris, in three months. I followed up the inquiry relative to that city through several of the subsequent months until I was tired, and found the proportions still the same. Since then I have heard that they have declared for a revisal of these laws; but I know of nothing done. It appears as if the contract that renovates the world was under no law at all. From this we may take our estimate of the havoc that has been made through all the relations of life.  

So alien smelled no-fault divorce, and so inseverably ran the two concepts of lifelong and marriage in England, that Samuel Johnson defined the estate with “the act of uniting a man and a woman for life; state of perpetual union.”  

While divorce was obtainable more readily in colonial courts than in England, the number of divorces in New England pre-1700 is estimated at fewer than 200. Not until 1949 did South Carolina authorize divorce. Divorce was so rare in colonial America that it “was mainly ‘legislative’; that is, each divorce was a separate law passed by the colonial assembly.”

**Contract Theory Elevates Women in the 1800s**

Also shaping American marriage law was nineteenth-century free market contract thought. That divorce would remain extremely rare in the new nation comports well with the classical liberalism of the founders, who incorporated limited-government attitudes of the Enlightenment. That philosophy assigns to government the defense of property, liberty,

10. Ibid., pp. 522–53.
and peace, popularly known as the “night watchman state,” a role that recognizes and defends—but does not interfere with—marriage as a social institution. Remember the logical precedence of market action over the juridical order. That philosophy cannot fully be comprehended sans a command of economics. For that philosophy constitutes a social analysis derivative from a scientific foundation, not a social construct.\textsuperscript{14}

The Austrian economist Ludwig von Mises (1881–1973) perceived that the study of the relationship between sexual life and property—more than of any other area of social knowledge—requires clearly articulated ideas. He claimed that contractual thinking—particularly during the high summer of economic laissez faire between 1840 and 1880—informed the law of marriage by suppressing the male’s role and installing the wife as his equal partner. The wife was liberated as the legal rights over wealth that she carried into her marriage, and wealth acquired thereafter, were enforceable at law.\textsuperscript{15} In fact, reform of married women’s property rights in various states resulted primarily from the push of those seeking broader consistency in property law, conforming that law to the economics of developing capitalism. Twentieth-century notions that marriage unites one man to one woman, is enterable only through mutual free accord, and that it levies a mutual and equal duty of marital fidelity, evolved from application of contractual attitudes to marital challenges. However, no-fault divorce has no precedent in these contractual attitudes.

A wife struggling to preserve her personal integrity in marriage could best do so in a rational economic order based upon the private ownership of the means of production. The contractual principle reinforcing free choice in love reaffirmed each woman’s individuality. European and American women therefore attained equality before the law. No human enactment would bar a woman from seeking fulfillment in a career, even while repudiating marriage. Outright abolition of marriage would render women no freer than they already were.\textsuperscript{16} Consequently, by temper-


ing the husband's role and elevating the status of women, contractual thought promoted an intrafamilial division of labor along gender lines. In the marital household, the division of labor was explicable in economic terms: Decisional costs would be minimized through allocation of one issue or another to unilateral decision-making. Meanwhile, specializations in work would foster comparative efficiencies in production.\textsuperscript{17}

In this framework, a homemaker-spouse's marital contribution is less likely than a breadwinner-spouse's marital contribution to be reflected in job-market and long-term income-earning capabilities.\textsuperscript{18} As Yale law professor Robert Ellickson found in his review of studies, marriage increases the husband's outside wage by 10 to 30 percent.\textsuperscript{19} On the other hand, household-specific human capital (e.g., how to deal with the recalcitrant oven) is precious on-site but worthless elsewhere. Because a homemaker, therefore, might in theory underinvest in home-specific skills, a homeownership share to the homemaker is appropriate. The breadwinner-spouse providing all of the house purchase-capital is, therefore, willing to add to the deed as co-owner the name of a homemaker spouse. This helps explain why in the twentieth-century, the social norm governing how a married couple ought to hold title to their house shifted to both spouses taking as co-owners, from the husband holding in his name alone.\textsuperscript{20}

Recent empirical studies confirm the value of this marital division of labor. In a 2006 study of National Survey of Families and Household data, W. Bradford Wilcox and Steven L. Nock of the University of Virginia concluded, among other things, that modern couples benefit from heightening their appreciation of the role that shared religious practice and normative commitments play in undergirding women's marital quality. Since shared church attendance and normative support for the institution of marriage correspond with enhanced degrees of female marital happiness, declines

\begin{itemize}
\item \textsuperscript{18} Ibid., p. 743.
\item \textsuperscript{20} Ibid., pp. 77, 86.
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over the past forty years in religious attendance, plus relaxed attitudes toward divorce and toward premarital sex, might account for the decline in marital quality over those four decades. Specifically, diminishing church attendance, and relaxed attitudes toward divorce and premarital sex, decrease marital quality insofar as they undercut the social and normative props fostering heavier investments in marriage. As the authors claim: “From a gender perspective, our findings suggest that increased departures from a male-breadwinning/female-homemaking model may also account for declines in marital quality, insofar as men and women continue to tacitly value gendered behaviors in marriage.”

Wilcox and Nock claim that men’s emotive work “is the most crucial determinant of women’s marital quality.” Women, they found, were not happier in marriages identified by egalitarian beliefs and practices. Wilcox and Nock suspect that more egalitarian-minded women—who tend to entertain greater expectations of intimacy and equality—are more critical of their husband’s emotive work, fueling marital conflict and so dampening husbands’ emotive work: “Moreover, we saw evidence that women who are more egalitarian-minded and more upset with the division of household labor receive lower levels of positive emotion work from their husbands, perhaps because they are more likely to initiate conflict with their husbands.”

Contrariwise, homemaker-wives not only report greater happiness with their husbands’ emotive work but also might be more likely to attract such attention from their spouses. Modest evidence, claim Wilcox and Nock, indicates that wives’ gender traditionalism relates independently to enhanced degrees of males’ positive emotive work in marriage: “Adherence to traditional beliefs and practices regarding gender seems to be tied not only to global marital happiness but also—surprisingly enough—to expressive patterns of marriage.” In all events, the decline in marital quality of the previous forty years appears to have halted in


22. Ibid., pp. 1340, 1322, 1399 (italics in original).
the 1990s. This was during the same period (in the mid-1990s) that, according to the Pew Research Center, labor force participation of all women ages 25 to 40, basically froze.

**Undermining the Sexual Division of Labor**

Working against the division of labor that strengthens the marital bond is the modern idea that marriage is not so much a partnership, but more a means to gratify the desires of each spouse indefinitely, a concept that emerged, according to Mises, only after the ideals of contract and consent were stamped upon marriage. As Kay S. Hymowitz recently wrote in the *Wall Street Journal*: “People may admit that passion fades a bit, but soul-mate idealism is a defining part of contemporary marriage.”

The downside is what Mises pointed out: some natures cannot tolerate marriage once young love dies. Upon love itself they press their heaviest demands, exaggerating what Freud called the idealization of the sex object. Feminist historian Stephanie Coontz framed this peril as an overdependence upon private family values, eclipsing satisfaction of emotional needs through, e.g., mutual-aid associations:

We may postpone confronting the shallowness of our inner life by finding one special person to love us or for us to love, yet when the love disappears, and our needs, inevitably, do not, we feel betrayed. We seek revenge, or at least contractual relief, demanding public compensation for the failure of private life to meet our special needs. Many palimony battles and bitter divorce brawls, for example, seem to be over social needs that right now can be expressed only in personal terms. They are disputes over what people owe each other after love is gone, what altruism is “worth” in our society if it does not earn you love.

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27. Mises, *Socialism*, p. 84.
Richard Posner claims this ideal of marriage founded on affection generates pressure for the safety valve of divorce once spousal affection fades.\textsuperscript{29} This may explain why wives—more than husbands—have filed for divorce throughout most of U.S. history, and especially since no-fault. The percentage of wife-filed cases rose from approximately 60 percent in the nineteenth-century to more than 70 percent (in some states) immediately upon the accession of no-fault divorce.\textsuperscript{30} According to Maggie Gallagher, the woman’s yearning for a relationship more intimate and profound than her husband is likely ever to provide drives numerous twenty-first century divorces.\textsuperscript{31}

Insofar as modern feminism assails the institutions of social life with the illusion that it can level such natural barriers to happiness as unrealistic expectations from wedlock, it serves as an offshoot of socialism. For a characteristic of socialism, evinced by Fabian socialist George Bernard Shaw, is to discover in mere social institutions the wellsprings of what actually are unalterable facts of life (as are unrealistic expectations from wedlock) and to bid to reform an intractable nature by reforming these targeted institutions. Supposedly socialistic society, as Mises notes, will eliminate the dependence of the wife upon her husband’s income. Maintenance of children would then become a collective, not a parental, affair. The family will evaporate, and sexual options become rather polymorphous.\textsuperscript{32} But the socialist theory that Mises surveys skeptically is fully acceptable to William Reich, Freud’s colleague. Not only did Reich claim that “the sexual revolution of the S.U. [Soviet Union] started with the dissolution of the family” but he also observed that under socialism

Marriage could be good, at least for a certain period of time, if there were sexual harmony and gratification. This would, however, presuppose a sex-


\textsuperscript{32} Mises, \textit{Socialism}, p. 87.
affirmative education, premarital sexual experience, and emancipation from conventional morality. But the very thing that might make for a good marriage means at the same time its doom. For once sexuality is affirmed, once moralism is overcome, there is no longer any inner argument against intercourse with other partners except for a period of time, during which faithfulness based on gratification exists (but not for a lifetime). The ideology of marriage collapses and with it the marriage.\textsuperscript{33}

Under this scenario, socialism thereby will restore the social forms that were universally valid prior to the society deformed by the dominance of private ownership.\textsuperscript{34}

**The Advent of No-Fault Divorce**

Sure enough, California Governor Ronald Reagan pioneered the country’s no-fault divorce option in 1970. William J. Bennett claims that by 1977, 47 states had repealed fault grounds for divorce.\textsuperscript{35} Elizabeth Fox-Genovese and the Institute for American Values claim that opposition was scant, and public debate slight.\textsuperscript{36} Consequently, as Georgetown law professor Milton C. Regan says, a disgruntled spouse could get a no-fault divorce in every state plus the District of Columbia in 1985. By 1987, a spouse could unilaterally receive a divorce over the partner’s objection in all but a pair of states.\textsuperscript{37} The gravity of change cannot be overstated: for the first time in U.S. history, one spouse successfully could petition for divorce (alleging no ground) over the partner’s objection.\textsuperscript{38}

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As it erupted on the scene through democratic means, the enactment of no-fault divorce contrasts with abortion on demand, decreed by the Supreme Court in *Roe v. Wade* in 1973. It likewise contrasts with the effective legalization of pornography by Supreme Court edict in *Miller v. California* in 1973 and *Jenkins v. Georgia* in 1974.\(^{39}\) It contrasts, too, with what former Judge Robert H. Bork prognosticates as the almost certain outcome of a Supreme Court-decreed constitutional right to same-sex marriage, impending pronto.\(^{40}\)

Even though it came about by democratic means, this forty-eight state sweep was liberation by socialist standards. George Bernard Shaw once wisely remarked, in his fiction, that chastity is the trade unionism of the married.\(^{41}\) Less sagely did Shaw posit:

It would be hard to find any document in practical daily use in which these obvious truths seem so stupidly overlooked as they are in the marriage service. As we have seen, the stupidity is only apparent: the service was really only an honest attempt to make the best of a commercial contract of property and slavery by subjecting it to some religious restraint and elevating it by some touch of poetry. But the actual result is that when two people are under the influence of the most violent, most insane, most delusive, and most transient of passions, they are required to swear that they will remain in that excited, abnormal, and exhausting condition continuously until death do them part.\(^{42}\)

Mises would concede that married love gradually fades. As Daniel Gilbert, the noted Harvard psychologist writes, “The experience yields less pleasure each time. Psychologists call this *habituation*, economists call it *declining marginal utility*, and the rest of us call it marriage.”\(^{43}\) Mises would point out, however, that the initial excitement of romance

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is replaced by a longtime friendly-affection repeatedly interrupted by re-flickerings of the original passion. Habitual becomes cohabitation.

Through children, parents relive their youths and console themselves for the renunciations of life. 44 Mises’s true-life portrait of marriage, therefore, transcends the Shavian wisecrack. Neither bride nor bridegroom ever swore—as well Shaw knew—to remain abnormally excited lifelong. As Ellickson notes, they instead vow to invest themselves lifelong in one another, and in their shared children. 45 Marriage for life, in contrast with no-fault divorce, reinforced their aims.

Furthermore, the “homeways” generated by gift exchange in a lifelong marriage smooth household functioning better than do contracts among parties with an easy way out. The latter, a feature of the current no-fault regime, nurture calculation and withholding. Yet for marriage to work, notes economist Jennifer Roback Morse, the parties must cheerfully and generously give without care for exact, immediate reciprocity. 46 Ellickson claims that for gift exchange to flourish, each participant should keep only a rough income-outgo account. 47 Why only a rough account? A merit of money is its substitution for trust: Adequate trust so diminishes money’s efficiency that money, says Jude Wanniski, becomes redundant. 48 An excessively close mutual reckoning of a balance of informal trade evinces distrust; among married partners it is associated with a greater prospect of divorce. In an intimate relationship, the fulfillment of one’s promise is likely to do more to enhance the relationship if participants perceive that in no fashion did law extract their performance. 49

Countless spouses have proved powerless to deliver love forever, whatever they had warranted. As Morse maintains, the contractual

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44. Mises, Socialism, pp. 83–84.
47. Ellickson, The Household, p. 103.
monitoring of devotion is problematic. Nevertheless, husbands and wives solemnly can covenant to invest in their spouse, their marriage, and their children. Deviations from this latter are far more readily metered. Some posit that love more freely flows along those channels deeply cut by investment. One canny rabbi shared this rule of thumb: “For where your treasure is, there will your heart be also.” (Matt. 6:21 and Luke 12:34). Or as a wedding sermon penned by Lutheran theologian Dietrich Bonhoeffer reflected: “It is not your love that sustains the marriage, but from now on, the marriage that sustains your love.”

**Contract Empowers; No-Fault Disempowers**

How, then, can a spouse—informed by these insights—bind himself (or herself) to invest in a marriage? Confesses Thomas C. Schelling, recipient of the Nobel Prize in Economics in 2005:

> Among the legal privileges of corporations, two that are mentioned in textbooks are the right to sue and the “right” to be sued. I first wondered what was so good about being sued, but soon realized that the right to be sued is the power to make a promise: to borrow money, to enter a contract, to do business with someone who might be damaged.

Scant wonder that Schelling well understands that the “I do” in a marriage vow is not simply a reply to a query: “It is part of a formula that changes the legal and social status of the person and her relation to the man who also says ‘I do.’”

> Scholars of contract are well cognizant that the legal enforcement of reciprocal promises expands the liberty of the contracting parties: it proffers the option of binding commitment.

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53. Ibid., p. 9.
former Solicitor General Charles Fried explains that in the nineteenth century, a promise *itself* (not simply the reliance thereon) came to be understood as the root of contractual obligation. There was reliance because *the promise* binds (not the reverse): “The promise principle was embraced as an expression of the principle of liberty—the will binding itself, to use Kantian language, rather than being bound by the norms of the collectivity.” Although flailed as a feature of Victorian promissory morality, the understanding of contract as promise not only closely reflected the mores of the laissez faire era but also served as a centerpiece of nineteenth-century liberalism.55

Fried is not unaware of the irritating irruption of regret in contracts: Come performance time, a promisor regrets the promise (e.g., marital vows) because the promisor regrets the value judgment (e.g., love) that led to it. Nonetheless, the Kantian logic undergirding contract means that others—even a collectivity sympathizing with a regime of no-fault divorce over one of lifelong marriage—are to respect the promisor’s capacity as a free, rational agent to choose the promisor’s own good and, therefore, to shoulder responsibility for the good selected. The choosing self is one extended temporally, and hence the determinations of that self are to be respected as persisting through time: “If we decline to take seriously the assumption of an obligation because we do not take seriously the promisor’s prior conception of the good that led him to assume it, to that extent we do not take him seriously as a person. We infantilize him.”56

University of Virginia Professor of Law Elizabeth S. Scott believes that today’s mode of legal enforcement of marital commitments comports with twenty-first century liberal—not laissez faire-liberal—principles. Paradoxically, relaxed marital-termination policy actually constricts the liberty of individuals to pursue their life’s goals. For the discardable, penalty-free vows of 2009 contradict the understanding of marriage as a relationship of mutual obligation.57 No-fault divorce laws therefore mean contractual disempowerment, even if self-enforced, says University of


56. Ibid., pp. 20, 14, 20–21.

Washington economist Yoram Barzel:

Self-enforcement, as is obvious, requires repeated interactions. When conditions for such interactions become less favorable . . . a larger fraction of all agreements will be enforced by third parties. Marital disputes can be used to test that prediction. In the past few decades, marriage has become easier to terminate. The duration of repeated interactions within marriage has been shortened, then, making the self-enforcement of the relationship less effective. The recent increase in legal (i.e., the state’s) third-party adjudication of marital disputes is consistent with the prediction.58

According to Lloyd R. Cohen of George Mason University, the crux of the difficulty is that a first spouse cannot have the same stake in the second spouse’s welfare as has that partner-spouse.59 For these and other reasons, foremost scholars of law and economics have for years pronounced dead the institution of marriage as a lifelong partnership.60 In every state but Louisiana, Arkansas, and Arizona, a bride and groom are literally disqualified from linking themselves until death does them part. What then are consequences of this legally-required ease of exit from the marriage?

The Advent of ‘Divorce Insurance’

Ease of exit from an association can both pinch the propensity to participate therein and shrivel loyalty thereto. So untrammeled rights to terminate household relationships can impede the attainment of the most profound domestic unity. Ellickson claims that any legal reform facilitating the household-relationship exit strengthens the hand of those household members best positioned to re-ally with new partners.61 Given


61. See Ellickson, The Household, p. 52 (citing Albert O. Hirschman, Exit, Voice, and Loyalty: Response to Decline in Firms, Organizations, and States [Cambridge: Harvard University Press,
transaction costs, economic theory teaches that a shift to a unilateral no-fault rule ought to increase inefficient divorces. Those are divorces wherein a spouse leaves the marriage because departure renders that spouse, separately, the bettered, albeit the balance of the family is rendered the worse-off. The husband is most likely to reap a majority of the surplus from his marriage. Why? Because he typically has wider opportunities for post-divorce remarriage. This renders his threat to break-up their marital home the more credible than his wife’s. According to the blunt Posner: “In a society that allows divorce, a man can begin searching for a new wife while he is still married to the old one; not so in a regime of no divorce.”

Contrast: The fiduciary principle is elsewhere the law’s response to the challenge of cost, to the fiduciary’s principal, of self-protection. As Posner notes, it levies on fiduciaries the duty of utmost good faith to principals, in contrast to the normal contractual duty of ordinary good faith. This looms large particularly if a principal proves helpless to defend herself. According to Canadian legal expert Michael Trebilcock, one goal of contract law is to discourage opportunism when an initial mover risks appropriation of her contractual performance by a second mover who senses a potent incentive to digest that first mover’s performance, and then abscond. According to James A. Mirrlees, who was awarded the Nobel Prize in Economics in 1996, “It is not as much the asymmetry of information that is special about principal-agent relationships, but the asymmetry of responsibilities, with the principal moving first, the agent

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64. Posner, Sex and Reason, p. 247.


following.” Marriage marks a long-term contract. As Greek legal scholar Aspasia Tsaoussis notes, a homemaker-spouse delivers early in the marriage, but a breadwinner-spouse delivers tardily. The timing for delivery on their respective duties is lopsidedly asymmetrical, with the breadwinner feeling the incentive to decamp after the homemaker has performed.

No-fault divorce did raise divorce rates, temporarily in any event. Hence was hatched what numerous observers call “divorce insurance.” To insure against divorce, the wife shields herself by employment during marriage. Evidence from several sources shows a connection between easy divorce laws and increased rates of paid employment. A. M. Parkman utilized a time-series data set spanning between 1975 and 1981 and encompassing data on household work. Women residing in a no-fault state worked in the job market an average of four hours more per week than did their fault-based state counterparts. Contrariwise, husbands in these states reduced their number of hours worked by nearly two hours. Parkman interpreted this expanded labor force participation as divorce insurance. Carolyn Graglia claims no-fault statutes cautioned women, unambiguously, to adopt a feminist perspective

by replacing homemaking with a fulltime career.\(^{73}\)

Feminists argue that to protect against the menace of becoming single-parents impoverished by divorce, married mothers must remain in the workforce.\(^{74}\) Husbands dedicated less to family than to career can cash in on that heavier investment by quitting the marriage: cutting loose from a partnership that has proved less profitable than his work-site.\(^{75}\) At the same time, research shows that while employed women have a higher probability of becoming divorced, the causality runs from expectation of divorce toward employment.\(^{76}\) So by chilling the investment needed in marriage on the part of both spouses, unilateral divorce law lessens the return on even those marriages that are still stable. Not only did husbands’ wage premium decline by 3 percent upon the turn to no-fault divorce, but wives’ willingness to invest in their husbands’ earning power also declined.\(^{77}\)

Furthermore, many Americans now believe that sexual behavior is less seamlessly bound to the fates of others than is financial behavior.\(^{78}\) Likewise, it has been long recognized by scholars that the spousal bond has become more tenuous (because it is legally terminable at will) simultaneously as employment relationships have grown more secure (because they are decreasingly terminable at will).\(^{79}\) In comparing the two gen-


erations maturing between 1930 and 1970, against the pair maturing between 1970 and 2010, did not the latter two generations of American spouses devote less and less of their lives to their marriages but more and more to their careers?

Charles Fried would say that the Kantian will of the later generations has been frustrated, as no-fault divorce has infantilized these adults for life. Clearly, these legal and social consequences reveal the extent to which the institution of marriage, described by writer and social critic Wendell Berry as “the fundamental connection without which nothing holds,” stands at risk in twenty-first century America. As long as no-fault divorce remains unchallenged, the law of marriage in America will not only remain disconnected from history, natural law, and economics but also vulnerable to more assaults, including the push of same-sex marriage laws. But only as the country rejects the anarchy of social deconstructionism and seeks a renewal of marriage law based upon English precedents or free-market contract thought—which empowers husbands and wives as life-long partners—might that “fundamental connection” survive the twenty-first century.

Dr. Swan is associate professor at North Carolina Agricultural and Technical State University School of Business and Economics, in Greensboro. Part 2 of this essay, exploring the impact of affirmative action on marriage and the home economy, will appear in a forthcoming issue of The Family in America.